FONDAZIONE G. VALCAVI
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"ECONOMIA E DIRITTO:
CONVERGENZE E CONFLITTI"

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Ore 16.30

Saluto del Rettore e presentazione dell'iniziativa

Ore 16.45

Considerazioni sulle possibili evoluzioni degli studi in tema di Law and Economics
Prof. Roberto Pardolesi
Ordinario di Diritto Privato, Università Luiss "G. Carli"

Ore 17.30

Il punto di vista di un economista
Prof. Alberto Sdralevich
Ordinario di Politica Economica, Decano della Facoltà di Economia, Università dell'Insubria

Ore 17.45

Il punto di vista di un giurista
Prof. Paola Viviani Schlein
Ordinario di Diritto Pubblico Comparato, Preside della Facoltà di Giurisprudenza, Università dell'Insubria

Seguirà cocktail

Roberto Pardolesi

Law and Economics, New Learning, and Poisonous Apples.

I. - I swear: what follows won't be yet another attempt to tell the story of a bright intellectual enterprise. There is already plenty of efforts aiming to offer either an apologetic scrutiny of the developments of L&E (worth to be mentioned, amongst the most recent, are the contributions authored by Francesco Parisi, Eli M. Setzberger, who does not dare to speak of dominant methodology for legal research, and Alessandra Arcuri) or a passionate critique (in which case the plateau where to choose would be possibly greater). Rather, I will try to briefly describe some states of mind about L&E, implying that I will move as an insider, less interested in its general acceptance than in trying to understand what to expect with it in the future.

II. – Before getting involved in the discussion of what might appear a puzzling oxymoron – L&E as a successful enterprise (in some settings admittedly more successful than elsewhere), though on the verge of being exposed to serious risks of asphyxia–, let me briefly delineate the frame, for the sake of the only reader who does not feel confident with it.

Standard economic theory has its roots in normal, everyday theory about how people act. Its basic elements are individual desires (preferences) and beliefs, and their relationship: people act to best get what they want, given what they believe about their situation. The subjective preferences are deemed exogenous, and not amenable to interpersonal comparisons. But they are all aggregated into the preference rankings of rational choice economics; and these preference rankings are numerically represented by utility functions. Beliefs about available actions, surrounding circumstances, and the like, come all modeled with subjective probability functions. Choice of action is treated as the result of subjective expected utility maximization. In standard economic accounts, all interests and values of a person are reflected in her utility function. Likewise, all of her beliefs are reflected in her subjective probabilities. Actions, then, are understood as the result of a person's whole mind.

The common sense at the core of economics helps explain its influence. Mathematical models do not really interpret or predict human action (this is David Kreps' "people-aren't-like-that" objection); yet, they retain their intuitive appeal because they are a "scientific" version of normal psychology. Thus, the "discovery" that the law, the common law elaborated by judges, appears to be driven by an underlying economic logic was all too obvious, though, to this day, there is no generally accepted theory as to why the common law promotes economic efficiency (beyond the rather aseptic observation that, everything else being equal, a rule maximizing social wealth is more palatable than one which wastes resources). Given that the nature of the law is to provide generalized rules to govern human behavior, it is no surprise that law and economics was such a fruitful match; the only real question, beside wondering why it took so long for the two to find each other, is why the relationship, once firmly established, might be about to collapse.

Assuming that a framework has been somehow delineated, let's try to answer this question, tracing the scenarios I was alluding to.

III. - The first scenario's background has been too often identified with Lake Michigan's shores. Actually, Chicago was not the only cradle. There were, dispersed somewhere else, other founding fathers: among them, needless to say, Pietro Trimarchi, working in absolute isolation in a system still dominated a highly dogmatic approach. It is also fair to recognize

the Chicago School has a metageographical connotation, in that it evokes a certain way of thinking, most importantly laissez-faire, generally endorsed by mainstream L&E scholars.

Nonetheless, it is unquestionable that Chicago as a physical location has written an important page in the history of L&E, largely because of the prominent scholars holding a position at the University of Chicago: among them, and skipping more ancient roots, Milton Friedman, Aaron Director, Ronald Coase, Gary Becker, George Stigler, and Richard Posner, as well as Armen Alchian and Harold Demsetz. Let me put it boldly: what once –and I was there!- was deemed a lunatic fringe turned out to be the strongest drive and became the icon of the climb.

In this first scenario, L&E carries out an exploratory activity, in a scientific environment – Milton Friedman was positive on that – which rejects the need to use any technicalities in economics. There was, quite often, a mathematical appendix, but it was just an appendix.

It was the time of the search for grand theories, of powerful syntheses, of shining intuitions, of considerations which appear nonsensical until they turn out to be unusually penetrating. That was the time of, *inter alia*:

- Coasian reciprocity, views of the cathedral and discovery of the many regimes governing incompatible uses of neighboring properties, until the last piece of the mosaic was found (weak protection of the author of emissions) (Supreme Court of Arizona, *Del Webb v. Spur Industries*);
- Burton and good faith *in executivis* as opposing actions aimed at regaining the opportunities lost as a consequence of the contract;
- penalty clause, Shylock's revenge and the crumbling of the "monument to juridical civilization";
- the valorization of Learned Hand's formula as a technique to clarify and specify the volatile concept of fault;
- Ackerman, the expansion of the temporal framework and the split-second absent-mindedness which bewildered André Tunc; and so on.

I'm choosing almost randomly in the wild bunch, and beyond the Chicago boundaries; indeed, the list might be way longer: such topics are still the starting, and possibly crucial points of our basic courses of EAL.

As the exploration was accomplished, *i.e.* when the economic approach touched the extreme boundaries of the legal system, the thrust faded away. And that happened when Chicago had already occupied – actually, it still permeates – a large part of American universities (Europe has never experienced the first scenario). The complexifiers were about to come over and take the lead, it is true: but could this mean a dramatic revision of the seminal, fundamental approach? The obvious answer is: no. The geographic exploration did not end up with the discovery of the sources of the Nile; to the contrary, the thirst for knowledge increased, although without the epic of "*Doctor Livingstone, I suppose*".

IV.- The second scenario might be characterized by the physiognomy of Steven Shavell, just to name the forerunner (but with so many followers!) and an implicit motto: *from law & economics to economic analysis of law* (in a sense purportedly different from the title of the seminal handbook of Richard Posner).

It's the era of the economists, who bring along sophisticated analytical tools and hardly conceal a degree of intolerance towards "unstructured", informal rationales. A large and growing fraction of law and economics work involves formal modelling or empirical models.

Accordingly, a Ph.D. in economics is perceived as a cultural precondition. Loose chattering about least cost avoider, efficiencies, transaction costs, and so forth, is banished as inchoate stuff.

I do not have any prejudice against sophistication, the refinement of analytical tools, the proliferation of Propositions, Proofs, Corollaries, QED, and analogue niceties. I won't embrace the "physics envy" critique at economists, reproaching them for the (ab)use of modeling as a thinly veiled attempt to make their work look more serious or to adopt a complex language to increase barriers to entry. Quite to the contrary, I am deeply convinced that a more mathematical apparatus is difficult to handle for the laymen, but at the same time can prove extraordinarily useful and worthwhile, if well grounded. As recently pointed out by Joshua Wright:

> Mathematical rigor and formality is not without its benefits. Modeling can help generate testable implications. Mathematics can force out into the daylight hidden assumptions and make explanations more precise in a unique way. Like any other tool in economic science, mathematical modeling can produce insights for some problems but maybe less so for others. It would neither make sense to claim that L&E left no room for the sort of detailed institutional analysis and exposition supplied by Alchian, Coase, Williamson, Klein, Demsetz, or Tullock than it would to claim that L&E should ignore the insights generated by careful theoretical or econometric work.

However, a *caveat* is warranted: in its current implementation, such an approach might cut the link with the origins and, what is even worse, with the legal component altogether. Concerning the former peril, one might reasonably object that claiming that L&E, as it stands now, leaves no room for the sort of detailed institutional analysis and exposition supplied by the founding fathers makes no more sense than claiming that L&E should ignore the insights generated by careful theoretical or econometric work. As to the latter, the implications are even more devastating. Again with Wright's words:

> There are at least three possible avenues through which the increase in formalization could be costly for L&E: (1) Economists will do work that is detached from legal institutions and law and therefore less relevant (the "detachment" problem); (2) L&E scholars will do work that is very relevant, and maybe even very good, but legal scholars won't know about it or care about it because of the "translation" issues associated with the formal mathematics will prevent it from being retailed to broader audiences, (the "retail" problem); and (3) Informal L&E will be "crowded out" of the law school landscape as it declines in value, (the "crowding out" problem) and as formal scholarship moves away from law schools toward economics departments, traditional subjects of L&E scholarship will be left to less qualified scholars (the "I know STATA and can get any regression through law review editors with a catchy enough title" problem).

This path ultimately paves the way towards a process of divergence, which would be at odds with the original interdisciplinary inspiration of L&E, while shutting the door to further developments. The worst-case outcome is a completely auto-referential endeavor, which identifies key research questions and hot topics in a totally autochthonous way, instead of drawing inspiration from (the desire to clarify) legal practice. The subsequent question rings, then, in a vein like the following: is L&E becoming so formal and specialized that the "retail problem" will render the methodology useless to the very audience that made it a success story by incorporating its insights into the law? To rephrase it crudely: will L&E move, where already academically entrenched, to economics departments and out of law schools in a few years? Will it ever emerge where it is still striving in order to get full recognition? At

would be 50, except that each side incurs trial costs of, say, 20 each. The defendant's expected payout would then be 70, and the plaintiff's net compensation 30. Though the total transaction value is still 100, trial, compared to settlement, increases the defendant's prospective costs while reducing the plaintiff's expected payoff. The value transfer is deemed to be less "efficient", because of transaction costs. However, these costs do no affect deterrence, since the standard of care is assumed to be the same. The tort system forces the defendant to compensate the plaintiff's injury regardless of whether the chosen option is trial or settlement. Accordingly, so goes the mainstream tale, the dispute resolution process is irrelevant to the question of tort efficiency, and the question of process efficiency boils down to a mere accounting of the transaction cost surplus.

But, as Rhees emphasizes, settlement pervades the tort system, so that the efficiency-oriented feature of the system only holds if the standard bargaining model works properly. Private decisions whether to settle or not depend on a stochastic prediction of the courts' decision, which in turn depends on a probabilistic assessment of the accident. If costs and benefits are matched in the aggregate, appropriate deterrence is achieved. This means that the postulate of the irrelevance of the dispute resolution processes is crucially geared on the simplifying, yet fundamental, assumption of risk neutrality on both sides: an assumption which contrasts reality, since it is commonly perceived that most natural persons are risk averse.

Now, a step forward. Since the world is uncertain, risk is a traded commodity; and, by the way, risk is the standard condition of a meritorious lawsuit. Absent some variance of outcome –the would-be plaintiff assumes to have a 80% probability to win, but the defendant strongly believes that she has a 60% chance of prevailing--, no lawsuit would ever arise. It is uncertainty that prompts litigation. There is already a problem with this view: the incentives supported by the Hand formula get blurred, the paradigm against which to evaluate the cautions (that should be deployed since they cost less than the expected damages) is no longer neat. But there Is something more. Risk ishould be neutralized. By deciding to settle, each party undertakes a hedging strategy aimed at eliminating risk. In view of the possibility that the court finds liability and awards 100, the plaintiff agrees to pay the defendant 50; as a consideration, if there is no liability, the defendant agrees that, if no liability is found, she will nonetheless pay the plaintiff 50. "Each party bets *against* one's most favourable outcome": practically issuing, according to Rhees, a put option (or underwriting an insurance policy) to protect the other against the contingency of a negative outcome. This hedging strategy maximizes expected value while eliminating risk.

Asset pricing principles of financial economics explain that uncertain cash flows are always subject to a risk adjusted discount, which determines the transaction price. Now, the discount on the expected value of the *res litigiosa* contradicts the efficiency claim, which assumes that deterrence is achieved through probabilistic allocation of cost. Irrespective of transaction cost differences, private settlement offers better pricing to defendants than the public forum. The *caveat* is striking: when the economics of settlement is considered, efficiency, the way we think of it, collapses on its own premises. Thus, the structure of fault-based systems presents an arbitrage opportunity, in which the plaintiff's choice of accepting a discount substantially funds the defendant's cost of resolution. From this viewpoint, the tort system appears hardly efficient, at least based on how efficiency has been defined by economic models. If the appropriate level of deterrence is judicially set under the Hand Formula, but the operational standard of care is determined by settlements, the defendant will be systematically under-deterred.

Forget these implications and focus on the cornerstone of the analysis. The new theory is no less abstract than the mainstream approach. But it tells a story that jurists would find more plausible: after all, they have been taught that *sidera sua habent lites.*

VI.- Back to my main point. We face the risk of a normative L&E (and so far, so good); but such normative endeavor would come without a *previous* and a *subsequent* positive L&E (not in the Chicagoan sense of an immanent efficiency-based aptitude). To put it more simply, this would fall short of understanding how and why the law is as it is and would merely focus on what the law should look like. Even more bluntly, *the way it is as the way it ought to be*.

This detachment can become a nightmare. Take, for example, the often celebrated theory of efficient breach. In its most suggestive version, building on Oliver Wendell Holmes' perception that contract is a promise to perform or pay damages, it holds that a seller, who has contracted to sell a commodity to a buyer, should breach the contract in order to resell the commodity to a third party who comes along later and offers a higher price, *if*, after compensating the counterparty, she will still make a profit. This outcome, transferring the commodity directly to the individual that values it most, is an allocatively efficient or Pareto-efficient solution.

The theory would have hardly convinced a German lawyer, who is routinely taught that the standard remedy for breach is specific performance; and would have been resisted also by both French and Italian scholars, since, as Rudden and Juillard timely pointed out, in both legal systems the upper limit of foreseeable damages does not apply when the breach was intentional (*scienter*), so that the trade-off faced by the untrustworthy promisor collapses because of unexpected losses suffered by the buyer. We all tried to overcome these hurdles arguing, for instance, that the German specific performance is only proclaimed to be the standard remedy, whereas it is actually overwhelmed by resort to damages; and, for the French/Italian side, that awareness of the harm caused to the promisee falls short of "*scienter*" (or alternatively, in Pietro Trimarchi's view, that foreseeability must exist at least at the moment the promisor decides to breach).

Be it as it may, we might nonetheless discover, much in the same way as the precedent example, that the theory is unworkable on its own grounds.

Actually, as shown by Eisenberg, the theory rests on two factual predicates which are far from straightforward. On the one hand, it assumes that expectation damages really leave the promisee indifferent between performance and breach: however, contract law theorists know that expectation damages do not bring about any such effect, since, besides being based on objective rather than subjective values, this measure fails to include lawyers' fees and other costs of dispute-settlement and litigation, which would not have been incurred if the promisor had performed. On the other hand, the theory assumes that the promisor knows the value that the promisee places on the commodity, whereas the seller will seldom possess such knowledge. And even if the buyer had disclosed that information, the seller would normally have no way of knowing what profits the buyer expected to make at the time of the seller's perform-or-breach decision, because meanwhile markets may have shifted, or the buyer may have increased his potential profits through an investment in beneficial reliance which will be wasted if the seller breaches. In addition to that, the encouragement of breach does not necessarily promote efficiency. Even in a world fraught with transaction costs, commodities will normally flow to higher-valued uses. If the second buyer, in Eisenberg's terms the overbidder, values the commodity more than the buyer, and knows who the buyer is, she will purchase from the buyer either an assignment of the contract or the commodity itself. If the third party does not know who the buyer is, a rational seller will either negotiate with the buyer to be released from the contract (so that she can sell to the overbidder), or will sell the overbidder's identity to the buyer or the buyer's identity to the overbidder.

But the most intriguing feature is that, were this theory widely followed, it might lead to

inefficiency. It would increase the need to resort to litigation, which is very expensive, as opposed to achieving performance of contracts through the internalization of the moral norm of promise-keeping, which is (apparently) very inexpensive; and, more importantly, would inefficiently reshape the parties' contract. It is a fundamental premise of contract law that autonomous and well-informed actors are the best judges of their own utility, so that enforcing bargained-for contracts is efficient, in the absence of pathologic situations such as fraud, duress, unconscionability, or the like. If the buyers were to expect that the seller is not bound by its commitment, or has got an extremely favourable exit option, they might give up and walk away, insist on an explicit contractual provision stating that the seller has a present intent to perform and that any profit on breach and resale will go to buyer, or demand a payment, in the form of a lower price, for the seller's right to resell. Buyers will react this way because, as Ian Ayres and Gregory Klass conclude, normally one key feature of a bargain promise is to convince the promisee that the promisor has an intent to perform.

This approach, based on economic arguments, challenges the classic theory. One more time, its appeal lies in drawing framework that jurists would find more sympathetic to their background. After all, they are normally bred under the polar star of *pacta sunt servanda.*

VII.- At the end of the day *–in cauda venenum*!-, what might be wrong with the second scenario is that, instead of viewing Law & Economics as the integration of two equally important disciplines, it would lead to an economic analysis of law in which the latter is just the passive object of the former. An object among many others, such as, say, Education, Public Health, or Environment. Just a bit more intriguing, maybe, since meanwhile even economists, with La Porta and Shleifer as gurus, have discovered that *legal rules do matter*!

Such a fascinating discovery lies at the bottom of the third scenario, which is still to come. In going, by the way, one might even wonder whether it will ever materialize. Critics and criticisms have always been abundant; as well as Cassandras, denouncing that the edifice's bottom has long since disappeared into the sand (Weinrib), that the movement has peaked out (Horwitz), that EAL is sick and spreads sickness (Jaffee), that it is no edifice at all, just sand (Anita Bernstein). As noted before, the platoon of those volunteering to sound the death knell is a crowded one. The truth is that, despite its intuitive appeal, economic analysis of law is controversial, no less than the underlying economic theory.

The basic tenet –rational choice, people act to best get what they want, given what they believe about the circumstances- is under attack. A large and growing body of empirical evidence reveals that people often fail to live up to the *homo oeconomicus* paradigm, and adopt actions that conflict with their interests (as predicted by standard economic theory). Why, then, bother with models based on assumptions that do not reflect the main features of reality? The reactions to this kind of criticisms are threefold.

One is complete dismissal: EAL is an aging giant, whose death certificate has already been signed, so that it will disappear, the sooner, the better.

Another is coming from the true believers and assumes the form of cooptation strategy: basically, it tries to account for recalcitrant behavior by either finding new inputs into the old models (e.g., sophisticated preferences or beliefs, information asymmetry, signaling, strategic behavior) or, recently, applying old model in new ways (for instance, accommodating for the insights of the Behavioral Economics).

The third reaction, still largely indefinite, might be a compromising attempt to make the best out of it, meaning that something should be rescued and revamped, whilst much stuff should be discarded and dropped. After all, it is still plausible to assert that rational choice theory, in

spite of all criticisms, does offer compelling insights into many circumstances, so that it can keep illuminating lawyers in their efforts to design fitting regulations in disparate domains, like environmental and competition law. The point is that preserving a scope for a declining mainstream paradigm is still compatible with other approaches which promise to enrich the analytical apparatus of L&E by offering new venues for studying problems when the application of rational choice theory would be impractical.

Be it (eclectic) as it may, if a third scenario is to come, as I strongly believe, one feature should be all too obvious, i.e. the goal to be pursued: positing economic analysis as a legal source, relevant to the making of the law and to its actual enforcement.

This goal cannot be accomplished *against* (or *despite*) the jurists. It should be kept in mind that, as Henry Manne reminds us:

> the original approach was simply a marginal (jurisprudentially speaking) movement from what most legal-realist-oriented law professors were already doing but, alas, doing very badly. They were trying to explain why one rule of law was better than another (...), but the focus was always on improving the law and not on showing the methodological skills of the authors. This was the intellectual victory which revolutionized the law school world, and it was all because of (...)the power of economics, vastly greater than that of any other discipline, to resolve what had appeared to be purely normative issues in a positive way. It was the introduction to this kind of power that opened the eyes of many law professors back in the 1970s, and which I think still has the power to amaze people (including, alas, many economists) who are not familiar with economics' great analytical powers.

This was the archetypical inspiration and the recipe for success in the past; and should be the lighthouse for the future. As perceptively stressed by Bruno Deffains, "l'étude des comportamennts qui fait abstraction du cadre juridique existent risque de ne pas avoir de valeur dans le monde reel. Si les economists écoutent ce que les jurists leur dissent, ils seront capables de developper des modèles plus proches de la réalité". Summing up. If we need a Ph.D. in economics, we need a Ph.D. in law, too. Even more importantly, we need interdisciplinary education and humility.

This is why we should firmly defend and reassert the value of the positive analysis, even though legal technicalities often appear inaccessible and Kafkaesque. The L&E contributed to shed light on many of these black holes, and can still do a lot more to clarify and rationalize legal concepts. And this is why, in the transition to the third scenario, we should strive to ignore the dubious sirens calling for an L&E (just) for economists!

VIII. – That the insights of economics should be deployed at the level at which it works for lawyers and judges, is a perspective economists won't perceive as particularly appealing. In their view, an interdisciplinary approach which goes only one way and drops any attempt to foster a bi-unique relationship is close to appear either unfair or simply unworthy. Yet, it should be clear that such a problem cannot be solved by adopting the opposite view, i.e. exporting a basically lawless L&E to the exclusive realm of academic economics (which, by the way, fond as it is of formal elegance, doesn't seem –to say the least- to appreciate such efforts).

I believe there is an alternative, which might lead to one more scenario –the fourth–, maybe already existing, though under disguise. But this idea is highly tentative; and should be retained for the sequel to come.

Ieri all'Università dell'Insubria la prima giornata di studi promossa dalla fondazione voluta dall'avvocato varesino

Economia e diritto: i codici di Valcavi nel mondo con Internet

(e.p.) - Muove i primi passi la Fondazione Giovanni Valcavi per l'Università dell'Insubria, creata nel 2008, diventata pienamente operativa alla fine del 2009 ma arrivata solo ora a tenere a battesimo il suo primo evento. Un lungo iter burocratico che ha permesso all'ente privato, nato a sostegno dell'ateneo varesino e comasco, di sviluppare solide radici. Un evento obbligato, in qualche modo scritto già nel dna della Fondazione, quello che ieri ha aperto la stagione degli incontri firmati dall'ente: una discussione accademica sul tema per specialisti "Economia e Diritto: convergenze e conflitti". In prima fila, non poteva mancare l'avvocato Valcavi che, con una cospicua e generosa donazione, da padre fondatore dell'università fin dai suoi albori, ha coronato il sogno di sostenerne le attività culturali e di ricerca. Il rettore Renzo Dionigi è presidente della Fondazione, Valcavi, 84 anni quest'anno, ex amministratore di banche del territorio, del Calzaturificio di Varese, presidente dell'ospedale, senatore, è vicepresidente e tali

Il pubblico che ha seguito i lavori. In prima fila l'avvocato Giovanni Valcavi (Foto Blitz)

rimarranno in futuro i suoi eredi. Per suo esplicito volere, l'ateneo collaborerà in modo sempre più stretto con l'Università della Svizzera Italiana.
«Sono molto soddisfatto - ha detto ieri l'avvocato, mentre stringeva mani e riceveva attestati di stima da parte dei professori e delle vecchie conoscenze cittadine -. Dopo trent'anni di lavoro, i miei sforzi vengono ampiamente ripagati. Penso che ci sia un modo nuovo di concepire il diritto e l'economia. E sono molto contento che i miei scritti, tradotti in tutte le lingue, siano molto richiesti anche su Internet in diversi Paesi del mondo». Le procedure di attivazione hanno richiesto tempi lunghi, ma ieri è partita la marcia della Fondazione che, come ha anticipato la professoressa Rossella Locatelli, membro del consiglio di amministrazione, «darà vita d'ora in poi a una giornata annuale. Il primo segno delle attività non poteva essere che una riflessione culturale e scientifica legata alla ricerca, il conflitto tra economia a diritto». La discussione ha riguardato la possibile evoluzione degli studi in tema di "Law and economics", argomento molto caro all'avvocato Valcavi, al quale il consiglio di fondazione ha voluto simbolicamente dedicare il primo incontro. Protagonista della lettura è stato il professor Roberto Pardolesi, ordinario di Diritto Privato Comparato presso la Facoltà di Economia della Luiss "Carli". A fare da contraltare, in qualità di "discussants", Alberto Sdralevich, ordinario di Politica Economica e decano della Facoltà di Economia dell'Università dell'Insubria e la professoressa Paola Viviani Schlein, ordinario di Diritto Pubblico Comparato e preside della Facoltà di Giurisprudenza.