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A MINI-SYMPOSIUM ON EARLY LAW AND ECONOMICS: INTRODUCTION

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To introduce these articles on *early* ''law and economics,'' let us begin with *modern* ''law and economics,'' not to add but precisely to avoid new labels and limit our discussion to the basic approach that grounds ''law and economics.'' This is an area of research which, in its modern version, was born in the 1940s at the law school of the University of Chicago under the influence of Aaron Director, and may be referred to as *old* ''law and economics.'' It evolved into a *new* ''law and economics'' in the 1960s under the influence of Ronald Coase and then, in the early 1970s and essentially because of (thanks to) Richard Posner, into *recent* ''law and economics,'' which is commonly known as the ''economic analysis of law''—a sufficiently specific label that reveals the transformation to which owes to Posner. In effect, the differences that exist between old and new ''law and economics'' are not as important as those that separate (either old or new) ''law and economics'' from the ''economic analysis of law.'' This distinction—''law and economics'' versus ''economic analysis of law''—is worth taking into account seriously. We use it as a framework to present the papers gathered in this mini-symposium.

I. HOW TO DISTINGUISH BETWEEN ''LAW AND ECONOMICS'' AND AN ''ECONOMIC ANALYSIS OF LAW''

Director and Coase, respective representatives of old and new ''law and economics,'' view themselves as economists and, as a consequence, share the same interest in the functioning of the economy. Therefore, their work can be characterized by one fundamental assumption about what economics is: there exists a subset of human activities (economic activities) that form the subject matter of our discipline; in other words, economics is defined by its subject matter, and economists must restrict their attention to what belongs to this subject matter. Also, they believe in the importance of institutions or, more specifically, of legal rules for the working of the economy. This represents a second assumption that characterizes the analyses they develop as ''law and economics'': legal rules necessarily influence economic activities and, for

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this very reason, economists must take them into consideration. Thus, ''law and economics'' takes the law (legal rules) into account because it improves our understanding of the functioning of the economic system.[1]

William Landes and Isaac Ehrlich who, along with Posner, contributed to the emergence of an ''economic analysis of law,'' also view themselves as economists, specifically, because they use a set of economic ''tools''—a term that Posner repeatedly uses[2]—to analyze all kind of problems and behaviors. Their works can be characterized by a first assumption: economics is the science that analyses the problems raised by scarcity and behaviors adopted or the choices made, by individuals or collective entities, to solve these problems. By contrast, they are not economists in the sense that they could be limited by the boundaries of a given subject matter, not in the sense that they had to analyze the workings of the economy. As a second assumption, their ''economic analyses of law'' aims at understanding the functioning of the legal system: the origin and legitimacy of legal rules that become an object of study as such, not because of their influence on economic activities; the behavior of judges that create or implement them; as well as the attitude of litigants and criminals.

Therefore, an ''economic analysis of law'' doubly reverses the ''law and economics'' perspective: it modifies the object, the economy or the legal system, and the definition of economics used, restricted to economic activities or extended to any kind of problem.

The distinction summarized in the previous paragraphs not only serves to characterize modern law and economics, it also makes clear earlier contributions, in particular those of the first political economists. This is what the articles presented in this mini-symposium demonstrate. They show that both Adam Smith and Jeremy Bentham are convinced there exist links between the economy and the law and between economics and legal theory. But their analyses differ. Smith, a political economist, adopts a ''law and economics'' perspective: he is more interested in the functioning of the economy and tries to understand the influence of legal rules on economic activities. For his part, Bentham, a legal scholar, proposes an ''economic analysis of the law'': he views economics as a method to improve his understanding of the legal system.

II. PRESENTATION OF THE TEXTS

In the first of the two articles discussing Smith's contribution to early ''law and economics,'' Jeffrey Young shows that ''Smith inherited and built upon'' the Protestant natural law tradition within which Samuel Pufendorf and Francis Hutcheson also worked. Thus, Young demonstrates that the three scholars—even if their tones and analyses differ—share a similar conviction about the social, institution or legal dimension of economic activities. Market phenomena are treated as social processes and are viewed as mechanisms through which individuals interact, and,

[1]For the precise words Coase uses and the reason why Coase wrote ''The Problem of the Social Cost,'' see Coase (1960, pp. 27–28; 1993, p. 250; 1996) and the remarks by Coase in Epstein et. al. (1997, p. 1138).
[2]See Posner (1971, p. 202; 1973a/1986, p. 3; 1973b, p. 399).

more broadly, economic activities are necessarily grounded in rights and are framed by legal restrictions. As a consequence, Pufendorf, Hutcheson, and Smith systematically discuss economic questions in chapters devoted to legal issues, natural rights and property rights, oaths and obligations, promises and contracts; they, to put it differently, discuss prices, the value of goods—that is, economic concepts as legal ones. Therefore, these Protestant natural law economists developed what we identify above as a ''law and economics'' perspective.

Manfred Holler and Martin Leroch propose a demonstration that complements Young's. It is in effect possible to interpret their paper as providing an explanation of why Smith views economic activities as embedded in social and legal institutions. They argue that Smith does not envisage human societies as groups of individuals who make choices under constraints but as social organizations based on interactions and exchange, *à la* Buchanan[3]: individuals exchange their positions with others because they sympathize with them. Thus, they show that when and because sympathy exists, rules spontaneously emerge but, beyond the limits of sympathy, formal legal rules are necessary. Similarly, juries can be viewed as functioning on this propensity to sympathize with others. In other words, legal institutions result in, depend on, and are also limited by the human propensity to exchange—sympathize—with others. And this is how they have to be understood: as means to organize exchange, not as means for solving problems of scarcity, as an economic analysis of law would have analyzed them. And, one may add, as Bentham analyzes them.

This is what Marco Guidi demonstrates in his discussion of Bentham's relatively neglected *Political Tactics*. Here is a text in which Bentham adopts the posture of an economic analysis of law or, to use Guidi's words, of someone for whom ''political economy is a branch of the science of legislation.'' Thus Bentham, a legal theorist, does not analyze an economic but a political—constitutional—problem. More precisely, he envisages a problem of decision making: how to establish a decision procedure in parliaments. This means that Bentham views institutions as means to make decisions or, at least, argues that this is what social scientists have to analyze. His perspective is not only similar to the problems analyzed by modern social choice theorists, notes Guidi, but is typical of economic analyses of legal or institutional issues. Bentham, then, proposes an economic analysis, and he speaks of ''incentives,'' ''rewards'' and ''penalties,'' as well as ''strategic behaviours,'' proposing an optimal decision procedure. This is the purpose of Bentham's book.

The use of economics as a method—a set of concepts—to analyze political or legal phenomena could then be viewed as indicating that Bentham is a precursor to an economic analysis of law and, more broadly, a forerunner of economic imperialism. This seems acceptable. Is it possible to shift the claim higher and argue, as Jimena Hurtado does in her article, that Bentham is ''an important philosophical influence'' which makes Gary Becker's economic imperialism possible? That he provides the ''philosophical foundations'' without which economic imperialism would be difficult

[3]We have developed an analysis that leads to the same results as those obtained by Holler and Leroch—that is, rules emerge because of sympathy but their action remains limited to ''friends and acquaintances''; when the size of the group increases, cooperation decreases, being replaced by free riding—but based on David Hume's definition of sympathy rather than on Smith's. See Josselin and Marciano (2001, 2002, 2005) and Marciano (2004).

to understand? Yes, answers Hurtado (while Posner, dealing with the same issue, had more mitigated conclusions (see 2001, ch. 1)) because he provides the philosophical framework of utilitarianism and the utility principle within which economics is used as a method with the purpose of analyzing any kind of human behavior. That is precisely what characterizes economic imperialism.

III. "LAW AND ECONOMICS" AND AN "ECONOMIC ANALYSIS OF LAW" 200 YEARS AGO

The articles that follow, we believe, are rich and interesting, not only for those interested in law and economics but also for Smith or Bentham scholars. They contain more than a discussion of the methodological distinction between two ways to envisage economics—with or without subject matter, as a set of tools *only* or not. We have nonetheless chosen this angle to introduce this mini-symposium because it reveals that the major, fundamental difference that exists between the approaches of Coase and Posner is similar to the difference that separated Smith and Bentham 200 years ago. This should not surprise us: Coase and Posner usually associate their works with Smith and Bentham, respectively. Is it a matter of influence? We would conclude instead that this distinction is genuinely important, sufficiently so to appear in the writings of different scholars in different places and different times.

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