INTRODUCTION

The potential for cross-pollination of economics and comparative law has attracted considerable attention in recent years, in economics and comparative law circles alike. Much of the law and economics literature of the past decade is devoted to debating the ‘legal origins’ thesis, according to which a country’s economic performance would be linked to its legal system’s being rooted in the common law or the civil law tradition. The proponents of this thesis, a group of scholars from among the ‘new institutional economists,’ have claimed, in particular, that common law systems are significantly more effective than civil law systems at fostering economic growth and that, among civil law systems, those within the German and Scandinavian families fare better than those within the French.¹ The import of these claims, moreover, is not just academic, as they have been integrated in the World Bank’s most recent statements of policy² – no doubt much to the dismay of civil law stakeholders, French ones in particular.³


Economists have tended to engage with the legal origins project on its own terms, debating such specific issues as the factors to be considered in the classification of systems as ‘civil law’ or ‘common law,’ the choice and respective weight of the variables used in the coding of these systems, the significance of the statistical correlations established, and the rigour of the regression analyses deployed. In contrast, comparative lawyers have tended to raise more general concerns about the suitability and value of using economic analysis for the purpose of comparing legal systems, thus probing the legitimacy of the project as a whole.

Among the many contributions to that debate, one stands out as particularly noteworthy. In ‘The Levers of Legal Design: Institutional Determinants of the Quality of Law,’ Gillian Hadfield argues that the focus of the legal origins literature on traditional common law/civil law distinctions based on differences in formal sources of law and degrees of judicial independence is misplaced and that attention ought to be redirected toward ‘the levers of legal design’ – the institutional features that determine the ability of legal systems to adapt, through judicial decision making, to their changing social environment. She singles out six such ‘levers’:

1. the organization of the courts and the extent to which jurisdiction is general or specific;
2. the organization of the judiciary and the extent to which judicial careers are organized on a bureaucratic career model or ... a ‘capstone’ model ...;
3. the mechanisms of information distribution and the extent to which information is distributed to a broad public audience or a more confined professional audience;
4. the procedures followed in finding facts and shaping the issues in adjudication;
5. the role of public versus private entities in the enforcement of judgments ...; and
6. the degree to which the mechanisms by which legal services are produced, priced and distributed are competitive or professionally-controlled.

It is to these ‘key institutional features’ rather than such features as reliance on code versus case law, she claims, that further empirical investigation must be directed in order to properly compare the adaptability, and hence the economic effectiveness, of legal systems.

The importance of Hadfield’s contribution reaches far beyond the debate over the economic significance of legal origins. Because her arguments ultimately engage the issue of the connection of law to its social environment, they matter for all legal systems, even those that may not endorse welfare enhancement as their primary value. Unlike such disciplines as philosophy, which deal almost exclusively in ideas, and such other disciplines as anthropology, which deal almost exclusively in facts,

5 Ibid. at 45–6.
law sits firmly at the juncture of facts and ideas. Although a product of the human mind, law cannot be law in the abstract, entirely dissociated from a given social reality. Even highly idealist systems that view themselves as aspiring first and foremost to internal coherence, as the French and German systems arguably do, still use adjudication to supply the real-life connection that is deemed necessary for the purpose of testing that coherence. While judicial decision making in those systems may not be considered law-creating, strictly speaking, it clearly is seen as essential for purpose of law-testing and thus, to an extent, law-improving. In sum, all legal systems, even the most idealist, cannot but worry to some extent about their capacity for adaptation.

But the devil is in the details, of course. One may well accept that adaptability on one level is an inherent feature of all legal systems, yet resist it being associated with ‘quality of law’ or ‘welfare promotion,’ however defined. It also is an open question whether law and its many dimensions are amenable to quantification, in the way suggested by the economists or in any manner at all. One might similarly object that the method by which law is partitioned and each of its elements examined in isolation from the others, while perhaps in conformity with best economic practice, cannot but do violence to the complexity and unity of law. Even if it were generally agreed that adaptability is a common concern of all legal systems, therefore, it is not clear whether the economic apparatus is best, or at all, suited for the purposes of operationalizing that concern.

These are just some of the questions that economists and comparative lawyers must broach together. Attempting to compartmentalize the economic and comparative law discussions, on the convenient assumption that they pertain to different dimensions of legal systems and that the conclusions reached in one can therefore safely be ignored in the other, clearly will not do. Insofar as the economic debate pertains to the issue of adaptability, or to any other common feature of legal systems, it speaks directly to the comparative lawyers. And, conversely, the economists cannot abstract from the richly textured knowledge of legal systems produced by decades of comparative law literature.

As ‘The Levers of Legal Design’ confirms, Hadfield is uniquely positioned to mediate that discussion. As an economist and a lawyer, she shares the economists’ desire to arrive at a formal understanding of the relation of legal institutions to welfare promotion while remaining sensitive to the complexity of law and its particularities as a social phenomenon. Her central claim in ‘The Levers of Legal Design’ indeed proceeds from an import into the economic debate of contemporary comparative lawyers’ concerns about the conventional dichotomy between common law and civil law. Also noteworthy in this respect is Hadfield’s choices of publication venues. Whereas ‘The Levers of Legal Design’ appears, like the rest of the legal origins literature, in an
This first University of Toronto Law Journal Focus Feature aims to pursue the economics/comparative law dialogue initiated by Hadfield. It gathers three prominent comparative lawyers’ commentaries on ‘The Levers of Legal Design,’ along with a response from its author. Our first commentator, John Reitz, is best known for his extensive work on the ‘political economy’ of legal systems – their different attitudes toward state intervention in the market. Reitz welcomes Hadfield’s project insofar as it stands to shed light on the institutional factors that foster or hamper judicial law-making, or make it more or less prominent. But he is sceptical of her association of adaptability with judicial law-making, as well as of the possibility of ever establishing a plausible causal relation between either adaptability or judicial law-making and any notion of social or economic welfare. On an internal level, Reitz questions Hadfield’s choice of institutional features, suggesting that some important features have been left out, while less important ones are included.

Our second contributor, Ralf Michaels, widely published in the areas of comparative private law, conflicts of law, and legal theory, similarly greets with much enthusiasm the possibility of a new dialogue between comparative lawyers and economists. He deplores with equal vigour the ‘deep deficiencies’ of the legal origins literature, on the one hand, and the lack of solid methodological foundations of the comparative law literature, on the other, and salutes Hadfield’s efforts at killing both birds with one stone. He is nonetheless concerned that, although Hadfield aims to present an unbiased assessment of legal systems that abstracts from their origin as common law or civil law, the parameters of her analysis – the focus on judicial as opposed to legislative activity; the

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implicit conception of law as primarily geared to societal responsiveness rather than intrinsic coherence – are inherently favourable to common law systems. In addition, Michaels worries that Hadfield may underestimate the interconnectedness of the determinants that she identifies and the value of treating legal systems as indivisible wholes. He also urges her to account for the admittedly ‘soft’ knowledge that comparative lawyers have produced about law and legal systems.

Perhaps most critical of Hadfield’s project is Pierre Legrand, our third commentator. A fierce advocate of legal cultural diversity, Legrand is particularly well known for his unflinching opposition to the European legal harmonization project.⁹ He considers the assumptions and ambitions of the economic approach equally unsustainable. In his view, whereas economists assume the possibility of ‘value-free’ observation, the economic discourse is, like all discourses, incurably trapped in the contingency of its particular discursive framework. And whereas economic comparisons of legal systems involve abstracting from legal specificity and reducing all law to a common measure, legal systems cannot but remain irretrievably enmeshed in their respective social and cultural fabrics and are therefore fundamentally incommensurable.

As it should be, Gillian Hadfield is given the last word. Our Focus Feature closes with her own thoughts on our commentators’ remarks.
