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In search of a broad research agenda in Law & Economics for Latin America

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Abstract

Recently Law & Economics has been gaining space in the intellectual arena in Latin America and today we have in that continent a small, yet rapidly increasing, number of scholars doing interesting and useful work in the field. This paper outlines a research agenda for this group of scholars.

KEYWORDS: law and economics, Latin America

IN SEARCH OF A BROAD RESEARCH AGENDA IN LAW & ECONOMICS FOR LATIN AMERICA

By

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1. Introduction

Law & Economics started in the United States almost fifty years ago. From there it spread to Europe, Asia, and more recently Latin America. But what has been a renewing force in the law elsewhere, has fared less well south of the Rio Grande. In Latin America, as Juan Javier del Granado puts it, economic analysis often remains an alien approach to law, remote from the concerns and mindset of civilian lawyers and judges.¹ I believe, however, that this trend has reached its point of inflexion. Recently Law & Economics has been gaining space in the intellectual arena in Latin America and today we have in that continent a small, yet rapidly increasing, number of scholars doing interesting and useful work in the field.²

What is it exactly that these scholars are doing? Or, to put it in more general terms: what does it mean to speak of a modern research agenda in Law & Economics? Today, I will give you my take on this question. I will start with a fairly long digression that will take a little more than half of my paper, namely an outline of the epistemology of Law & Economics. This “digression” highlights key elements of origin, aims and analytical tools employed within Law & Economics. With that in mind, it will be much easier to understand why it is possible to talk of a broad research agenda in Law & Economics that goes beyond applied microeconomics and that is reachable to most, if not all, Latin American lawyers. That will be the subject of the second part of my paper.

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¹ Juan Javier del Granado and M.C. Mirow, The Future of the Economic Analysis of Law in Latin America: A Proposal for Model Codes, *Chicago-Kent Law Review*, v. 83.1, 2008, pp. 293-325.

² See <http://works.bepress.com/alacde/>

2. Outline of the Epistemology of Law & Economics

What is Law & Economics? The field of Law & Economics has been described as a theoretical body grounded on the application of economics to norms and political institutions. Nicholas Mercurio and Steven Medema define Law & Economics as “the application of economics (especially microeconomics and basic concepts of welfare economics) to examine the structure, process and economic impact of legislation and legal institutions”.³ This definition is useful as a preliminary approach, but as I will later suggest, it is too narrow.

As noted by Edmund Kitch,⁴ Law & Economics descends from two intellectual traditions: political economy and legal realism. Since these traditions cover a tremendously large spectrum of topics and methodologies, it comes as no surprise that Law & Economics is a very broad field as well. The Online Encyclopedia of Law & Economics⁵ describes a number of different schools and approaches within Law & Economics that include the Chicago School, the New Haven School, the Austrian School, and the New Institutional Economics approaches, just to name the most relevant ones. Thus, in synthesizing the epistemology of Law & Economics, I will limit myself to highlighting predominant approaches. Law & Economics is controversial not only outside, but also within, its own borders. In fact, many (if not all) of the points I will make during the course of my paper are the source of controversy, or at least require refinement that entails controversy.

Law & Economics encompasses two distinct dimensions, that is, two independent – yet interconnected – epistemological levels. The first, which is merely descriptive, is called Positive Law & Economics. The second, which is prescriptive, is called Normative Law & Economics. While Positive Law & Economics is concerned with describing the practical effects of the law, Normative Law & Economics analyzes whether, and to what extent, notions of justice and fairness should communicate with notions of efficiency, wealth maximization and welfare maximization.

Let us start with the descriptive dimension, Positive Law & Economics. Like most things, Positive Law & Economics is more clearly understood if we start with an example, so I will bring up an example from my country, Brazil. In March of 2006 Senator Maria do Carmo do Nascimento Alves, from the state of

³ Nicholas Mercurio, Stever G. Medema, *Economics and the Law – From Posner to Post-Modernism*, Princeton: Princeton University Press, 1999, p. 3.

⁴ Edmund W. Kitch, The Intellectual Foundations of Law and Economics, *Journal of Legal Education*, v. 33, 1983, p. 184.

⁵ Available at <http://encyclo.findlaw.com>.

Sergipe, presented bill of law that would allow customers of services performed on a continued basis (e.g. users of telephone or cable TV services) to require the same benefits that are offered to new customers. For instance: if a cell phone carrier offered to new customers a one-month free of charges deal, old users would be able to request a similar benefit. Naturally, the stated goal of such bill of law was to protect consumers.⁶

But what is going to happen in the event that the Brazilian Congress eventually decides to approve this bill of law? I find it is very unlikely that such legislation will reach its praiseworthy objective of protecting consumers. Most probably, when current cell phone users are granted the possibility of demanding the same kinds of discounts that are being offered in marketing campaigns designed to attract new customers, cell phone carriers will simply change their marketing strategies. Marketing campaigns premised on discounts for new customers will become more expensive on the margin, and so it will be more advantageous to conduct marketing campaigns based on other strategies, particularly advertising. All in all, I believe this bill law can do very little to protect consumers. In fact, it probably harms them more than it helps them.

The point I wish to make is simple. Depending on one's moral and ideological convictions, one may accept the proposition that it is worthwhile to protect consumers as matter of fairness. But a descriptive – thus positive issue – exists independently of this normative analysis. Will a certain kind of legislation achieve its stated normative objectives? This is necessarily a positive, that is, a descriptive, question. It has nothing to do with the normative question of whether protecting consumers is fair, desirable or moral. One may accept that a normative goal is correct, but as Richard Epstein puts it, “there is a subsidiary factual premise that must be argued for independently [of the normative goal]. You must ask the question: When you look at the present array of rules, do they achieve the stated goals?”.⁷ When the legal means do not lead to the desired outcomes, the normative debate does not make practical sense.

In order to understand whether a proposed legal instrument achieves its preset normative objective it is necessary to make use of a descriptive analytic tool. The central argument within Positive Law & Economics is that microeconomics can offer sound methods to work out this means-end analysis. Robert Cooter discusses a number of versions of that argument, and I will highlight the two most relevant.⁸ The first version is that economics can *explain*

⁶ For this illustrative example I am thankful to Prof. Carlos Emmanuel J. Ragazzo, from the law school of the State University of Rio de Janeiro – UERJ.

⁷ Richard A. Epstein, Positive and Normative Elements in Legal Education, *Harv. J. of Law & Public Policy*, v. 255, 1985, p. 258.

⁸ Robert Cooter, Law and the Imperialism of Economics: An Introduction to the Economic Analysis of Law and a Review of the Major Books, *UCLA L. Rev.*, v. 29, 1982, p. 1260.

the structure of legal rules; the second is that economics can *predict* their consequences.

Let us start with the explanatory version. Legal systems can be understood as part of the institutional arrangements that result, in equilibrium, from the rational maximization of scarce resources by all of the individuals in the society. For example: the rule of negligence (which in Continental Systems corresponds to what could be translated as “subjective liability for extra contractual illicit acts”) could be explained as being an institutional arrangement that aims at giving incentives for potential wrongdoers and potential victims to take actions that can minimize the chances of materialization and extension of harms. In turn, the more recent adoption of a rule of strict liability (“objective liability”, in Continental Systems) in some cases could be explained as being the result of the high costs to prove negligence in many instances such as accidents with explosives.

Of course, to explain legal institutions as being the resultant force of rational maximization by the individuals is to ignore the cultural, historic and political factors that also shape the existing interactions. Thus, as Cooter suggests, it is necessary to articulate a softer version of the explanatory version of the argument that economics is useful for legal analysis. As he puts it, “there may be some areas of law which can be explained by economics, but there are other areas of law in which economics explanations will always be incomplete”.⁹ This means that economics can illuminate problems and suggest hypotheses, but it can be enriched when conjugated with other fields particularly Anthropology, Psychology, History, and Sociology.

There is, as I have said, a second version of the argument that microeconomics is useful for legal analysis, namely that economics can be employed to predict the consequences of legal rules. Law & Economics moves the consequences of the law to the center of the legal debate. The idea is to model human behavior in such way that it can be possible for lawyers, judges and legislators to understand what is likely to happen as a consequence of the myriad of different possible institutional arrangements and interpretations of the law. However, and this should be clear now, the predictive power of economics suffers from the same limitations that affect its explanatory power. Economics is limited; but so is any other means of analysis. In any case, the ever growing importance of interdisciplinary research, and the ever increasing number of scholars interested in Law & Economics, is a token of the vitality and usefulness of the Law & Economics approach.

⁹ Id.

What are the analytic tools employed within Positive Law & Economics to explain the law or to predict its consequences? At its core, Positive Law & Economics applies marginal models to legal problems. Accordingly, the concepts of scarcity, rational maximization, equilibrium, incentives and efficiency are crucial. In addition, the most useful theoretical backdrops for the analyses can be found in Transactions Costs Theory, Rational Choice Theory, and perhaps most importantly, New Institutional Economics.

New Institutional Economics has been defined as “an interdisciplinary enterprise combining economics, law, organization theory, political science, sociology and anthropology to understand the institutions of social, political and commercial life”, that “borrows liberally from various social-science disciplines” but uses the primary language is economics. Its goal is “to explain what institutions are, how they arise, what purposes they serve, how they change and how - if at all – they should be reformed.”¹⁰ New Institutional Economics recognizes that the economic structure depends on the historical, cultural, social, political and legal contexts, and that such contexts can render radical institutional changes excessively costly – thus impossible. It requires from the scholar a broader understanding of the legal phenomenon premised on the complexity of social change. It is particularly useful because it can move the researcher away from economic reductionism without driving him into speculative philosophy or metaphysics.

I spoke about the descriptive level of Law & Economics. Now let me move on to the other level, Normative Law & Economics. Mostly everybody would agree that there is something wrong, or perhaps undesirable, about wasting resources. Accordingly, there is something intuitive in the connection between efficiency (which is the absence of waste) and fairness. But what is the reach of this connection? To what extent should cost-benefit analysis be tolerated when it clashes with principle-based notions of justice? These are obviously thorny questions. Instead of resolving them, I will sketch the set of answers given by two of the most reputable legal economists, Richard Posner and Guido Calabresi. I chose them not because they offer the most radical answers – Posner once offered a radical answer, but he later abandoned it – but because their answers are the most influential.

Towards the end of the 1970s decade, Posner posited that wealth maximization should provide ethical foundations for the law.¹¹ The idea was that legal rules and political institutions in general should be evaluated in terms of whether they advance the maximization of wealth in society. The term “wealth”,

¹⁰ Source: International Society for New Institutional Economics (<http://www.isnie.org>).

¹¹ Richard A. Posner, *The Economics of Justice*. Cambridge, Mass.: Harvard University Press, 1983.

as used by Posner, is different from GDP or from the sum of market values of all property. Wealth should include the consumers' and producers' surplus that is generated in economic exchanges. Surplus values exist because people hold particular items of property exactly because they attach a higher value to those items than the market does. These incremental values are a source of utility, but Posner suggested that the law should back up only utility backed by willingness to pay (and this was the key distinction between wealth maximization and applied utilitarianism, which it resembles).¹²

Strictly speaking, Posner's original formulation of wealth maximization is "Normative Law & Economics". By using welfare economics not only to describe how the law works, but also to prescribe how it should work, Posner's principle of wealth maximization transformed efficiency into a deontological principle. It was a new metaphysics for the law.

Posner's radical claim generated an infuriated rebuttal from a number of scholars such Jules Coleman,¹³ Ronald Dworkin,¹⁴ Anthony Kronman,¹⁵ and Frank Michelman,¹⁶ just to name a few. Central to their critique was the claim that wealth maximization was an incomplete guide to social action because it had nothing to say about the original distribution of rights and wealth. Criticism also pointed out that the principle of wealth maximization could end up justifying racist and xenophobic policies because it treated people as cells of a unique organism – and the wellbeing of the cell is only relevant insofar as it promotes the well being of the organism.

In 1990, Posner gave in. He wrote: "the normative theory of [Law & Economics] has been highly contentious in its own right. Most contributors to the debate over it conclude that it is a bad theory, and although many of the criticisms can be answered, several cannot be".¹⁷ From then on Posner abandoned the idea that wealth maximization could lay ethical foundations to the law, and embraced legal pragmatism instead. Since then, Posner has

¹² To illustrate the principle of wealth maximization, suppose A is willing to pay up to \$10,000 for B's car (that means the car is worth \$10,000 for A because he is indifferent between having \$10,000 or the car) and B is willing to sell his car for at least \$9,000 (so the car is worth \$9,000 to B). If A buys the car for any amount between \$9,000 and \$10,000 the wealth (that is, the surplus) of the society increases by \$1,000. If the sale occurs for, say, \$9,500, each party shares half of the surplus; if the car is sold by \$9,000, A manages to get all the surplus; if the car is sold for \$10,000, B gets all the surplus; and so on.

¹³ Jules Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's 'The Economics of Justice'*. *Stanford Law Review*, v. 34, n. 5, 1982, pp. 1105-1131.

¹⁴ Ronald M. Dworkin, *Is Wealth a Value?*, *The Journal of Legal Studies*, v.9, n.2, 1980, pp. 191-226.

¹⁵ Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, *The Journal of Legal Studies*, v.9, n.2, 1980, pp. 227-242.

¹⁶ Frank I. Michelman, *A Comment on Some Uses and Abuses of Economics in Law*, *The University of Chicago Law Review*, v. 46, n.2, 1979, pp. 307-315.

¹⁷ Richard A. Posner, *The Problems of Jurisprudence*, Harvard University Press, 1990, p. 375.

published a vast *oeuvre* where the role played by wealth maximization is more discrete than in his first writings. By “converting” into the pragmatic “faith”, Posner discarded the idea that efficiency could serve as an overarching principle for the law.¹⁸

What is pragmatism? I do not know of a single definition that can satisfactorily encompass all of its standpoints. Cornel West tried to find a common denominator and suggested that pragmatism is “a future-oriented instrumentalism that tries to deploy thought as a weapon to enable more effective action”.¹⁹ Posner claims to be the kind of legal pragmatist that “emphasizes the scientific virtues [...], elevates the process of inquiry over the results of inquiry, prefers ferment to stasis, dislikes [...] metaphysics, is doubtful of finding ‘objective truths’ [...] is uninterested in creating an adequate philosophical foundation for thought and action, likes experimentation, likes to kick sacred cows, and – within the bounds of prudence – prefers shaping the future to maintaining continuity with the past.”²⁰

I believe that Posnerian legal pragmatism grounds Normative Law & Economics insofar as it places the focus of the legal analysis in what may be practical, consequential, and empirical. Law is thus viewed as an instrument, not as an aspiration. Posner rejects the idea that the law can be grounded on permanent principles that can be set in motion through logical manipulation. While rejecting efficiency as a unique grounding for law finding and law making, the pragmatist Posner posits that the meaning of things is social, not immanent, and that human actions should be analyzed in consonance with the circumstances and consequences.

Within Posner’s pragmatic approach, judges should give weight to the consequences that arise out of the myriad of possibilities that legal texts entail, and they should also bear in mind that the law is powerful tool for value creation. But exactly because efficiency is not an overarching principle, Posner will suggest that judges should also consider the importance of defending democratic and constitutional values, legal language as a useful means of communication within the legal field, and the problems of separation of powers. Given the conflicts that arise in the course of this highly complex process, the law finding and law making will continue to be an art; not a science. And being scientific, is exactly the core aspiration of economics.

¹⁸ Posner’s original ideas remain influent. Currently, their most vehement and influent supporters are Louis Kaplow and Steven Shavell. See *Fairness versus Welfare*, Cambridge, Mass.: Harvard University Press, 2006.

¹⁹ Cornel West, *The American evasion of philosophy: A genealogy of pragmatism*, University of Wisconsin Press, 1989, p. 5

²⁰ Richard A. Posner, *The Problems of Jurisprudence*, Harvard University Press, 1990, p. 28.

Guido Calabresi is the second reference that I will discuss. I will be brief because Hugo Acciarri already discussed Calabresi here yesterday. Let me recap some key ideas. Calabresi rejected the notion that efficiency could provide ethical foundations for the law from the onset of the Law & Economics movement.²¹ For Calabresi, legal systems should be fair on the first place; wealth maximization and the reduction of social costs should be secondary, although important, objectives.

Calabresi placed the problem of wealth maximization within the broader context of the debate on the conditions for effectiveness of policies of the modern regulatory state. In an elegant summary of the Yale School of Law & Economics, of which Calabresi is the central figure, Susan Rose-Ackerman suggests that the goals of Law & Economics should be (i) to establish economic justifications for public action, (ii) to realistically analyze legal and bureaucratic institutions, and (iii) to assign useful roles for the courts within the modern systems of public policies.²²

As so, for Calabresi, the issue has never been whether efficiency can be an overarching concept to ground the law, but how the task of creating a fair society could be improved with cost-benefit analysis. The premise of that kind of intellectual venture is assumption that notions of justice or fairness that disregard the expected consequences of the law are in practice incomplete.

All in all, I believe that Posner and Calabresi diverge more on their ideological background than on their theoretically takings (Posner more on the right and Calabresi more on the left). Both share a concern for trying to find middle grounds between consequentialist and principle-based ethics. Their works open new windows of thought that integrate the cost-benefit analysis within the debate about fairness. The result is the possibility that law be made more responsive to social needs. At its core, this is what Law & Economics is all about.

3. Outline of research agenda in Law & Economics for Latin America

With all of that in mind I can now move to the crux of my paper which is to outline a modern research agenda in Law & Economics for Latin American scholars. Let me start out by clarifying the kind of research agenda that Law & Economics *does not* offer. A substantial number of the students, lawyers and

²¹ Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis*. New Haven: Yale University Press, 1970, pp. 17-18.

²² Susan Rose-Ackerman, *Law and Economics: Paradigm, Politics, or Philosophy?*, 1989, apud Nicholas Mercurio e Steven G. Medema, *Economics and the Law – From Posner to Post- Modernism*. Princeton: Princeton University Press, 1999, p. 79.

legal scholars with some familiarity with Law & Economics falsely believe that the task of Law & Economics is to offer definitive answers to normative dilemmas. These people falsely believe that Law & Economics encompasses a certain set of doctrines and mantras that will lead to results such as “in X situation, judges and legislators shall adopt rule Y because this is the efficient solution to problem Z”.

Guido Calabresi has long ago observed that the idea that Law & Economics may offer these kinds of definitive answers is “ridiculous”.²³ Law & Economics is an approach to legal problems and a tenant of that approach is that it is not doctrinaire. This is why a research agenda in Law & Economics should not be concerned with pinpointing the positions of the leading figures in the field on every legal debate. The way they reason is more important than their specific conclusions.

So what should be the academic project of Law & Economics for Latin America? Essentially, it should be (1) to deepen the debate about new institutional frameworks emphasizing the set of incentives posed by each institutional alternative; (2) to highlight the set of incentives posed by existing legal and political institutions so as to highlight vested interests that hide within rhetorical, fallacious, and populist arguments employed in public debates, as well as to highlight the interests of those groups that are underrepresented in the political process; (3) to think over the role of the Judiciary Powers in such way that they can effectively contribute to the development of democracy and the implementation of public policies, yet also taking into account that most Latin American countries already possess a fairly well-established legal tradition that descends from Continental Europe; and finally (4) to enrich the legal grammar by offering new conceptual tools that can help lawyers and legislators to deal with legal dilemmas in the context of law finding and law making.

These efforts can be put forth from the standpoint of at least the following perspectives.²⁴

- Comparative institutional analysis. The notion that the legal system may be an aggregation of rewards and punishments can lead the scholar to compare the incentives posed by each possible legal framework. For instance, Brazilian Congressmen have certain immunities that make it very difficult for the public prosecution to sue them for criminal wrongdoings and the goal of such immunities is to award politicians a very broad freedom of speech. To what extent the elimination of such

²³ Guido Calabresi, Thoughts on the Future of Economics, *J. Legal Educ.* v. 33, 1983, p. 363.

²⁴ The set of methodological approaches suggested in the paper is an expansion of similar ideas previously articulated elsewhere. See Edmund W. Kitch, The Intellectual Foundations of ‘Law and Economics, *Journal of Legal Education*, v. 33, 1983, p. 187.

immunities would impair their freedom of speech? And to what extent would it deter corruption? Similar research can be employed in various other legal issues that range from the right to bear guns to usury laws.

- Functional analysis of law, secondary effects and boomerang effects. To understand the effects of the law, one should also look beyond the immediate consequences for those directly subjected to a certain piece of legislation or to the parties to a certain legal dispute. For instance: a legal rule that greatly protects low-income tenants might favor certain poor tenants involved in specific legal disputes concerning their existing contracts, but it may also distort the rental market by decreasing the aggregate offer of housing for the group of low-income tenants.
- Empirical studies. Economists find the assumption of rational maximization instrumental in the formulation of theories, but it is important to try to confirm such theories by means of testing, experimentation, and statistics.²⁵ The ultimate test for a proposition inspired in economic analysis is not its elegance of internal consistency, but its empirical verification. In particular, joint works between legal and non-legal researchers can be fruitful. Empirical evidence can be used either as a starting point that indicates an equilibrium wherefrom the researcher can identify the agents' preferences, or data that will inform the relevance of each variable within a testable statistical analysis. As so, generalizations can be useful even when they explain only part of the empirically observed behavior.
- Interface with other social sciences. The assumption of rational maximization is useful because the quest for one's own well-being is a common pattern. But rational maximization is an instrumental premise, not an axiom. Here there are at least two important problems. First, as Herbert Simon's theory of bounded rationality postulated, "individuals are intentionally rational, but limitedly so";²⁶ the consumption of heavy drugs, the existence of phobias, and the excessive aversion to certain risks is an evidence of people's bounded rationality. Secondly, and most importantly, individuals' preferences are imbedded in broad social and cultural contexts. As Cass Sunstein elegantly puts it, "people do not generally consult a freestanding 'preference menu' from which selections are made at the moment of choice; preferences can be products of

²⁵ Thus, Milton Friedman's take on methodology in positive economics is of essence. See *Essays in Positive Economics*, University of Chicago Press (1953), 1970.

²⁶ Simon, Herbert A. 1957. *Models of Man: Social and Rational*. New York: John Wiley & Sons, p. xxiv.

procedure, description, and context at the time of choice,”²⁷ and that also means that studies in Law & Economics can greatly benefit from inputs from other disciplines such as Anthropology, Psychology, History, and Sociology.

- The study of market failures and government (or bureaucracy) failures. The existence of market failure is the classic justification for the state to regulate an activity. But the demonstration of market failures is an incomplete intellectual venture because regulation can (and often does) fail too. Therefore, the question is not so much whether the market fails, but whether it fails more or less than the government. The suggestion here is to foster a comparative exercise that contrasts the feasibility and effectiveness of different institutional arrangements premised either on the government’s regulation or on price mechanisms within free markets. To illustrate, let us briefly consider the problem of excessive air pollution. How can the government deal with the problem? One alternative is to regulate activities, for instance, by establishing caps on gas emissions. Another alternative is to increase the tax burden on the activities that generate such emissions. A third alternative is to create property rights over units of pollution (that is, carbon credits). A fourth alternative is not to do anything and hope that polluters and the rest of the population will spontaneously solve the problem (for instance, by migrating to places where the air is cleaner). What is the best alternative? This question cannot be answered a priori (that is, deductively from general principles of law), but it should take into account the likely result of each option.
- Comparative legal studies. Differences in the structure of legal institutions may arise as a consequence of different cost structures in each society and each historical period. Comparative studies can be particularly useful when they offer a theory that can help elucidate the observed differences (rather than merely describing such differences). As noted by Frank Michelman, “one comes to define and perceive, and thus to understand, one’s own culture – one’s own intellectual situation – only by imagining alternative possibilities.”²⁸ This reinforces the importance of doing Legal History and Comparative Legal Studies from a functionalist (as opposed to doctrinal) perspective.

²⁷ Cass R. Sunstein, Behavioral Analysis of Law, *The University of Chicago Law Review*, Vol. 64, No. 4. (Autumn, 1997), p. 1176.

²⁸ Frank I. Michelman, Reflection on Professional Education, Legal Scholarship, and Law-and- Economics Movement, *Journal of Legal Education*, v.33, 1983, p. 202 (also noting that “if all you think to search for in other cultures is correlation between variations in ‘cost conditions’ and ‘the structure of legal institutions,’ you foreclose the possibility of recognizing a culture in which one of the controlling ‘conditions’ is that crucial promptings and motivations do not take the ‘commodity’ form of marginally interchangeable ‘costs’ at all. And so you may fail to see that one of the distinguishing and contingent features of our own thought process is its relentless urge to reduce every motivation to a cost”).

- Legal theory. Debates in Law & Economics can be worked out within legal theory. To illustrate with an example, start with (fairly well established) assumption that different cultural environments require different legal theories.²⁹ Should legal theory also be different depending on the level of economic development of a country? In a recent paper, Robert Cooter and Hans-Bernd Schaefer contrast the relative advantages of drafting laws based on general principles or precise rules.³⁰ With precise rules there will be relatively few facts controlling the law's application so applying a precise rule requires little information. Three advantages are said to follow from this fact. First, the parties have less to dispute about the facts which makes dispute resolution quicker and cheaper. Second, disguising bribes to officials is harder, so corruption is riskier. Third, precise rules laws demand less sophistication and education from the legal officials who apply the law. The trade-off however lies in that precise rules might be too inflexible. Updating precise rules requires repealing old rules and enacting new ones, which seldom keeps pace with social and economic change.
- Legal philosophy. Normative Law & Economics is an articulation of ideas in the realm of public ethics. It ultimately concerns the moral justifiability of actions taken in the public domain, or of social and political institutions.³¹ As noted by Horacio Spector, normative legal philosophy and moral and political philosophy bear a necessary connection [because] the justification of a decision affecting other people is ethical in nature." This means that any kind of analysis within Normative Law & Economics will engender philosophical problems. The issue is not so much whether these philosophical problems exist (they obviously do), but whether one wants to be oblivious to them. Bertrand Russell notes that "philosophy, though unable to tell us with certainty what is the true answer to the doubts which it raises, is able to suggest many possibilities which enlarge our thoughts and free them from the tyranny of custom. Thus, while diminishing our feeling of certainty as to what things are, it greatly increases our knowledge as to what they may be; it removes the somewhat arrogant dogmatism of those who have never travelled into the region of

²⁹ To illustrate, think about the differences in the grounds for legitimation of authority in a theocratic and in a democratic society.

³⁰ Robert D. Cooter and Hans Bernd Schaefer. "Law and the Poverty of Nations", 2008, unpublished, available at: http://works.bepress.com/robert_cooter/144, p. 121. See also Richard A. Posner, *Creating a Legal Framework for Economic Development*. World Bank Research Observer, Vol. 13. Iss. 1, 1998, pp. 1-11.

³¹ Horacio Spector, Symposium: Law and Economics and Legal Scholarship: Foreword, *Chicago-Kent Law Review* v. 79, 2004, p. 345.

liberating doubt, and keeps alive our sense of wonder by showing familiar things in an unfamiliar aspect.”³²

4. Conclusion

Let me conclude by saying that in Latin America the efficient application of the available resources should be a top priority. As a continent, we're relatively poor, and in some cases we are desperately poor. To face the challenges posed by poverty, we need legal institutions that stimulate productive activities, the peaceful resolution of conflicts, the rule of law, the consolidation of democracy, the enhancement of free enterprise and innovation, and the reduction of corruption, bureaucracy, and waste. The study of the set of incentives put forth by each legal institute is an important part of this process, and legal scholars can – and should – take part in this process. Moreover, with the rapid development of Law & Economics in Spain and in a number of Latin American countries, it has become increasingly possible to do research in Law & Economics without knowing English. Nowadays, researching in Law & Economics is possible for any Latin American legal scholar that has intellectual curiosity and entrepreneurial spirit.

³² Bertrand Russel, *The Problems of Philosophy*, 1912, pp. 156-157, apud Richard A. Posner, *The Problems of Jurisprudence*, Harvard University Press, 1990, p. 4.