Faculty Publications
UC Hastings College of the Law Library

Author: Ugo Mattei
Source: Hastings International and Comparative Law Review
Citation: 18 Hastings Int'l & Comp. L. Rev. 157 (1994).
Title: Efficiency as Equity: Insights from Comparative Law and Economics

Originally published in HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW. This article is reprinted with permission from HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW and University of California, Hastings College of the Law.
Efficiency as Equity: Insights from Comparative Law and Economics

By Ugo Mattei*

I. INTRODUCTION

Equity and efficiency are usually perceived as antithetical concepts. An efficient legal solution may not be equitable, and an equitable one may not be efficient.¹ Many of the arguments used against law and economics sound like this: law should be concerned with justice and equity; although such values may not be costless for a society, even if their pursuit is inefficient, such costs are not something with which lawyers should be concerned.

You can find this line of argument both in American and non-American academic literature.² However, now that law and economics is an established scholarly discipline, that sort of literature seems rather banal and superficial. It fails to throw any new light on either equity or efficiency as legal tools, and it does not tell us much that is new about the nature of the legal process.³

* Alfred and Hanna Fromm Professor of International and Comparative Law, Hastings College of the Law, University of California. Professor of Law, University of Trento, Italy. Dr.Giur. Università di Torino (1983); LL.M. Boalt Hall (1989).

Previous drafts of this paper were presented at the International Conference on Equity and Aequisitas, Hebrew University of Jerusalem, May 1993; at the second Comparative Law and Economics Forum Meeting, Brussels, June 1993; at the Faculty Work in Progress meetings, Hastings College of the Law, October 1993; and at the American Law and Economics Association, Author's Bazaar, Stanford Law School, May 1994. The author wishes to thank the participants to these events for their valuable comments and, in particular, Robert Cooter, James Gordley, Antonio Gambaro, Duncan Kennedy, Radhika Rao, Rudolf Schlesinger, and Tony Weir, for their editing work and comments.

1. See, e.g., A. Mitchell Polinsky, AN INTRODUCTION TO LAW AND ECONOMICS (2d ed. 1989).


3. On the other hand, for a refreshing and deep analysis, see H. Peyton Young, EQUITY IN THEORY AND PRACTICE (1994).
In this paper I will adopt a comparative approach to law and economics4 and discuss some of the contexts in which the notion of equity has been used within the Western legal tradition. I will focus on the relationship between equity and efficiency in these contexts in order to show how equity and efficiency—far from being antithetical ideas—are in reality much more closely linked than might at first appear.

My paper is concerned with equity and efficiency in adjudication. I will not, therefore, discuss the assumption, sometimes diffused in the legal community, that equity has to do with distribution—and is therefore mainly the province of the legislature—while efficiency has to do with the allocation of resources. I assume that both equity and efficiency have a role in both these contexts.5

I will focus on three different contexts in which equity might seem opposed to efficiency: (1) the institutional context, (2) the substantive context, and (3) the context of legal transplants. I will seek historical and comparative evidence for my assumptions.

My conclusion is that equity and efficiency are of equal use to lawyers as techniques of legal argument.

This paper is not normative. It is a first attempt to describe a number of cases which may be explained or justified both in terms of equity and in terms of efficiency.

II. EQUITY AND EFFICIENCY IN THE INSTITUTIONAL ARENA

Equity is commonly used in an institutional sense. A common lawyer immediately thinks of the Chancellor and his Court. In comparative law literature this is also the primary meaning of the term equity. Indeed, one of the major classic differences between the common law and the civil law is the dual nature of Anglo-American jurisprudence with its institution of trust and division between legal and


equitable rights and remedies, a result of the historical accident of equity jurisprudence.6

According to the classical work of Maitland,7 followed by leading English legal historians from Holdsworth8 to Milsom9 to Baker,10 the jurisdiction of the Chancellor in the sixteenth century developed to overcome the shortcomings of the courts of common law. The formalism of the writ system, and the fact that damages were the only remedy at law, denied justice to plaintiffs in cases of continuing torts, unfulfilled contracts, and breach of a relationship of trust. The plaintiff to whom justice was denied could go to the Chancellor to seek equity—i.e., justice given according to the Chancellor's conscience. It was the Chancellor's business to examine the potential results of the application of legal rules contained in the body of the common law (e.g., rules on the transfer of ownership in the case of trusts) and to stop the rigid enforcement of those rules by applying equity.

By the time of Lord Nottingham, equity had developed its own set of doctrines administered in a separate set of courts. The Chancellor's feet were harmonized.11 Remedies such as injunctions, specific performance, tracing, and so forth were born.

This development is considered to be one of the major revolutions in the history of the common law.

Supposedly, the moral idea of equity played such a large role in this institutional adventure that it even gave its name to the entire system. Chancellors were so interested in and concerned about equity and justice that they created their own court.

We can now try to see the story from a different perspective. It is an historical fact that English courts competed for patronage by working out more efficient institutional arrangements. The aim was to attract clients by offering a cheaper, faster, and more effective justice. We should never forget that the judges and practitioners of each court were making their living from the success of the business of their

11. The great seventeenth century legal scholar, John Selden, in his Table Talk compared the chancellor's conscience—which was the basis of equity jurisprudence—to the length of the chancellor's foot. Each chancellor had a different conscience as well as a different shoe size! John Selden, Table Talk 49 (Frederick Pollock ed., 1927).
court. Moreover, running a superior court has always been a major source of power since deciding cases entails the framing of legal rules.\textsuperscript{12}

This competition explains, for example, the way in which the King’s Bench overtook the Common Pleas in the sixteenth century. Common Pleas had been the leading common law court, but it was slower to abandon old fashioned procedures. The King’s Bench, by using the bill procedure introduced in England by the equity court, took the lead in the common law jurisdiction.\textsuperscript{13} The famous battle for jurisdiction at the time of Sir Edward Coke can also be explained by a competitive model, where both common lawyers and equity lawyers were as concerned with obtaining a monopoly position for their courts as with achieving equity.\textsuperscript{14} Surely, the ultimate victory of equitable remedies both in England (Judicature Acts) and in the United States (Federal Rules of Civil Procedure) is primarily due to the more efficient legal organization offered by the courts of equity.\textsuperscript{15}

It is therefore interesting to note that the creation and survival of such a set of remedies (injunctions, specific performance, trust, etc.) can be justified both by equity (equity will not leave a plaintiff without a proper remedy) and by efficiency. These remedies are, indeed, the outcome of a competition between alternative legal instruments, determined in the long run by considerations of institutional efficiency.\textsuperscript{16}

Law and economics gives us, in the theory of externalities, the explanation of why injunctive relief (a property rule) is in many instances more efficient than damages (a liability rule), and why the judge should always be free to choose between them.\textsuperscript{17} Moreover, one hardly needs law and economics to understand that a simpler system of procedure and trial allows a decision to be made more cheaply and therefore avoids waste.

\textsuperscript{12} See generally John P. Dawson, The Oracles of the Law (1968).
\textsuperscript{13} See Baker, supra note 10, at 87-88.
\textsuperscript{16} That a modern legal system cannot survive without an effective remedy for continuing torts or for breach of contracts is evidenced by the fact that similar legal tools, included in codes or developed in case law, are also available to litigants in the civil law.
\textsuperscript{17} See Robert Cooter & Thomas Ulen, Law and Economics (1986).
III. EQUITY, EFFICIENCY, THE FORMS OF ACTION AND THE WELFARE STATE

Equity introduced flexibility to the legal system. It is sufficient to compare two authoritative books such as Littleton (1402-81) on Tenures and Blackstone's (1723-80) Commentaries to get historical evidence for such a conclusion. The former was written just before the Chancellor's Court appeared on the scene. It describes a very strict, rigid and completely unprincipled system of forms of action, shaped by historical accidents. In contrast, Blackstone's book describes a flexible system of decentralized decision-making developed by the courts of law and equity. It describes the cooperative arrangement developed after the Chancellorships of such great figures as Francis Bacon, Lord Nottingham, and Lord Eldon. It is interesting that while Littleton gives us a picture of the common law before the rise of equity, Blackstone provides us with one of the common law—or rather the common law plus equity—before the rise of statute law.18

Certainly, equity introduced an important element of flexibility into the English legal system which was indispensable to its evolution given the extreme rigidity of the writ system.19

Today, when all the western world lives in the age of statutes,20 the legal system is at least as complex and disharmonious as that described by Littleton. Rigidity, however, is no longer due to a writ system, but to the overuse of command and control regulation which forecloses any principled development of the legal system. The clearest example in private law is in the law of torts: whenever a strict ex ante regulation has been established, the possibility of an ex post test of reasonableness of the conduct of an actor is simply withdrawn from the judge. That withdrawal may be very inefficient, as some areas are overregulated and others underregulated.21 In public law the analogy between the forms of action and the modern machinery of justice is even clearer. Even in England, where the bureaucratic reasoning of public law has never reached the peaks that it has in other European countries, recent developments illustrate my point. Under Order 53 of the Rules of the Supreme Court, a system has been established by which the applicant for judicial review is trapped in the path he has

---

19. For a comparative analysis see Schlesinger, supra note 6, at 299.
chosen. There is no way of turning to ordinary procedure once the public law path has been chosen.22

There are many differences of course, but we can learn from historical experience and say that complex regulation in the welfare state plays a role similar to that played by the forms of action in medieval common law—to foreclose the harmonious development of the law.

In this scenario, if a legal system is to evolve it needs the intervention of some external force playing a role similar to that played by the courts of equity in medieval England. Modern law and economics is certainly trying to play this role by using the idea of efficiency rather than that of equity.23 The consequences in a concrete case of applying positive law (e.g., a strict liability regulation) are discussed in the light of the efficiency principle. The rigid and abstract application of regulation or of doctrines of law is discouraged as inefficient.24 Law and economics considers decentralized decision-making made by courts to be better than centralized regulation. Decentralized decision-making is better able to introduce flexibility.25

Efficiency considerations argue against any automatic application of a given doctrine. In the American law of nuisance, for example, the traditional common law-equity arrangement has been dismantled by such considerations.

For example, in the New York case of Boomer v. Atlantic Cement Co.,26 a polluting cement plant which employed over three hundred workers was allowed to continue its activity but was compelled to compensate for the continuing nuisance. The equitable doctrine that any "unreasonable" nuisance must be enjoined was abandoned even though damages were clearly insufficient for the plaintiffs. According to the traditional maxim that equity does not leave a plaintiff without an adequate remedy, an insufficient remedy at law should lead to an injunction when, after balancing the equities, the nuisance is considered unreasonable. In this case, the traditional common law-equity arrangement would have offered only a black or white alternative be-

---

tween enjoining the plant, if the nuisance was unreasonable, or allowing the pollution to continue, if the nuisance was not unreasonable. In a broader perspective, however, the internalization of the externalities (damage remedy) was preferred on efficiency grounds and the "balancing of hardships" shifted from the test of reasonableness to the choice of the remedy.

In *Spur Industries v. Del E. Webb Development Co.*,\(^27\) an Arizona "coming to the nuisance" case in which a residential area was built close to a pre-existing pig-breeding farm, the solution whereby damages and injunction supplement each other to the exclusive benefit of one party was also rejected. The doctrine that the remedy for a continuing tort was damages for the past plus an injunction for the future was abandoned. The plaintiffs, who lived in the residential area, were granted an injunction but the defendant farmer, who had to remove his activity, was awarded compensation. In both these pathbreaking cases, considerations of efficiency were explicitly taken into account by the courts.\(^28\)

In different historical contexts and in different institutional backgrounds, equity and efficiency have made similar contributions to the development of the law. In the case of equity, a different set of lawyers with a different set of doctrines introduced flexibility.\(^29\) In the case of efficiency, academic lawyers—different players in the legal process—have introduced flexibility. We can also say that the pressure for flexibility comes from a group of lawyers with a legal culture different from that shared by the participants of the legal process under challenge. In the case of equity lawyers, the legal culture on which they drew was the Roman law while lawyers advocating efficiency drew on economics, both disciplines with high academic standing and prestige.

**IV. EQUITY, EFFICIENCY, AND SUBSTANTIVE LEGAL RULES**

Equity as an institution is a phenomenon peculiar to the common law tradition. However, equity as a way of reasoning about law is not


\(^{28}\) See Cooter & Ulen, *supra* note 17, at 171-80.

\(^{29}\) Common lawyers took over the Courts of Equity after their secularization during the reign of Henry VIII (1509-47).
limited to the common law and is a characteristic of the Western legal tradition.  

Efficiency as a paradigm of legal scholarship with a strong impact on the legal process is a peculiarity of the American system. But efficiency as a way of reasoning about law is no longer limited to the common law world and is diffused among civil law countries as well.

In certain cases, even the concrete solutions of certain legal problems belong both to equity and efficiency. The law of takings—or of expropriation in the public interest as it is known in the civil law—provides us with an example of a convergence that is by no means limited to a small number of legal systems. It exhibits a general trend in the law which may help comparativists in their task “to discover the forces that are permanently and universally at work in all systems of law.”

One of these forces is, to be sure, the principle of moral equity according to which no single person should bear the complete burden of a course of action whose benefits are common to a large number of people. The person whose property is taken for public use suffers a loss. This loss should be minimized as much as possible by paying compensation which makes it possible, at least in theory, to buy similar property elsewhere. That this compensation should be paid by the community which will benefit from the taking accords with the old Justinian maxim of justice suum cuique tribuere. And indeed, the guarantee of private property against the state, theoretically described by the natural law and embodied in the revolutionary Declaration of Human Rights, has been one of the cornerstones of modern political and legal doctrine. From France the idea of the guarantee of private property against the state has found its way into the legal systems of the capitalistic world. Its content has been clear enough to lay the foundations of a law which can be described as “common” (necessity


33. Among the founding fathers Madison was particularly influenced by French political thought. Until “his” fifth amendment, private property had not been classed among the fundamental values of American law. See Bernard Bailyn, The Ideological Origins of the American Revolution 34-93, 188-89 (1967). Blackstone’s scholarship was based on the same natural law literature which was the cultural asset of the French Revolution. See S.F.C. Milsom, The Nature of Blackstone’s Achievement, 1 Oxford J. Legal
of public use; compensation). It has been flexible enough to allow historical divergence particularly as to the amount of compensation, although the trend is toward market value.

We should add that the institutional structure of the legal systems which have reached the same result could not be more different. In Germany and Italy, there are special Constitutional Courts.\textsuperscript{34} In the United States, any judge may strike down an act or decision as unconstitutional.\textsuperscript{35} In the United Kingdom, there is not even a written constitution to apply.\textsuperscript{36} In France, the Constitutional Council reviews a statute before its enactment but has no power of ex post judicial review.\textsuperscript{37} Despite these huge institutional differences, the law of takings may be considered largely convergent in these systems so far as the underlying principles are concerned.\textsuperscript{38}

This convergence may be explained both as a matter of equity and of efficiency. If we examine the problem of takings, there can be no serious doubts that there are strong economic reasons to compensate at market value private property taken for public use. As far as the public use requirement is concerned, the economic theory of public goods provides both a justification and a limit.\textsuperscript{39} The justification is that the government needs to be able to acquire the inputs that are necessary to provide public goods which the market cannot easily provide. The limit is set by the consideration that any private use of the power of eminent domain will be inefficient since it produces a result that private parties would not reach by bargaining. The forced sale, in other words, would move the property from a higher valued use to a lower valued use.

\textsuperscript{34} Grundgesetz [Constitution][GG] art. 93 (F.R.G.); see Arthur T. Von Mehren & James R. Gordley, The Civil Law System: An Introduction to the Comparative Study of Law 137 (2d ed. 1977); Costituzione [Constitution][Cost.] art. 134 (Italy); see M. Cappelletti et al., The Italian Legal System: An Introduction (1967).

\textsuperscript{35} Marbury v. Madison, 5 U.S. 137 (1803).


\textsuperscript{38} For an updated, systematically developed outline of the law of compensation for expropriation, see Compensation for Expropriation: A Comparative Study (Gerwin M. Erasmus ed., 1990).

\textsuperscript{39} See, for a discussion, Cooter & Ulen, supra note 17, at 191.
Compensation should be paid for takings in order to avoid externalities. It is inefficient to compel a private property owner to assume the entire cost of benefits that are enjoyed by the whole community. The whole community should pay for the benefit it receives. Also, efficiency requires us to spread losses as much as possible. Moreover, the costs of governmental action should be internalized. In a public use of eminent domain, however, it is inefficient to allow the private property owner to force the government to pay the reservation price for his property (i.e., the subjective value which he could insist on obtaining from a private person) because this would make the governmental supply of public goods impossible. Every owner whose property was involved would overestimate the value of the property and would have an incentive to be the last person to settle.\footnote{Id. at 193.} The efficient outcome is therefore guaranteed by paying the objective market value.

This short analysis suggests that the general convergence of modern legal systems, despite the large variety of institutional backgrounds, could be explained both as a movement towards efficiency and towards equity.

In many other instances, which can be illustrated from the law of tort and contract, we can reach the same result. Among the topics that have been recently discussed by scholars comparing equity and aequitas\footnote{See Second Hebrew University Conference on Equity (A.M. Rabello ed., forthcoming).} much attention has been devoted to the duty to bargain in good faith. And indeed, such a duty, which requires that a reasonable amount of information be disclosed to the other party, is not only a common development of modern contract law throughout the western world, but is also commended by the very basic microeconomic assumption that a certain amount of information must be disclosed to the participants in a market or the market will not function properly. Even more generally, the theory of “abuse of rights,” although difficult to reconcile with the individualistic assumptions of a system of private rights, has been accepted as a matter of equity throughout the western world. Indeed such a doctrine is strongly supported by the Pareto efficiency principle as well, and it is probably at the core of Amartya Sen’s criticisms of paretian efficiency.\footnote{Amartya Sen, The Impossibility of a Paretian Liberal, 78 J. Pol. Econ. 152 (1970). See also Charles Rowley & Alan Peacock, Welfare Economics: A Liberal Restatement (1975).}
It may be added that many of the contributions of law and economics are by no means counter-intuitive. When efficiency advocates take a normative approach, they advocate solutions often reached by lawyers on traditional grounds. On the other hand, if we take the positive perspective, we have seen in the example of the competition between the courts that a certain legal evolution can be explained equally by notions of equity and efficiency.

V. EQUITY AND EFFICIENCY AS LEGAL ARGUMENTS

Law has an important practical dimension. Since the beginning of the Western legal tradition lawyers have been arguing whether law should be more of a theoretical doctrinal enterprise or just a practical business. We can trace this debate to the reaction of the humanists to the baronists in the fifteenth century. Indeed, the role of lawyers in the western world can be understood in terms of the continuous interplay of these two different approaches. The commitment to doctrine and theory has been the major source of lawyers' legitimacy: they were able to claim they had a neutral approach to problem solving. The practical aspect of lawyers' work has made them a powerful and influential corporation of hidden law-givers.43

Since law has a practical dimension it requires an approach somewhat different from that of a purely academic discipline. Participants in the market of legal ideas, doctrines, and institutions are not only scholars but also practicing lawyers, legislators, and even business people. In the Popperian marketplace, on the other hand, participants in the "game science" are only scholars.44 Legal scholars acknowledge that the practical nature of their discipline is developing "normative" theories alongside "positive" ones. In comparison, it would make no sense for a linguist to develop a normative theory of, say, mute consonants.45

In order to maintain their role in framing legal rules and institutions, lawyers had to find some reason why their opinions about the

---

45. See, on the task of linguistics, Ferdinand De Saussure, Course in General Linguistics 6 (Charles Bally et al. eds. & Wade Baskin trans., 1966). On the analogies between legal scholarship and linguistic scholarship, Rodolfo Sacco has developed a structuralist approach. Rodolfo Sacco, Legal Formants: A Dynamic Approach to Comparative Law, 39 Am. J. Comp. L. 1, 343 (1991) [Hereinafter Legal Formants].
rules that govern society should count more than anybody else’s. They had to legitimize their work. For nine hundred years, whenever they could not or would not rely on a “text,” they played with the philosophical concept of equity and justice. In using this concept, however, they were not bothered by or even aware of the many different theoretical notions of equity and justice framed by legal philosophers. Indeed legal philosophers and scholar of jurisprudence were part of a transnational community of scholars, mostly civilians, whose work was completely removed from the concrete workings of any positive legal system. This explains why the concepts used in the works on jurisprudence have a foreign flavor for the common lawyers.  

An impressive literature on the concept of equity or justice can be found in any law library. A superficial look at it confirms the incredible variety of significance coming out of the same significant (i.e., the word “equity”). Despite this, lawyers have been working with the idea of aequitas since their profession began, and they have built up a number of legal traditions around this ambiguous term. The same development occurred, as we know, with English equity where the conscience of the Chancellors became so harmonized with the rules of common law that even equity courts developed a doctrine of stare decisis. In other words, there have always been philosophical ideas of equity and legal uses of the idea of equity.

If equity is traditionally a category of legal argument, the same cannot be said for efficiency which has been marketed only recently as an American product.

Seen in terms of the history of ideas, Law and Economics has grown to be a powerful approach because the discipline has given some strength to the claim that legal scholarship is a science. Indeed, the shift from equity to efficiency brings to the analysis of the law a set of value judgments which is claimed to be more widely acceptable and less subjective in nature. There may be as many opin-

46. According to Peter Stein, for example, jurisprudence always had a foreign flavor to the common lawyer because of the deep debt it owed to Germany. See Peter Stein, Legal Science During the Last Century: England, in Inchiesta Di Diritto Comparato, La Scienza Del Diritto Nell’Ultimo Secolo 19, 23-24 (Mario Rotondi ed., 1976).

47. It would be naive to attempt a bibliography here. See, however, just to get the flavor, Edgar Bodenheimer, Treatise on Justice (1967); Chaim Perelman, The Idea of Justice and the Problem of Argument (John Petrie trans., 1965).


ions on equity and justice as individuals evaluating a certain legal solution or a certain factual situation (Selden’s joke about the Chancellor’s feet tells us exactly this story). There are just three recognized standards of economic efficiency which are at the roots of the success of economics among the social sciences.  

However, as soon as efficiency ceases to be merely an economic notion defined by academics and enters the argument of lawyers, the lawyers continually shift from one meaning to another as their practical arguments require. Thus, once efficiency enters the practical arena of the law, it necessarily loses some of its claimed scientific rigor and objectivity. Even law and economics scholars are divided on such crucial issues as whether in car accident cases a strict liability regime is more or less efficient than a fault regime. And again, there are efficiency arguments on both sides of the question as to whether the seashore should be maintained in a regime of public or private property, or whether regulatory takings should or should not be compensated. Europeans experienced a practical awakening from the wonderlands of legal objectivity when, while enacting the American-inspired directive on products liability, they consulted American law and economics literature to decide whether producers should be liable for the so-called development risks. They discovered that it was impossible to find a single answer to this important question.

In response to such a scenario, we may say that both equity and efficiency are only techniques of legal argument. They are therefore typical scholarly products that are indeed very influential in the success of a legal theory in the marketplace of legal doctrines, but are empty boxes which need to be filled with meaning by the legal community.

50. Pareto Efficiency, Kaldor Hicks Efficiency, and Wealth Maximization. For a discussion of the three, see 2 Richard A. Posner, Economic Analysis of Law (3d ed. 1986). See also Symposium, Efficiency as Legal Concern, 8 Hofstra L. Rev. 485 (1980). Just as the ordinalist revolution has succeeded in making economics "scientific" by solving the problems related to interpersonal comparisons, the law and economics revolution claims to have succeeded in doing the same to legal scholarship after the abrupt awakening lawyers were given by legal realism.


VI. EQUITY, EFFICIENCY, AND LEGAL TRANSPLANTS

If equity and efficiency are just scholarly techniques there is no doubt that their role in the legal process can better be understood within the theory of legal transplants. From this point of view, we can say that English equity is the product of a transplantation of doctrines from the Roman law to the peculiar institutional conditions of England. In competing for patronage by offering more efficient legal tools to litigants, the early Chancellors, at the time clergymen, were using the legal skills provided by their canonistic background. As is well known, canon law and civil law continually interacted with each other. The most notable importation in this early period was the so-called Roman canonical procedure; but many substantive doctrines were imported as well, particularly in the domain of contract law. Early Chancellors were clearly at ease in using the reorganized Roman law doctrines. Once the Courts of Equity had been secularized, and common lawyers had taken over the office of Chancellor, this rich heritage of flexible doctrines would have been wasted had it not been translated into a language familiar to common lawyers by St. Germain's Doctor and Student. From that moment the same ideas of equity developed in very different ways in England and on the continent. In England they developed into modern equity jurisprudence. On the continent, in a reaction against a prior period that had attempted to make the law excessively precise, general clauses were codified (good faith is the best known example) in order to provide the flexibility needed by any modern legal system. After this importation from the civil law to the common law, the direction changed.

54. Such a theory is sustained in its extreme form by Alan Watson, Legal Transplants: An Approach to Comparative Law (1978). For its use in comparative law and economics, see Mattei, supra note 4.
56. See Holdsworth, supra note 18, at 266.
57. See Schlesinger, supra note 6, at 299. "Modern civil law, i.e. Code Law, is essentially the product of the last two centuries, a period sufficiently free from ancient formalism so that the draftsmen of the codes have been able to combine both strict rules of law and broad equitable principles in a single unified structure." Id.
58. According to Rudolfo Sacco, Introduzione al Diritto Comparato (4th ed. 1988), two reasons have determined the increase of "prestige" of Anglo-American law in the world legal community after World War II: first, the feeling that the system was more efficient and therefore progress and development would follow from its adoption; and second, the feeling that individual rights have been more effectively protected in common law than in civil law countries.
The more interesting institutional tools created by courts of equity were reimported by the civil law. Trust is of course the best example.

We can again draw a parallel between equity and efficiency. However, we should first make clear that scholarly writings may be agents of legal change as powerful as the concrete remedies offered by a court of law. In the competition for framing the rules of law, legal doctrine is a powerful contender. In the long run the impact of scholarly teaching and reasoning heavily influences applied law. This is particularly true in contexts in which the courts are not organized as a centralized power. It is no surprise that the role of legal scholars has been much greater in Germany than in France. Indeed, in Germany judicial power has never been centralized in a single pyramid. It was not centralized in the nineteenth century since unity came late (1870) and scholars had already gained their predominant position. It was not even centralized after political unity, because each area of the law had its own pyramid, and border conflicts in the penumbra allow greater scope for scholarly work. The same relationship may be found in the common law world, by comparing England and the United States. In England, where there is a strong centralized judiciary, the position of legal scholars has always been depressed. In the United States, since Langdell, legal scholarship has been the most important force promoting national uniformity of the legal system. The Western legal tradition is so full of instances in which legal change is led by scholars that we do not need to give examples here. Scholars often push for legal change by advocating foreign solutions openly or secretly. Scholars thus become powerful agents of legal transplantation.

In the United States, law and economics is already deeply influencing the methods of reasoning of a new generation of lawyers, and its impact on the applied law is already a reality. In the civil law, moreover, analysis in terms of efficiency is not only an imported aca-

59. Compare, for a demonstration of this assumption, Legal Formants, supra note 45, at 346.
61. For a full discussion see Ugo Mattei, Common Law: Il Diritto Anglo-Americano 262.
ademic movement. Its institutional impact may reach applied law on all the occasions—which are more and more frequent—in which an American solution is imported. Products liability—imported from the United States into Germany and then incorporated in the European directive—is a good example.54

Continental lawyers have managed to cast themselves as political problem-solvers by developing connections with the intellectual and cultural leadership of their society. Legal paradigms have always been successful in direct proportion to their degree of correspondence with leading scientific paradigms. Much historical evidence may be offered for this hypothesis.65

Philological techniques used in medieval religious and literary culture were also applied by the glossators. Humanistic ideas at the beginning of the modern age supported the legal revolution of the humanists, from Cuiacius to Alciatus. And the link between philosophical rationalism and natural law is again as easy to observe as the Kantian roots of the historical school founded by Savigny. These approaches to the law have penetrated the entire Western legal tradition and were not limited to the civil law world. It is sufficient to allude to the work of Bracton, to that of Grotius, as well as to the magnificent success of Savigny and his school from England to the United States.66

At a certain moment, the common lawyers, who like the classical Roman jurists had lived somewhat apart from the cultural environment of their society, became active in the universities as “scientists.” Meanwhile the civilians, abandoning their universalist attitude, have enclosed themselves in state-based parochialism. The result has been a major change of leadership within the Western legal tradition: common law models—hitherto tributary to the Romanist tradition—have taken the lead.67

The success of the idea of efficiency as an analytic tool for legal analysis may be understood within this framework. Economics is still

---

54. The directive followed the American model as it was being promoted by a German scholar while, as it is well known, the German Supreme Court had simply (and effectively) reversed the burden of proof. See SCHLESINGER, supra note 6, at 560-61.
55. See CANNATA & GAMBARO, supra note 43.
57. For evidence of this development see Ugo Mattei, Why the Wind Changed: Intellectual Leadership in Western Law, 42 AM. J. COMP. L. 195 (1994).
considered the queen of the social sciences. American legal models, which already enjoy worldwide prestige, receive a strong scientific legitimation from their connection with economic science. When philosophy was the prestigious academic discipline, lawyers managed to find within its tools—or more precisely within its jargon—the key to their success. The pattern is now repeating with economics. Western lawyers are constantly seeking some trapping of nobility, to cope with the social responsibility.

---

