THE NIHILISM OF THE ECONOMIC ANALYSIS OF LAW

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1. Introduction

During the eighties and nineties, the first generation of law and economics has been severely attacked concerning methodological, philosophical as well as legal aspects of the theory. As compared to the mid-seventies and early eighties, when the "paradigm of classical law and economics had just reached full bloom"[1], the movement has now split into quite different lines of inquiry, each exploring new and different research directions. Economic analysis of law has evolved a lot in recent years, and its actual insights reach far beyond the theses professed by the efficiency approach initiated three decades ago among others by Richard Posner.[2] Law and economics has become a vast and heterogeneous discipline, reflecting several traditions, sometimes competing and sometimes complementary, including the Chicago School of Law and Economics, the New Haven School, Public Choice theory, Institutional Law and Economics, New Institutional Law and Economics and Austrian Law and Economics.

The latter has in particular provided a decisive critique of traditional, efficiency-oriented law and economics, by showing that social efficiency is an empty and meaningless concept[3]. Today, even the strongest bastions of neoclassical economic theory of law seem to take into account the insights of the

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[1] Ellickson (1989), 24.

[2] Posner (1977) has taken his line from Coase (1960), Becker (1968) and Calabresi (1971).

[3] See Kirzner (1988) on welfare economics. Austrian economists underlined the impossibility for a social planner (legislator or judge) to centralize the knowledge that would be required in order to promote an allocation of resources which corresponds to a social optimum. Cf. Hayek (1945). Consequently, the problem of dispersed and subjective knowledge seriously compromises the idea of an efficient law making in the sense of a balancing of social costs and benefits. Cf. Rizzo (1979), O'Driscoll (1980).

Austrian school[4]. Contemporary economic analysis of law furthermore experiences the influence of recently emerging postmodern legal theories whose revolutionary impact on American legal philosophy in general can hardly be exaggerated. A particularly influential theory is the critical studies movement which emphasizes the systematic discrimination by the American legal system of some classes of the population[5].

Parallel to the explosion of the literature in these different fields[6], there seems to be a sort of implosion of neoclassical economic analysis of law, the so-called Chicago Law and Economics, which so far has been the dominant school of thought within the law and economics movement. This implosion may be explained by the fact that a growing part of the discipline seems to become more and more self-critical, to the point of questioning central assumptions like the efficiency of the legal system.

More than ever, law and economics seems to be confronted with the necessity of a consensus concerning the definition of its objectives. In order to underline the nature of the different shifts operated by the movement over the past few decades, it is helpful to refer to the initial context and in particular the difficulties which have marked the evolution of neoclassical economic analysis of law (1). This essay attempts to show that more and more recent writings in conventional law and economics tend to create an amazingly nihilistic view of the law, which appears to be a logical consequence from the theory's underlying methodology, and that there can be no genuine progress of the theory without a radical inversion of the values and the logic upon which it is built (2). In this respect, the critical approaches of efficiency theory, as far as they provide a more realistic and critical vision of the law, may help neoclassical economic analysis of law to get out of the deadlock to which their methodology eventually leads it. In particular Austrian economics, which is built on an entirely different methodology than neoclassical theory, can offer important insights.

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[4] See for instance Ulen (1999), 326.

[5] See for instance Unger (1986)

2. Shifts of the efficiency concept

2.1. From a descriptive to a normative standard

Until the end of the seventies, traditional economic analysis of law primarily focused on exploring and developing the descriptive aspects of the theory. The majority of the first law and economics scholars were interested in the law *as it is*, not *as it ought to be*. Their purpose was to use standard microeconomic tools in order to explain the logic of judicial decision-making in a large variety of legal fields, as well as the reaction of those governed by the law to the different existing legal rules. In more or less sophisticated models, this theory sought to underline the mechanisms by which the law encourages efficient behavior.

Initially, the descriptive thesis has been deduced from the empirical observation that numerous legal doctrines conform to simple, informal, yet very useful economic models[7]. It holds that for centuries common law judges have developed an intuitive sense of economics by seeking, more often implicitly than explicitly[8], to arrange legal rules so as to maximize efficiency, either by minimizing the costs of entering into bargains[9], or by simulating the state of affairs that would have been the outcome, had free bargaining been possible among conflicting parties. Faithful to the logic of standard economic theory, this approach to legal reasoning indeed describes judicial decision-making as the intervention of an external

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[6] The interdisciplinarity of this literature is no longer limited solely to economics and law, but starts to spread to other disciplines, such as sociology, legal anthropology or social psychology. The emergence of movements such as " behavioral law and economics ", " socio-economics " or " law and society " reflects this evolution.

[7] The interpretation judges in tort cases currently give to concepts like " due " or " reasonable care ", " common " or " ordinary use ", "negligence ", etc. could be considered as an implicit allusion to the idea of efficiency. Posner (1977). Efficiency considerations could frequently be observed also in many doctrines in the field of contract, such as for instance those governing mistakes, gratuitous promises, impossibility or fraud by non-disclosure. See A.T.Kronman (1978).

[8] A widely discussed example where a judge explicitly referred to an economic standard of negligence is Judge Hand's decision in the 1947 case U.S. v. Caroll Towing Co., 159 F. 2d 169 (2d cir. 1947), giving rise to the famous "Hand formula ", according to which a defendant could be considered as negligent if the loss caused by the accident, multiplied by the probability that the accident occurs, exceeds the costs of precaution measures he should have taken in order to avoid the accident.

[9] As shown by R.Coase, if transaction costs are low, and property rights are well defined and efficiently protected, parties at a conflict will have an incentive to enter into a bargaining process and will in fact find an arrangement that is in their mutual advantage. This outcome will correspond to an optimal resource allocation. In other words, in the absence of transaction costs, the market can internalize legal problems. See Coase (1960).

authority in a free but defective market, -an intervention that is considered indispensable in order to achieve a state of social efficiency. Built on a weighing of social costs and benefits, the common law is understood in this perspective as a system for maximizing the wealth of society. Concretely, this means that in a field like tort law for instance, liability is systematically placed on the party that could have avoided the accident at least cost[10].

The first versions of descriptive theory almost unanimously concluded that the common law is efficient, or at least tends towards efficiency. Rubin[11] for instance underlined a tendency inherent to the common law process that constantly replaces inefficient rules by efficient rules. He argues that inefficient rules will more frequently be adjudicated rather than settled, and in this way, the self-interested decisions of litigants whether to sue or to settle will progressively drive the law towards efficiency.[12]

Over the past few decades, an impressive amount of empirical studies, undertaken in a number of areas of law, accompanied the efforts of economic analysis of law scholars to confirm the theory of the efficiency inherent to the legal process. Nevertheless, those which have clearly succeeded in testing the comparative efficiency of alternative legal rules are rare.

Several reasons may be underlined to explain this relative lack of useful empirical evidence. First, informational problems render empirical testing difficult[13]. In order to determine for instance whether different tort rules are efficient, the economist would have to correctly evaluate not only the number of accidents that did occur under the different alternative legal rules, but also the number of accident that did *not* happen, because of fear of tort liability. He must furthermore be able to determine the costs of the actual as well as the "hypothetical" accidents, the amount of precaution measures undertaken by individuals under the alternative regimes, the effects of the various legal rules on individual behavior, the cost of these alternative measures, the administrative costs of the alternative regimes, etc. This would be a highly complex task, and simple case studies do not reveal this information.

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[10] See for instance G.Calabresi (1971).
[11] Rubin (1977).
[12] See also G.L.Priest (1977)and (1980).
[13] As underlined by economists of the Austrian School. See for instance M.J.Rizzo (1979) and (1980).

Moreover, internal incoherence of the models sometimes leads to contradictory conclusions within the descriptive part of the economic analysis of law. Thus, a multitude of descriptive theses coexist within economic analysis of law, sometimes drawing opposite conclusions about the same phenomenon (for instance concerning the question whether strict liability or negligence is the most efficient liability rule). It is obvious that they cannot all be correct at the same time.

The most important reason which may explain the failure of early empirical studies to prove the efficiency thesis of the common law may simply be that the legal practice does not confirm, but rather refutes, the conclusions of descriptive economic analysis of law. Once again, the economic analysis of tort law provides a pertinent illustration of the difficulties law and economics scholars encountered while attempting to verify the efficiency theory. In particular, they had to cope with a paradox concerning causation. On one hand, the traditional corrective-justice principle of causation, which most law and economics scholars consider as an intuitive and unscientific approach[14], is deliberately evacuated from the analysis. Law and economics models are built on mathematical relations between "objective" variables such as the probability that an accident occurs, the monetary value of the damage, the amount of precaution measures undertaken by the involved parties, etc., rather than on the causal link existing between the author of a damage and his victim. The elimination of causation from scientific discourse and its replacement by precise mathematical terms is widely acclaimed among law and economics advocates as an " evidence of scientific progress "[15].

On the other hand, descriptive economic analysis of law seeks to empirically prove that the common law is efficient. Yet, traditional common law in the field of tort liability is essentially built on the principle of causation. How then can the common law be efficient in the sense suggested by economic analysis of law? Some authors have argued that " most ", but " not all " of the common law is efficient. Posner for instance states that " the common law's commitment to efficiency is strong, but not total "[16]. While the common law system in general tends to promote economic efficiency, some anomalies could subsist in

[14] See for instance Landes- Posner (1981).
[15] R.Cooter (1987), 523.

particular. But can causality, this central and fundamental principle of tort law, be seriously considered as such an anomaly ? This conclusion would certainly be senseless. The problem is really difficult to solve, which explains not only numerous concessions to the logic of causality in standard law and economics[17], but above all the emergence of prescriptive suggestions on the way how tort law should be designed in order to be efficient.

In other words, the difficulties to empirically verify the descriptive theory of efficiency may explain why the economic analysis of law movement has progressively shifted from an explanatory to a normative theory. If it is not possible to prove by observation that the common law *is* efficient, an alternative is to state that it *ought to be* efficient. This is how law and economics scholars came to mask the gap that became apparent in the theory because of the failure of empirical work to confirm it.

Nevertheless, the normative theory has not been exempt of problems either. It has indeed been confronted with major challenges. For instance, it had to determine which would be the most appropriate and practicable efficiency criterion for the law. But above all, it had to find a judicious answer to the question why an economic criterion should be considered as a worthy goal so that judicial decisions and legal institutions should try to apply it.

2.2. From an operational to a metaphysical conception of efficiency

Considering law as an efficiency generating instrument, normative economic analysis of law deliberately proceeds to a reduction of law to this economic goal. Faithful to the logic of traditional economic theory, most law and economics scholars adhere to the conviction that ethics is a purely subjective and arbitrary matter, and that there is no scope for it in economics. From the beginning on, they presented themselves as neutral and non ideological scientists, refusing to introduce any value judgments into their analyses of legal decisions, procedures or institutions. They pushed this objectivation even further than traditional

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[16] Posner, (1977), 4th ed. (1992), 263.
[17] For instance Calabresi (1975), Shavell (1987), Landes - Posner (1983).

economists, by denying any link not only between economics and ethics, but also between law and ethics. Any concept that cannot be quantified or formalized, is considered as a subordinate and suspect value.

It is essentially for this reason that the idea of justice is devalued in traditional law and economics. Considered as an intuitive, arbitrary, irrational and metaphysical concept, justice is deliberately ignored. Instead, economic efficiency is advanced as an objective criterion.[18] For early law and economics writers, efficiency is the only adequate criterion of justice ; in other words, there is no justice apart from efficiency. For Posner, in a world of scarcity, the worst injustice is the waste of resources. In this perspective, a fair or just legal system is one that deliberately promotes gains in social welfare[19].

More precisely, it is the norm of social wealth maximization[20] that is considered by most law and economics advocates as the normative criterion that reflects best their ideal of a good legal system. The criterion of financial compensation elaborated by Kaldor and Hicks in the thirties, considered as the equivalent of social wealth maximization, is presented as a more attractive and practicable moral principle than classical utilitarianism and the Pareto criteria[21]. According to Posner, it is a happy compromise between two moral principles open to criticism, retaining their virtues and eliminating their bad features[22]. This allegation has been under severe attack by critiques who have shown that if anything, just the opposite is true : wealth maximization exhibits the vices of both and the virtues of neither[23].

In spite of the numerous critiques underlining the serious technical and philosophical deficiencies of the Kaldor-Hicks wealth maximization criterion, the vast majority of economic analysis of law scholars continue to advance this principle as a normative goal to guide legal reasoning. For the last two decades, a large part of the law and economics literature was devoted to improving the technical aspects of the

[18] Posner (1977), 22.
[19] Posner (1977), 22.
[20] Wealth being defined as the value in dollars or dollar equivalents of *everything* in society. Posner (1977), 12.
[21] Posner (1977).
[22] R.A.Posner (1980).
[23] A.T.Kronman (1980), 228.

theory. Nevertheless, few efforts were undertaken to justify the principle of social wealth maximization against criticisms, and in particular to provide philosophical foundations for it. Attempts to explain or justify why criteria such as equity, fairness or justice had to be ignored and why an extra-legal concept, and in particular an economic concept, should be more appropriate than a criterion derived from the law, remained exceptions[24]. Most law and economic scholars simply seem to take the imposition of an economic value upon the law for granted.

Rather than distrusting the value of efficiency, some economists recently came to question the rationality assumption on which economic theory is built. Ulen[25] for instance criticizes traditional rational choice theory for being unable to provide legal economists with a methodical account of the fallibility of human reason. He makes the success of future law and economics dependant on the development of a more complex and complete theory of human decision-making which combines rational choice theory with coherent insights of human fallibility. Such a theory would be vastly more satisfying than rational choice theory in order to serve as a foundation for the elaboration of legal systems whose goal it is to create incentives for individuals to act efficiently. For instance, while in a given context rational choice theory might concede that it is better to leave wide freedom of action to individuals (on the ground that they, not some outside party, are the best judges to evaluate the merits of decisions concerning themselves), a more elaborated economic theory of human behavior might underline the fact that in the given field, people systematically take wrong (i.e. socially inefficient) decisions, -for instance by exaggerating present pleasures and underestimating future costs of a decision like smoking. In this case, it would be more efficient to grant less liberty to them[26]. As a result, social efficiency may, in some cases, justify legal manipulation and coercion.

In this perspective, if there is a problem in the theory, it can hardly be attributed to the assumption of efficiency. From a criterion for evaluating the performance of the legal system to accomplish a given goal, the concept of social efficiency has progressively turned into an absolute value that has to be defended at

[24] An exception is for instance Posner (1980) and (1995a).
[25] Ulen (1999).
[26] Ulen (1999), 327, 328.

any price. Efficiency has become an intrinsic good, a "component of value "[27], -a goal worth pursuing for its own sake, and not in order to promote another value, such as for instance utility, coordination or justice. Rothbard has qualified it a myth[28]. Undeniably, an important part of law and economics has been built up into an ideology.

Describing the evolution of neoclassical economic analysis of law in these terms may appear amazing, if it was not Ulen himself who admitted the dogmatic character of the approach by inviting scholars to " leave the cathedral and get to the microscope "[29]. The discipline should quit acting " like a religion and more like a science " [30].

At the same time, this statement reflects a sort of doubt or crisis of the belief in the value of social efficiency which has started to spread within traditional economic analysis of law since a few years.

3. The devaluation of the efficiency hypothesis

3.1. Symptoms of disintegration

Authors who not so long ago were fervent advocates of the efficiency hypothesis have recently come to question it. Some argue that the tendency of the common law towards efficiency is altered by the fact that litigants act as interest groups trying to maximize their own economic benefits[31]. Even the central law and economics hypothesis according to which judges systematically seek to maximize social welfare is contested. Rubin for instance, who elaborated one of the first evolutionary models for underlining an

[27] To use the terminology of Dworkin (1980).
[28] Rothbard (1979).
[29] Ulen (1999), 326.
[30] Ulen (1999), 326.
[31] Rubin-Bailey (1992).

inherent tendency in the common law towards efficiency[32], has recently come to doubt the assumption that judges systematically work to replace over time inefficient rules by efficient rules[33].

Cooter and Kornhauser[34] have admitted that few decisions reflect judges imposing an efficiency analysis from a cost-benefit standpoint. They furthermore argue that there is no empirical evidence that inefficient laws are litigated more frequently than efficient ones. Hadfield[35] has shown that because of impassable informational problems, even with efficiency-seeking judges, efficiency will not result. These critical models further attempt to identify what judges really maximize, underlining the different motivations which could drive judges to prefer inefficient rules, such as for instance the desire to be cited more often, in order to gain in prestige or reputation, or the willingness to promote further litigation and thus work for their fellow lawyers[36]. Rubin and Bailey[37] assimilate judges to interest groups lobbying for legal rulings and causes of actions that will increase their business in the same way that interest groups lobby legislators. Blume and Rubinfeld[38] argue that establishing new rules can have a negative impact on judges' career potential. Risk-adverse judges who fear to be overturned, may be reluctant to encourage change. Thus, such motivational problems seriously reduce the incentives judges may have to adopt changes in the law towards more efficiency.

Contesting the tendency inherent to legal processes to promote efficiency, some of these new lines of inquiry within the traditional law and economics movement finally lead to conclusions that are quite similar in many respects to those of the Critical Legal Studies movement, which initially has stood as a major counter-argument of standard, efficiency-oriented law and economics. For this postmodern theory, which has profoundly influenced contemporary legal thinking in America, the legal system is designed above all as an instrument of oppression of the socially and economically powerless (such as women, ethnical minorities, low income citizens)[39]. In other words, the economically and socially

[32] Rubin(1977).
[33] Rubin- Bailey (1992),34-35. See also Schwartzstein (1994), 1060.
[34] Cooter- Kornhauser (1980).
[35] Hadfield (1992), 585.
[36] Kobayashi-Lott (1993). See also Schwartzstein (1994), 1059.
[37] Rubin- Bailey (1992).
[38] Blume-Rubinfeld (1982).
[39] Cf. Griffin-Moffat (1997)

powerful classes manipulate the law to serve essentially their own interests. This explains why for critical legal studies, the legal system can impossibly be efficient. Ironically, some law and economics advocates now seem to come to similar conclusions, which is of course a long way from the basic assumption that the common law is inherently efficient.

Some authors have recently driven self-criticism an important step further by contesting not only the efficiency assumption, but the very method upon which law and economics is built, namely the importation of scientific, extra-legal methodologies (such as economics) into legal reasoning. The disappointment of economic analysis of law has lead some writers to cast doubt on the idea of a science of the law. The title of a recent article by S.Lubet[40] clearly reflects this distrust : « is legal theory good for anything » ?, question to which the answer given is : « no, it is useless »[41].

Also A.T.Kronman[42] henceforth rejoins the famous conclusion by Oliver Wendell Holmes according to which « the life of law has not been logic : it has been experience »[43]. In America, numerous writers actually revolt against an excessive theorization of the law. They consider that serious problems arise when theorizing loses touch with reality and when it becomes a value in its own right without regard to its practical value[44]. In this respect, most of them criticize the harmful influence law and economics is likely to have on leading law schools. They claim that the kind of reasoning advocated by standard economic analysis of law, which after all is one of the dominant movements in American legal thought, risks to accentuate the « growing disjunction between legal education and the legal profession »[45]. Thus, law and economics is more and more frequently counted among the intellectual and institutional forces that have contributed to provoke a serious crisis in the American legal profession[46].

[40] Lubet (1997).
[41] Lubet (1997), 193.
[42] Kronman (1993).
[43] Holmes (1880), 233.
[44] Even Ulen admits this eventuality. See Ulen (1999), 325.
[45] To use the terms of the title of a paper by Edwards (1992).
[46] Kronman (1993), 4.

How can this self-critical tendency within the efficiency theory of the law be explained ? It is surely not a coincidence that the most destructive critiques emanate from authors of the law and economics movement. Because it has confused the law with a value that has turned out to be an empty and meaningless concept[47], this approach has inevitably exposed itself to deception. In neoclassical economic analysis indeed, law is assimilated to its goal, efficiency. If this goal reveals itself inappropriate, if it becomes obvious that the evolution of the law is far from reflecting the ideal norm that was supposed to define it, one can hardly avoid concluding that the law is inefficient. It is this experience of discrediting of the efficiency value that a growing part of economic analysis of law seems actually to be going through. Efficiency has finally become a weapon turned against itself.

Nevertheless, the critiques remain fundamentally impregnated by the belief in the relevance of this criterion to correct the legal system's deficiencies. As far as they conclude that the law is inefficient and that this is the crux of the problem, these various critical lines of inquiry inside the law and economics movement continue to evaluate the legal system in the light of efficiency. Even if they no longer share the traditional law and economics assumption according to which there is some sort of invisible hand process that drives the law towards efficiency, they still believe that it is important (and eventually that it is possible) to envisage reforms that contribute to enhance the efficiency of the law. Thus, they still agree with traditional law and economics on a fundamental point, namely that efficiency makes sense as a legal goal. This is certainly the major shortcoming of these critiques. However pertinent and enriching they may be, these analyses nevertheless remain faithful to the logic of the theory they refute.

3.2. Inversion of values

It seems that there can be no genuine progress of traditional law and economics unless it proceeds to a fundamental inversion of logic. This would first of all imply a vision that avoids confusing the law with criteria for evaluating it.

[47] As shown by Kirzner (1988) concerning the concept of social efficiency used by welfare economists.

What has furthermore to be revised is the idea according to which it is possible to rationally reconstruct legal rules as well as the reactions of those governed by the law. Traditional economic analysis of law indeed assumes that it is possible to exogenously set up and impose upon society legal rules and institutions that create adequate incentives so that people, at least on average, adopt an economically efficient behavior. It presumes that all rules of conduct can be deduced from an extra-legal logic (and more precisely an economic logic), and hence are perfectly predictable. This rationalist vision has lead to an approach which sees in law merely an instrument of deterrence.

An inversion of this « top-down » logic[48] would necessarily imply an endogenous vision of the law : a legal reasoning from the « bottom up »[49]. Such a conception can be related to the description of legal process provided by Austrian economists. In the Austrian tradition[50], indeed, the law, as it emerges from the legal practice, is viewed as a social institution, a form of spontaneous order that comes out as individuals (legislators, judges, lawyers, market participants) interact in their attempts to develop adapted responses to the problems posed by their ignorance and uncertainty. In this perspective, a society's legal system has no existence apart from the subjective preferences and the conduct of the individuals who constitute that society. The evolution of such a system is open-ended and unpredictable. In Hayek's vision, it is not clear what the original purpose of the law was[51], because the law emerges as the result of " human action, not human design "[52]. Legal rules and institutions are determined as part of an ongoing social learning and adaptation process which operates through trial and error, experimentation, imitation and compromise. As a consequence, the law, as Austrians perceive it, could not be perfectly efficient, fair or whatever. In contrast to standard law and economics, the Austrian understanding of law openly accounts for the imperfections in the legal system without considering the presence of such flaws as a misfortune. What imports to this perspective is to understand how the law works, evolves and adapts to change, what makes it intelligible and to what it serves in society, in other words its *modus operandi*. In this line of thinking, no ultimate value is advanced whose achievement becomes a central goal for legal institutions.

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[48] Cf. Posner (1995 b).
[49] Cf. Rizzo (1999).
[50] See for instance Menger (1883).
[51] Hayek talks about the « purposeless common law ».

The only implicit value that matters in Austrian reasoning is individual freedom of action. Here probably lies one of the major differences of logic between neoclassical law and economics and the Austrian vision of legal process. While the first sees in law a means *to act upon* individuals (-the purpose being to direct and control human behavior in order to make it compatible with the desired social goal), in the latter, law is understood as a means that allows individuals *to act for themselves*, according to their own objectives and means. In the Austrian perspective, law seeks to « maximize individual freedom of action »[53], the only constraint being imposed by individual responsibility not to harm others.

Even though, through such assertions, efficiency considerations implicitly emerge in the Austrian framework, efficiency is far from being a central value in this context. It furthermore has a very different meaning than in traditional economics. In the rare cases Austrian economists formulate normative judgments of a policy or an institution, their assessment is not based upon the efficiency characteristics of the resource allocation resulting from that policy or institution, but rather upon estimations as to the relative impacts of policy alternatives on the degree of freedom accorded to individuals to implement the plans they have made[54]. Efficiency is not viewed as a goal[55], but rather as an attribute of a legal system that seeks to promote the creation in society of an order of actions on the part of individuals. As emphasized by Rizzo[56], efficiency is a purely relative concept. Efficiency *per se* does not mean anything. There are no intrinsic values, all values are necessarily adherent.

4. Conclusion

[52] Hayek (1960), 35.
[53] Cf. Hayek (1973), 103.
[54] Crespi (1998).
[55] Except for some recent Austrian writers (such as Cordato, 1992 and Schwartzstein, 1994) who have attempted to elaborate new social efficiency criteria based along Austrian lines (dynamic, subjective, « catallactic » criteria), rather than on neoclassical foundations. Nevertheless, these approaches reveal themselves as largely irreconcilable with the line of thinking they defend (Crespi, 1998).
[56] Rizzo (1979), 71.

This paper has emphasized a rather nihilistic vision of the law recently developed by neoclassical law and economics. Its objective has been to show that these self-critical tendencies, which in some cases lead to a mistrust of the idea of theorizing the law, is a logical consequence of the penchant of this movement for transforming efficiency into a myth, an absolute value. This process of disappointment coincides with an important crisis of law and legal professions in America, underlined among others by writers who some years ago still defended the principles of conventional law and economics. The strength of these critiques resides in the fact that they offer a pertinent and realistic vision of the actual evolution of the law. Yet, they do not provide an alternative approach suggesting reforms for redressing the legal system's deficiencies.

This paper further evoked the Austrian approach for its methodological qualities. The Austrian theory not only provides tools to critically evaluate the foundations of the efficiency approach to law, but more importantly, its methodology allows for a considerate economic understanding of legal phenomena. This does not imply, however, that Austrian theory and neoclassical law and economics can easily be considered as alternatives, as far as both theories refer to different aspects of what might be called "law". While posnerian law and economics has in mind the traditional top-down, centralized lawmaking by a sovereign who monopolizes the authorized use of force, Austrians are concerned with customs, practices, standards of behavior, any social rules and institutions which are not the result of positive lawmaking, but rather the outcome of the complex interplay of a multitude of individual actors, seeking to develop adapted answers to the problems posed by life in society.

Our analysis finally leads to the question whether looking for a criterion to evaluate the validity of legal rules or institutions is an appropriate method for an economic analysis of law. While the reliance on the value of social efficiency as a universal foundation of law (*strict foundationalism*) is undeniably open to criticism, there is on the other side a risk to fall into the extreme opposite, a similarly radical and unsatisfactory *anti-foundationalism*[57]. A major challenge for contemporary economic analysis of law might consist in finding a way between these two extreme visions.

[57] The rejection of any foundation for the law is one of the distinctive characteristics of so-called « post-modern » legal approaches. See Litowitz (1997).

REFERENCES

BECKER G.S.(1968) "Crime and Punishment"; *Journal of Political Economy* 6, 167.

BLUME L.-RUBINFELD D. (1982) “The Dynamics of the Legal Process”, *Journal of Legal Studies*, 405.

CALABRESI G.(1971) *The Cost of Accidents*; University of Chicago Press, Chicago.

CALABRESI G.(1975) "Concerning Cause and the Law of Torts. An Essay for Harry Kalven, Jr."; *Univ. of Chic. Law Rev.* 43, 69.

COASE R.H.(1960) "The Problem of Social Cost"; *Journal of Law and Economics* 3(1), 1.

COOTER R.(1987) "Torts as the Union of Liberty and Efficiency: An Essay on Causation"; *Chicago-Kent Law Rev.* 63(3), 523.

COOTER R.-KORNHAUSER L. (1980) “Can litigation Improve the Law Without the Help of Judges?”, *Journal of Legal Studies* 9, 139.

CORDATO R.E. (1992) *Welfare Economics and Externalities in an Open Ended Universe: A Modern Austrian Perspective*, Kluwer Academic Publishers, Boston, Dordrecht, Londres.

CRESPI G.S. (1998) “Exploring the Complicationist Gambit: an Austrian Approach to the Economic Analysis of Law”, *Notre-Dame Law Review* 73(2), 315.

DWORKIN R.M.(1980) "Is Wealth a Value?"; *Journal of Legal Studies* 9(2), 191.

EDWARDS H. (1992) “The Growing Disjunction between Legal Education and the Legal Profession ”, *Michigan Law Rev*. 91*,* 34.

ELLICKSON R.C. (1989) « Bringing Culture and Human Frailty to Rational Actors : A Critique of Classical Law-and-Economics », *Chicago-Kent Law Rev*. 65, 13.

GRIFFIN M.-MOFFAT R.C.L. (1997) (eds.) *Radical Critiques of the Law*, Univ. Press of Kansas, Lawrence, Kansas.

HADFIELD G. (1992) “Biases in the Evolution of Legal Rules”, *Georgia Law Rev*..80, 583.

HAYEK F.A.(1945) "The Use of Knowledge in Society"; *American Economic Review* 35, 519.

HAYEK F.A. (1960) *The Constitution of Liberty*, Routledge and Keagan Paul, London.

HAYEK F.A.(1973) *Law, Legislation and Liberty: Rules and Order*, vol.1, Routledge and Kegan Paul, London

HOLMES O.W. (1880) «Review of Langdell, A Selection of Cases on the Law of Contracts », *American Law Rev*. 14, 233.

KIRZNER I.M.(1988) "Welfare Economics: A Modern Austrian Perspective" in W.BLOCK and L.H.ROCKWELL (eds.): *Man, Economy and Liberty. Essays in Honor of Murray Rothbard*; Ludwig von Mises Institute, Auburn, Alabama.

KOBAYASHI B.- LOTT J. (1993) “Judicial Reputation and the Efficiency of the Common Law”, *Wharton School Working Paper*.

KRONMAN A.T.(1978) "Mistake, Disclosure, Information and the Law of Contracts"; *Journal of Legal Studies* 7(1), 1.

KRONMAN A.T. (1980) “Wealth Maximization as a Normative Principle”, *Journal of Legal Studies* 9(2), 227.

KRONMAN A.T.(1993) *The Lost Lawyer: Failing Ideals of the Legal Profession*, The Belknap Press of Harvard Univ. Press, Cambridge, Massachusetts.

LANDES W.-POSNER R.A.(1981) "The Positive Economic Theory of Tort Law"; *Georgia Law Rev.* 15, 851.

LANDES W.-POSNER R.A.(1983) "Causation in Tort Law: An Economic Approach"; *Journal of Legal Studies* 12(1), 109.

LITOWITZ D.E. (1997) *Postmodern Philosophy and Law*, University Press of Kansas, Lawrence, Kansas.

LUBET S. (1997) “ Is Legal Theory Good for Anything ” ? *University of Illinois Law Rev.*1, automne, 193.

MENGER C. (1883) “ The ‘Organic’ Origin of Law and the Exact Understanding Thereof ”, in MENGER C. *Investigations into the Methods of Social Sciences, With Special Reference to Economics*, New York Univ. Press, New York, (reprinted 1985).

O'DRISCOLL G.P. (1980) "Justice, Efficiency and the Economic Analysis of Law. A Comment on Fried"; *Journal of Legal Studies* 9(2), 355.

POSNER R.A. (1977) *Economic Analysis of Law*; Little, Brown and Company, Boston et Toronto.

POSNER R.A. (1980) "The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication"; *Hofstra Law Rev.* 8(3), 487.

POSNER R.A. (1995 a) "Wealth Maximization and Tort Law : A Philosophical Inquiry", in OWEN D.G. (ed.) *Philosophical Foundations of Tort Law*, Clarendon Press, Oxford.

POSNER R.A. (1995 b) *Overcoming Law*, Harvard Univ. Press, Cambridge, Massachusetts.

PRIEST G.L. (1977) "The Common Law Process and the Selection of Efficient Rules"; *Journal of Legal Studies* 6(1), 65.

PRIEST G.L. (1980) "Selective Characteristics of Litigation"; *Journal of Legal Studies* 9(2), 399.

RIZZO M.J. (1979) "Uncertainty, Subjectivity and the Economic Analysis of Law", in M.J.RIZZO (ed.): *Time, Uncertainty and Disequilibrium. Exploration of Austrian Themes*"; Lexington Books, D.C. Heath and Co, Lexington, Massachusetts.

RIZZO M.J. (1980) "The Mirage of Efficiency", *Hofstra Law Review* 8(3), 641.

RIZZO M.J. (1999) « Which Kind of Legal Order : Logical Coherence and Praxeological Coherence », *Journal des Economistes et des Etudes Humaines* 9(4), 497.

ROTHBARD M.N. (1979) "The Myth of Efficiency", in M.J.RIZZO (ed.): *Time, Uncertainty and Disequilibrium. Exploration of Austrian Themes*"; Lexington Books, D.C. Heath and Co, Lexington, Massachusetts.

RUBIN P.H. (1977) "Why is the Common Law Efficient?"; *Journal of Legal Studies* 6(1), 51.

RUBIN P.H.- BAILEY M.J. (1992) “The Role of Lawyers in Changing the Law”, *Emory University Law and Economics Working Papers Series*, n.47, 34.

SCHWARTZSTEIN L.A. (1994) “An Austrian Economic View of Legal Process”, *Ohio State Law Journal* 55, 1049.

SHAVELL S. (1987) *The Economic Analysis of Accident Law*, Harvard Univ. Press, Cambridge, Massachusetts.

ULEN T.S. (1999) “The Present and Future State of Law and Economics”, *New Developments in Law and Economics*, *Erasmus Programme in Law and Economics,* vol.2, OTT C.-SCHÄFER B.(eds.), 320.

UNGER R.M. (1986) *The Critical Studies Movement,* Harvard University Press, Cambridge, Massachusetts.