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ARTICLE

Is Law Like Social Sciences? On 'New Private Law Theory' and the Call for Disciplinary Pluralism

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Abstract
This article reflects upon the challenges arising from a "pluralistic" approach to private law theory. Having distinguished the different meanings of the notion of "pluralism", it focuses on epistemic pluralism and stresses the importance of an interdisciplinary stance. At the same time, it criticizes the emphasis put mainly on the dialogue with social sciences, clearly mirrored by the traditional organization of the ERC panels. Finally, it advocates a deeper and more critical engagement with the economic approaches to law.

Keywords: Private law theory; pluralism; interdisciplinarity; law & economics

A. Introduction

European legal scholars are indebted to Stefan Grundmann, Hans Micklitz, and Moritz Renner for their contribution to an unconventional and thought-provoking *New Theory of Private Law*.[1] The importance of this work could hardly be overstated if compared to most of the Continental-European private-law handbooks, both in terms of substantive contents and original take—not incidentally, the book was originally published in German with the title *Privatrechtstheorie* and addressed a German public.[2] However, the aim of this article is not to provide a detailed overview of the book, nor to explain why it is different from many other European handbooks; and not even to reflect on the substantive topics analyzed in the second part of the volume. Rather, I would like to focus on two general questions that were addressed to the participants to the online book launch, which took place in December 2021. They were phrased as follows:

a) "In which way might a pluralist interdisciplinary approach influence the proprium of legal scholarship, its position in the social sciences?"; and
b) "can 'New Private Law Theory' be regarded as a Counter-Narrative to the Economic Analysis of Law?"

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[1]*See* STEFAN GRUNDMANN, HANS-W. MICKLITZ, & MORITZ RENNER, NEW PRIVATE LAW THEORY: A PLURALIST APPROACH (2021) [hereinafter NPLT].

[2]*See generally* STEFAN GRUNDMANN, HANS-W. MICKLITZ , & MORITZ RENNER, PRIVATRECHTSTHEORIE (2021).

B. Pluralist Approach: What Kind of "Pluralism"?

The wording of the first question may provide some insights about the general framework behind the *New Private Law Theory*. Two expressions deserve to be emphasized: "Pluralist approach" and "social sciences."

"A pluralist approach" is the subtitle of the book. However, "pluralism" is a catch-all notion, which risks leading to a misleading result if not properly narrowed down. There are many ways of talking about "pluralism."[3] What kind of pluralism is envisioned in this volume? The focus is not so much on the dimension of "normative" or "legal" pluralism,[4] as on "methodological" or "disciplinary" pluralism.[5] Namely, the central thesis of the volume is that "the theory of private law must take into account the findings of different disciplines in order to develop an adequate description of society."[6]

This is not to say that normative pluralism in a narrow sense is alien to the *New Private Law Theory*. By contrast, it is an integral component of it[7] but at the same time does not seem to constitute its main pillar. The authors convincingly reject the idea of the political state as the "lynchpin of legal normativity"[8] and put the emphasis on the importance of underappreciated normative orders, such as standard-setting organizations in transnational law or business communities.[9] However, the scope of the inquiry appears to be mainly defined by the Western idea of law and by the role that it plays in the framework of a market economy. Indeed, the specific instances of "pluralism beyond the state" that are discussed throughout the book are mostly embedded in the experience of the so-called Global North.[10] Indigenous law, customary law, religious law, and the law of distinct ethnic communities are not part of the analysis. This is understandable, considering that this book is firmly rooted in the European intellectual tradition, which is less prone to recognizing such dimensions of legal pluralism, at least within the matrix of a classical private-law discourse.[11] At the same time, we should be conscious that on a transnational level such perspectives could be enriching, as they often bring radically different visions about the relationships between "individual" and "society," "the private" and "the public," and could therefore contribute to a critical re-examination of the—locally—uncontested assumptions of Western private law. One might think, for instance, of the importance of "chthonic traditions"[12] in the field of property law and the management of the commons; of the non-monetary forms of reparations, such as the apologies, in the law of civil liability, as we learned in many cases of human rights violations and transitional justice;[13]

[3]*See, e.g.,* William Twining, *Normative and Legal Pluralism: A Global Perspective*, *in* THE OXFORD HANDBOOK OF TRANSNATIONAL LAW 34 (Peer Zumbansen, ed. 2021).

[4]*See*, *e.g.*, BRIAN Z. TAMANAHA, LEGAL PLURALISM EXPLAINED (2011); *Id.* at 31; Ralf Michaels, *Law and Recognition—Towards a Relational Concept of Law*, *in* IN PURSUIT OF PLURALIST JURISPRUDENCE 99 (Nicole Roughan & Andrew Halpin, eds. 2017).

[5]*See generally* Massimo Vogliotti, *Pour une formation juridique interdisciplinaire*, *in* PRATIQUE(S) ET ENSEIGNEMENT DU DROIT. L'EPREUVE DU RÉEL 277 (Jean Jacques Sueur & Sarah Farhi, eds. 2016); Jan M. Smits, *Law and Interdisciplinarity: On the Inevitable Normativity of Legal Studies,* 1 CRITICAL ANALYSIS L. 75 (2014); Linda Hantrais, *Methodological Pluralism in International Comparative Research,* 17 INT'L J. SOC. RSCH. METHODOLOGY 133 (2014) (interesting particularly to comparative law scholars).

[6]GRUNDMANN, MICKLITZ, & RENNER, *supra* note 1, at 1.

[7]*See Id.* at 3 ("New Private Law Theory *is neither state centred nor exclusively national . . . "* (thesis four).).

[8]Martha-Marie Kleinhans & Roderick A. Macdonald, *What is* Critical *Legal Pluralism?*, 12 CAN. J. L. & SOC'Y 25, 30 (1997).

[9]GRUNDMANN, MICKLITZ, & RENNER, *supra* note 1, at 25–26.

[10]*See Id.* at 2–3. (clarifying "[i]n selecting texts of reference for our book, we place the European and US legal traditions at the centre. . . . The necessary limitations correspond both to the background of the authors and to the manifold connections of the traditions. The exclusion of other perspectives, in particular those of the Global South . . . is not intended.").

[11]To measure the differences, one might read the essays collected *in* REPENSER LES PARADIGMES: APPROCHES TRANSSYSTÉMIQUES DU DROIT (Yaëll Emerich & Marie-Anrée Plante, eds. 2018).

[12]*See* PATRICK H. GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 61 (2010).

[13]*See*, *e.g.*, APOLOGIES IN THE LEGAL ARENA: A COMPARATIVE PERSPECTIVE (Nicola Brutti, Robyn Carroll, & Prue Vines, eds. 2021).

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or of post-colonial perspectives on intellectual property law.[14] Also, it seems safe to affirm that this book does not reject the orthodox image of the law "as an external object of knowledge" and the role of subjects as "law abiding" rather than "law inventing."[15] It rests, therefore, on a set of assumptions which would not be easily shared by the proponents of postmodern or critical legal pluralism,[16] and that we may conventionally label "weak normative pluralism."[17]

C. Cognitive Openness and Interdisciplinarity: Who Is My Neighbor?

Similarly, if attention is focused on the second dimension of the notion, that of "methodological or disciplinary" pluralism, we are once again confronted with a version of pluralism that is neither a strong nor radical one. It may be regarded as "weak" or "selective" disciplinary pluralism from two different viewpoints.

First, it does not question the ultimate autonomy of the law and legal scholarship. Indeed, it forcefully advocates cognitive pluralism, in the sense that to better understand legal phenomena we are invited to look beyond legal categories—*external* perspective.[18] At the same time, however, *internal* legal reasoning is entrusted with a gatekeeping function as soon as value systems adopted within different disciplines—for instance, efficiency—create inherent tensions between the law and its environment.[19] More precisely, legal values are regarded as part of the necessary set of preconceptions (*Vorverständnisse*) that guide the interaction between law and other disciplines: "[W]e welcome and advocate the broad inclusion of social theory – in combination with traditional legal theory – when it comes both to addressing doctrinal questions and to applying and further developing the law, but only such theories that have been 'reconstructed' from a legal value perspective."[20] In various parts of the book, the "need for legal scholarship to examine the same type of reconstruction of neighboring disciplines under the auspices of its own value system" is strongly emphasized.[21] One might argue that the overall logic of the NPLT is to reconcile cognitive openness and normative closure.[22] The *proprium* of legal scholarship is therefore preserved: Law is conceived of as a discipline, and not simply as a subject matter.[23]

Second, it seems to locate the law decidedly within the social sciences. It is in this perspective that most of the interdisciplinary exchange is conceived and deployed throughout the book, as the specific wording of question one indirectly confirms. This seems to be in line with a trend observable at the supranational level, and namely within the framework of the European Research Council (ERC).[24] As is well known, one of the striking features of the type of research encouraged

[14]*See* Michael Birnhack, *A Post-Colonial Framework for Researching Intellectual Property History*, *in* HANDBOOK OF INTELLECTUAL PROPERTY RESEARCH: LENSES, METHODS, PERSPECTIVES 260 (Irene Calboli & Maria Lillà Montagnani, eds. 2021).

[15]*See, e.g.*, Kleinhans & Macdonald, *supra* note 8, at 35; Roderick A. Macdonald & Kate Glover, *Implicit Comparative Law,* 43 REVUE DROIT UNIVERSITÉ SHERBROOKE 123 (2013).

[16]*See* TAMANAHA, *supra* note 4, at 201–202 (describing and critically assessing such perspectives).

[17]The dichotomy of weak/strong is used aspecifically and without reference to the seminal article by John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM 1, 5 (1986).

[18]*See* GRUNDMANN, MICKLITZ, & RENNER, *supra* note 1, at 1.

[19]*Id.* at 16.

[20]*Id.* at 35.

[21]*Id.* at 16.

[22]*Id.* at 101.

[23]*See* Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship,* 18 YALE J.L. & HUMANS. 155, 159, 175 (2006) (discussing more information on this conceptual alterative); Helge Dedek, *Stating Boundaries: The Law, Disciplined*, *in* STATELESS LAW: EVOLVING BOUNDARIES OF A DISCIPLINE 9 (Helge Dedek & Shauna Van Praagh, eds. 2015) (detailing On the significance of law as a "discipline").

[24]BARBARA HOENIG, EUROPE'S NEW SCIENTIFIC ELITE: SOCIAL MECHANISMS OF SCIENCE IN THE EUROPEAN RESEARCH AREA (2017).

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by such institutions is multi- and inter-disciplinarity.[25] However, it is not irrelevant to understand what kind of interaction is *de facto* favored. The traditional architecture of the ERC panels—I will not take here into consideration the changes introduced for the 2021/2022 calls[26]—subtly implies a positioning of the law within the social sciences. This is evinced by the fact the only sub-panel that specifically dealt with legal issues—until the 2020 modifications—was "legal studies, constitutions, comparative law, human rights."[27] It is located within panel SH2, which refers to "institutions, values, beliefs, and behavior."[28] The fields covered are related not only to law, but also—and to the largest extent—to disciplines such as sociology, social anthropology, political science, social studies of science, and technology. One may assume, therefore, that the panel SH2 is primarily focused on social sciences.[29] By contrast, disciplines belonging to the core of "humanities" (*Geisteswissenschaften*) are mostly found in panels SH5 and SH6.[30] This might seem a simple formal and organizational matter. However, as jurists trained in comparative law very well know, taxonomies are only apparently innocent tools.[31] Indeed, when the ERC structure is used for allocating public funds, disciplinary assignment is not meaningless. As a matter of fact, it may make a difference that a research project in law is evaluated together with projects coming from the social sciences rather than with those belonging to the humanities.[32] And this is true not only at a supranational, but also at the national level, considering that the ERC taxonomy has been increasingly used by national research agencies—the Italian case is emblematic—as an alternative to the traditional disciplinary assignment, which considered "law" as an autonomous field of research.[33] Issues like "frontier research" and "proper methodology" of a project inevitably arise[34] and assume bigger importance when the legal science—traditionally one of the most conservative disciplines, having a rather homogeneous set of methodologies or disciplinary canon—is directly confronted with fields of research that systematically employ quantitative methods and strive to assume a nomothetic posture as opposed to an idiographic one.[35]

[25]Christian Baier & Vincent Gengnagel, *Academic Autonomy Beyond the Nation-State: The Social Sciences and Humanities in the European Research Council*, 43 Österr. Zeitschrift für Soziologie 65, 80 (2018).

[26]Now SH2 is entitled, "Institutions, Governance, and Legal Systems"; Eur. Rsch. Council, Revision of ERC Panel Structure for the 2021/2022 Calls (May 2020), https://erc.europa.eu/sites/default/files/document/file/Revision_ERC_panel_structure.pdf.

[27]*Id.* Formerly SH2_8, now SH2_4.

[28]*Id.*

[29]*See* Thomas König, *Political Science and the European Research Council,* 18 Eur. Pol. Sci. 248, 250 (2019).

[30]*See* Thomas König, *Peer Review in the Social Sciences and Humanities at the European Level: The Experiences of the European Research Council*, *in* Research Assessment in the Humanities: Towards Criteria and Procedures 151, 159 (Michael Ochsner, Sven E. Hug, & Hans-Dieter Daniel, eds. 2016) (giving an in-depth description of the evaluation and funding process).

[31]*See* Pier Giuseppe Monateri, *Methods in Comparative Law: An Intellectual Overview*, *in* Methods of Comparative Law 9–10 (Pier Giuseppe Monateri, ed. 2012).

[32]*See* Barbara Hoenig, *Structures, Mechanisms and Consequences of Europeanization in Research: How European Funding Affects Universities,* 31 Eur. J. Soc. Scis. Rsch. 504 (2018) (detailing the impact of European funding models on individual and institutional behaviors, as well as on disciplines and knowledge content).

[33]There are several studies that illustrate how research in social sciences and humanities is transformed when funding is sought at the supranational (European) level. *See, e.g.*, Christian Baier & Vincent Gengnagel, *Academic Autonomy Beyond the Nation-State: The Social Sciences and Humanities in the European Research Council,* 43 Österr. Zeitschrift für Soziologie 65, 67 (2018). Much less attention is devoted to the opposite trend, that is, the impact of the supranational framework (typically ERC taxonomy) on national models of research funding.

[34]For an in-depth analysis of the typical model of ERC grant-winning research, see Barbara Hoenig, Europe's New Scientific Elite: Social Mechanisms of Science in the European Research Area 90 (2018); Baier & Gengnagel, *supra* note 33, at 74.

[35]*See* Alberto Martinelli, *La comparazione in Scienza Politica e Sociologia*, *in* Comparare: Una riflessione tra le discipline 142–43 (Giorgio Resta, Alessandro Somma, & Vincenzo Zeno-Zencovich, eds. 2020) (discussing a distinction between the two general attitudes).

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To locate the law within the social sciences or the humanities, as convincingly argued by David Howarth, is neither an innocent nor an uncontroversial choice.[36] A clear sign of this is the intense struggle which took place in American universities in the last two decades—ideological, but with practical consequences also in terms of budget and facilities for research—between the proponents of two different approaches: On the one hand, law and the social sciences, emblematically represented by economics; and on the other, law and humanities, represented by literature.[37] As Jack Balkin and Sanford Levinson depicted it,[38] the competing paradigms are epitomized in two famous quotes: The first by O.W. Holmes, according to which "for the rational study of the law the black-letter may be the man of the present, but the man of the future is the man of statistics and the master of economics"[39]; and the second by Learned Hand, quite paradoxically, as he wrote the famous opinion in *United States v. Carrol Towing*[40] that set the stage for the economic theory of negligence in tort law: "I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon, and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject."[41]

As a matter of fact, the book seems to incline more towards the former than the latter perspective. Moral and political philosophy, as well as history, do enjoy a remarkable position.[42] However, the largest part of the intellectual exchange takes place with sociology and economics. Economics, in particular, has a pivotal position. Other perspectives, such as literary studies and the arts, feminist perspectives, and post-colonial studies, emerge only occasionally, raising the impression that the book is more sensible to a dialogue with the social sciences that with the humanities. Is this intended? Not necessarily so. One might argue that the choice of the partner is closely related to the specific characters of the conversation. Indeed, the topics analyzed in part II mostly deal with market relationships. Had the book specifically considered other dimensions of private law, such as the regulation of personal identity and personality rights, of human body and bioethical issues, as well as of intimate and family relationships, insights provided by the humanities would have probably appeared unavoidable.[43] As it has been observed, "the Humanities deal in the idiosyncratic, the non-reproducible, the singular;" and "lawyers who are creating devices or structures for particular people—contracts, for example, or even international treaties—need to know about the individual with whom they are dealing, not just about averages. The idiosyncrasy dealt with in literature and history, although it cannot safely teach parallels or 'lessons,' can at least open the lawyer to a fuller range of the possibilities of human behaviour."[44]

To avoid any misunderstanding, one could hardly overstate the extraordinary importance of the choice for cognitive openness made by the authors in this book, as well as the particularly insightful dialogue established with economics and sociology. Having all such materials and readings in a volume essentially written for jurists and namely for students of private law is in my opinion an unprecedented, courageous, and particularly remarkable step. I simply argue that

[36]David Howarth, *Is Law a Humanity? (Or Is It More Like Engineering?)*, 3 Arts & Humans. Higher Educ. 9 (2004).

[37]Balkin & Levinson, *supra* note 23, at 177.

[38]*Id.* at 155.

[39]Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

[40]159 F.2d 169 (2d Cir. 1947).

[41]Learned Hand, The Spirit Of Liberty: Papers and Addresses of Learned Hand 81 (1951), *quoted in* Balkin & Levinson, *supra* note 23, at 155.

[42]See Grundmann, Micklitz, & Renner, *supra* note 1, chs. 5–7.

[43]This is not to say that, even regarding more traditional patrimonial private law, the insights from literary studies, to name just one field of research, would not be extremely profitable, as evidenced, for instance, by the brilliant lectures given by Jon Elster at the College de France on the concept of *homo oeconomicus*: Jon Elster, Le désintéressement: Traité Critique de l'Homme Économique, vol. I (2009).

[44]Howarth, *supra* note 36, at 17.

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the path opened by the authors should be taken further to gradually overcome the old totem of law's *Isolierung* from its environment, which still affects much of the legal education in continental Europe.[45] To do this, it is important to bring into the analysis also other disciplines and intellectual movements, having the potential to enrich the conceptual landscape, as well as to bring to the fore values and interests downplayed by purely technical reasoning aimed at grasping regular tendencies and general behaviors, rather than the "singular" and the "non-reproducible."[46] Incidentally, one should not forget that resort to the humanities has served, in the American landscape, to place at center stage issues like race, gender, and sexual orientation.[47]

D. New Private Law Theory as a Counter-Narrative to the Economic Analysis of Law?

This brings me to the second question referred to at the outset of this article. May the *New Private Law Theory* represent a Counter-Narrative to the "Economic Analysis of Law" (EAL)?

If we take these words literally, the answer is already in the question, and we might conclude that the attitude of cognitive openness forcefully advocated by this book has at least potentially the ability to provide a counternarrative to EAL. As masterfully noted by Guido Calabresi, the choice of the labels is not neutral. By using the notion "Economic Analysis of Law," we convey a specific message as regards the direction of the knowledge-flow: Who analyzes what. In his book, *The Future of Law and Economics*, Calabresi contrasts two intellectual paradigms, the one represented by Jeremy Bentham and the other by John Stuart Mill.[48] Speaking of Bentham, Mill observed that he used to approach all ideas with the attitude of a foreigner and, if they did not satisfy his test—the utility test, he immediately dismissed them as "vague generalities." Mill added that Bentham did not pay attention to the fact that "these generalities contained the whole unanalyzed experience of the human race."[49] In Calabresi's reading, Bentham, the "colonizer," epitomizes the approach of the "economic analysis of law," while Mill personifies the perspective of "law & economics."[50]

Such a distinction between the two different "forms" of the dialogue between law and economics which has taken place in American universities since the 1970s is interesting to our purposes, because it sums up two possible interpretations of interdisciplinarity. According to the former, the whole gamut of rules, institutions, and legal doctrines must be analyzed and assessed based on parameters external to the legal system, such as social justice, gender equality, or Pareto efficiency. Bentham did the same when he applied the utility test to any existing rule or institution, inferring a judgment of rationality or irrationality, and the Economic Analysis of Law is seen by Calabresi as an ideal continuation of this approach. In fact, it subjects the existing legal framework to an efficiency test: If it conforms to it, this means that the structure itself is rational and must be preserved; if it does not conform to it, it deserves first to be criticized, and then reformed. In so doing, Calabresi concludes, economic analysis of law is not that different from the Marxist approach or from all other approaches that analyze, evaluate, and criticize the law in conformity with exogenous parameters, adopting a purely instrumental reading of the normative dimension.[51] By

[45]Still worth reading from this point of view is the forward-looking essay by the Italian legal theorist Uberto Scarpelli, *L'educazione del giurista,* Riv. Dir. Proc. 1 (1968), Vogliotti, *supra* note 5, at 283.

[46]It is worth noting that in my country (Italy) studies belonging to the movement of law & humanities are proliferating. See, for example, Donato Carusi, Sua Maestà legge? Tre secoli di diritto, potere, letteratura (2022); Le arti e la dimensione giuridica (Orlando Roselli, ed. 2020), L'armonia nel diritto: Contributi a una riflessione su diritto e musica (Giorgio Resta, ed. 2020); Lavoro, diritto e letteratura italiana (Roberto Voza, ed. 2009), Francesco Galgano, Il diritto e le altri arti: Una sfida alla divisione delle culture (2009).

[47]*See* Balkin & Levinson, *supra* note 23, at 167–68.

[48]*See* Guido Calabresi, The Future of Law & Economics: Essays in Reform and Recollection (2015).

[49]*Id.* at 1.

[50]*Id.* at 2.

[51]*Id.* at 7.

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contrast, opting for the second reading of interdisciplinarity, legal institutions should be the focal point of a plurality of perspectives, all legitimate and capable of contributing to a better understanding of the underlying social phenomena. Mill would embody its spirit, due to the methodological reservations expressed in relation to the Benthamite approach, and in particular his disregard of all forms of rationality other than the utilitarian one; and we might rightly consider Guido Calabresi's scholarship a perfect example of this standpoint.[52] The stance adopted by the *New Private Law Theory* is perfectly in line with this second perspective, which is, by the way, the only one feasible if one shares the general assumption of the autonomy of legal scholarship.[53]

This having been said, we may go back to the initial question of whether *New Private Law Theory* may be considered a Counter-Narrative to law and economics. Methodological pluralism and internal values selection work undoubtedly in this direction. However, I contend that to effectively achieve what Roderick Macdonald called the "de-colonization" of the law school,[54] one should bring into the *New Private Law Theory* a more explicit and direct critique of the "*Menschenbild*" laying behind the "economistic" models.[55]

Chapters three and eleven of the book do an excellent job in presenting the results of the behavioral approach and the idea of bounded rationality as a better alternative to the REMM (resourceful, evaluative, maximizing) model of human behavior. By focusing on the systematic deviations from rationality, *New Private Law Theory* takes a decided step towards bridging the gap between the highly formalized and compelling assumptions of the economic theory and the much less coherent and predictable patterns of persons' daily behavior.[56] This is a very important point, as it makes the acceptance of economic explanations of legal phenomena dependent upon the adoption of an empirical double-check.[57]

What one may find underdeveloped in this description is the treatment of the flaws of rational choice theory arising not from *cognitive limitations*—insufficient information, information overload, cognitive biases[58]—but from *behavioral motivations*.

One of the main tenets of orthodox economic analysis of law is what Edgeworth defined already in 1881, the "first principle" of economics, that is the idea of self-interest, according to which persons behave rationally "if and only if they intelligently pursue their self-interest, and nothing else."[59] However, an impressive amount of experimental research, well represented by the work of Ernst Fehr at Zurich, demonstrates that in most social settings self-interest coexists with altruism and other-regarding preferences.[60] Games such as the Ultimatum Game, the Dictator Game, the Trust Game, and the Contribution to Public Goods Game, as well as other natural experiments, show that "many people are strongly motivated by other-regarding preferences and that concerns for fairness and reciprocity cannot be ignored in social interactions."[61]

[52]*Id.* at 3.

[53]*See supra*, ¶ 3.

[54]Roderick A. Macdonald & Thomas B. McMorrow, *Decolonizing Law School*, 51 ALBERTA L. REV. 717 (2014); Jack M. Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949 (1996).

[55]I employ this word in a strictly Polanyian sense. *See* Karl Polanyi, *The Contribution of Institutional Analysis to the Social Sciences*, *in* KARL POLANYI, FOR A NEW WEST: ESSAYS 1919–1958, 1955, 1960 (Giorgio Resta & Mariavittoria Catanzariti, eds. 2014).

[56]Consistently with the behavioral approach: Christine Jolls, Cass R. Sunstein, & Richard H. Thaler, *A Behavioral Approach to Law and Economics,* 50 STAN. L. REV. 1471 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics,* 88 CAL. L. REV. 1051 (2000).

[57]From this viewpoint, see the remarks by Ronald Coase, *Impresa, mercato e diritto*, *in* RONALD COASE, IMPRESA, MERCATO E DIRITTO 43–44 (2006).

[58]*See* DANIEL KAHNEMAN & AARON TVERSKY, CHOICES, VALUES AND FRAMES (2000).

[59]AMARTYA SEN, THE IDEA OF JUSTICE 179 (2009) (referring to FRANCIS Y. EDGEWORTH, MATHEMATICAL PSYCHICS: AN ESSAY ON THE APPLICATION OF MATHEMATICS TO THE MORAL SCIENCES 16 (1881)).

[60]*Cf.* Jon Elster, *Fehr on Altruism, Emotion and Norms,* 27 ANALYSE & KRITIK 197 (2005).

[61]Ernst Fehr & Klaus M. Schmidt, *The Economics of Fairness, Reciprocity and Altruism—Experimental Evidence and New Theories*, *in* HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY, VOL. I 615, 617 (Serge-Christophe Kolm

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This is difficult to explain based on traditional economic models unless the idea of "self-interest" is watered down to an extent sufficient to encompass other-regarding preferences.[62] As a matter of fact, economic theory still struggles to explain why people systematically donate objects instead of money, despite the clear inefficiency of such choice, as evidenced by the famous essay by Waldfogel on the *Deadweight Loss of Christmas*.[63] Any such difficulty is alien to legal science, whose centuries-long treatment of gift-giving reflects a significantly different and less simplistic model of rationality. As illustrated by the ground-breaking book by Richard Hyland,[64] the regime of gifts in classical civil codes is the result of a compromise between different paradigms. On the one hand it reflects the attempt of the revolution and of classical liberalism to overcome the old "gift economy" of the *ancien régime*, by substituting it with the new logic of market-exchange, perceived as less asymmetrical and more freedom-enhancing.[65] The famous essay by Louis Josserand, "Le déclin du titre gratuit et sa transformation," which echoed Jhering's "Zweck im Recht," is a good example on point.[66] On the other hand, the civil code provisions unequivocally illustrate that the atomistic and utilitarian approach to gift-giving is nothing more than wishful thinking.[67] One might only mention—taking the Italian civil code as an example—the rules on remunerative gift, article 770, and modal donation, article 793, or on the revocation for ingratitude, article 801, or occurrence of children, article 803: They all show the importance of the dimension of reciprocity and deny the image of the "pure and disinterested" gift advocated by the reformers. The *Menschenbild* enshrined in the regime of gift giving is much closer to the idea of society depicted by Marcel Mauss than by Jeremy Bentham.[68] The human being, and namely the *homo donator*,[69] is not regarded as an isolated individual, a calculating and dispassionate actor, nor a person with an unlimited amount of information, always able to properly evaluate them. On the contrary, we deal with a subject prone to passions and emotions; embedded in a thick network of personal and family relationships, which are generally affected by the act of gift giving; unable to abstract from that the whole gamut of social duties and conveniences—generally governed by the logic of reciprocity—which make the gift an act inherently far from "free" in all senses.[70]

The observation of actual behaviors confirms the assumptions laying behind the legal architecture. One of the main findings of a large-scale comparative analysis of gift-giving, is the fact that the legal systems' attempts of "taming" the gift and subjecting the social practices of giving, receiving, and reciprocating to rigid constraints generally turn out to be a failure.[71] Very illustrative, in this regard, is the experience of the Canadian Indian Act, which made the traditional practice of

& Jean M. Ythier, eds. 2006); Ernst Fehr & Urs Fischbacher, *The Nature of Human Altruism,* 425 NATURE 785 (2003); Ernst Fehr & Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity,* 14 J. ECON. PERSPS. 159 (2000); Ernst Fehr & Bettina Rochenbach, *Detrimental Effects of Sanctions on Human Altruism,* 422 NATURE 137 (2003); Ernst Fehr & Simon Gächter, *Cooperation and Punishment in Public Goods Experiments,* 90 AM. ECON. REV. 980 (2000); Herber Gintis, Samuel Bowles, & Ernst Fehr, *Explaining Altruistic Behavior in Humans,* 24 EVOLUTION & HUM. BEHAV. 153 (2003); Sabine Winmann, Lucie Binder, & Martin Schultze, *Constructing the Facets of Altruistic Behaviors (FAB) Scale*, 52 SOC. PSYCH. 299 (2021); Olga M. Klimecki, Sarah V. Mayer, Aiste Jusyte, Jonathan Scheeff, & Michael Schönenberg, *Empathy Promotes Altruistic Behaviors in Economic Interactions,* 6 SCI. REPS. 31961 (2016).

[62]Korobkin & Ulen, *supra* note 56, at 1060–65.

[63]Joel Waldfogel, *The Deadweight Loss of Christmas*, 83 AM. ECON. REV. 1328 (1993), JOEL WALDFOGEL, SCROOGENOMICS: WHY YOU SHOULDN'T BUY PRESENTS FOR THE HOLIDAYS (2009).

[64]RICHARD HYLAND, GIFTS: A STUDY IN COMPARATIVE LAW (2009).

[65]*See also* Anne Foubert, Le don en droit (2006) (Paris II) (giving the thought-provoking doctoral dissertation).

[66]Louis Josserand, *Le Déclin du Titre Gratuite et sa Transformation*, *in* LOUIS JOSSERAND, ÉVOLUTIONS ET ACTUALITÉS: CONFÉRENCES DE DROIT CIVIL 135 (1936).

[67]STEFANO RODOTÀ, LA VITA E LE REGOLE: TRA DIRITTO E NON DIRITTO 124 (1998).

[68]MARCEL MAUSS, ESSAI SUR LE DON: FORME ET RAISON DE L'ECHANGE DANS LES SOCIÉTÉS ARCHAÏQUES (1925).

[69]JACQUES T. GODBOUT, *LE DON, LA DETTE ET L'IDENTITÉ:* HOMO DONATOR VERSUS HOMO OECONOMICUS (2000).

[70]*See* Foubert, *supra* note 65.

[71]*See* HYLAND, *supra* note 64, at 10, 113.

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potlatch—widespread among the First Nations—a crime, striving to reduce what the Europeans believed to be its socially disruptive effects. However, such provisions turned out to be completely ineffective, as is demonstrated by the fact that Franz Boas did its field work and wrote its famous reports on the *potlatch*[72] at the very moment when legally it was prohibited.[73]

In conclusion, rational choice theory cannot—in its pure form—be relied upon for the sake of explaining, criticizing, or reforming legal institutions, not only due to the cognitive failures of human agents, but also because the motivational assumption of self-interest proves to be very unrealistic and to some extent even misleading. For this reason, one may seriously doubt that law and economics can be of great help, as a *descriptive* tool, to a deeper comprehension and conceptualization of substantial parts of private law, which are based at least partly on other-regarding preferences and values, from the law of gift-giving to the regulation of body rights, to intimate and family relationships.

E. Exploiting the Potential of the NPLT's Critical Approach

Let us now consider the *normative* aspect, particularly regarding the NPLT's fifth thesis , according to which NPLT reflects *critical approaches* to private law. The authors clarify that the benchmark of critical approaches to private law is represented by the social question, which emerged between the nineteenth and the twentieth century and was further developed after the Second World War.[74] Indeed, a significant part of European critical legal scholarship deals with social issues in contemporary European private law.[75] However, the focus has mainly been on redistribution and related issues such as protection of the weaker party and access to justice. What has been underestimated, in my opinion, is the issue of market containment. Said otherwise, attention was mainly paid to the regulation of existing markets, as well as on redistribution, but the not less important issue of where to set the boundaries between market and non-market dimensions has been generally downplayed.

This has become a critical topic for contemporary moral and political philosophy,[76] and at its core it is strictly related to the discussion about the motivations of human behavior.[77] Rational choice theory seems to be based on what Karl Polanyi defined as "obsolete market mentality,"[78] namely the assumption that "maximizing" behavior is embedded in human nature, rather than being the historical—and therefore contingent—product of a particular architecture of social and economic relationships emerged in connection with the Industrial Revolution and the gradual shift towards a "market society."[79] Economic sociology has long reflected on this issue and the references to a famous study by Mark Granovetter in chapter. twenty-seven fruitfully bring this discussion into the book.[80] It is remarkable, for our purposes, that experimental research has offered empirical evidence to Polanyi's intuitions. Not only, as we noted above, do many experiments demonstrate that other-regarding preferences do exist and have an important role for the sake of predicting human behavior.[81] Even more interesting, several studies have shown that the specific features of the institutional framework strongly affect the type of interpersonal interactions as well as the content of individual preferences. In particular, the propensity of individual to act selfishly, or

[72]Franz Boas, The Social Organization and the Secret Societies of the Kwakiutl Indians: Based on Personal Observations and on Notes Made by Mr. George Hunt, United States National Museum, Report for 1895 (1897).

[73]This example is provided by Hyland, *supra* note 64, at 89.

[74]*See* Grundmann, Micklitz, & Renner, *supra* note 1, at 4.

[75]*See* Hans-W. Micklitz, The Politics of Justice, The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice 161 (2018).

[76]*See* Michael J. Sandel, What Money Can't Buy (2012), Debra Satz, Why Some Things Should Not Be For Sale: The Moral Limits of Markets 192 (2010), Margaret J. Radin, Contested Commodities (1996).

[77]*See supra*, ¶ 4.

[78]Karl Polanyi, *Our Obsolete Market Mentality: Civilization Must Find a New Thought Pattern,* 3 Comment. 109 (1947).

[79]*See also* Karl Polanyi, The Livelihood of Man 12–14 (1977), Gareth Dale & Karl Polanyi, The Limits of the Market 89–187 (2010).

[80]*See* Grundmann, Micklitz, & Renner, *supra* note 1, at 504.

[81]*Supra* ¶ 4.

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instead to be altruist and take into consideration other persons' wellbeing, significantly varies depending on the competitive or cooperative character of the institutional framework.[82]

I will provide here just two examples.

The first is a famous experiment carried out by Uri Gneezy and Aldo Rustichini in Haifa.[83] With the aim of contrasting the parents' habit of arriving late to pick up their children at kindergarten, the school board introduced a monetary fine of about three euros for any delay of at least ten minutes. The goal was to understand whether a monetary sanction for free riding on teachers' working time could lead to a change in parents' behavior. Parental behavior did change, but in a direction opposite to what had been foreseen. Rather than decreasing, the cases of delayed pick-up doubled. The explanation for this result is that by introducing a fine, the cost of "deviant" behavior ended up being quantified and made equivalent to a monetary price. Rational agents felt morally legitimized to "purchase" the service in question in larger quantity than in the past. Furthermore, such an attitude became resistant to change. Indeed, after a few weeks, the school board decided to eliminate the penalty for the delay, reestablishing the previous regime. As a result, cases of delay not only did not return to the pre-existing level, but they even had a slight increase. Once a commodity, one might argue, always a commodity![84]

The second example is offered by a famous article by Falk and Szech on "Morals and markets."[85] In an experiment carried out in Germany, some persons were given the chance of either saving the life of a mouse and receive no money, or having the mouse killed and earn a monetary sum. The behavior was analyzed in three different conditions: "[A}n individual treatment in which subjects decided between the life of their mouse and a given monetary amount (around 10 euros), a bilateral trading market, and a multilateral trading market." The result was the following: "[I]n the individual decision treatment, 46% of subjects were willing to kill their mouse for 10 euros. In contrast, 72.2% of sellers in the bilateral market were willing to trade for prices below or equal to 10 euros; and this figure was even higher in the multilateral market."[86] This and similar experiments—as well empirical studies, such as the famous book by Richard Titmuss on blood donations[87]—illustrate the so-called "crowding out" effect of markets, that is the fact that markets may erode moral standards.[88] According to the authors of the above-mentioned article, this is closely related to three specific features of the institutional setting: 1) given the multi-personal character of trading, "responsibility and feelings of guilts may be shared and thus diminished"; 2) "market interaction reveals social information about prevailing norms. Observing others trading and ignoring moral standards may make the pursuit of self-interest ethically permissible, leading further individuals to engage in trade"; 3) markets provide "a strong framing and focus on materialistic aspects such as bargaining, negotiation, and competition, and may divert attention from possible adverse consequences and moral implications of trading." Looking at these results from a Polanyian perspective, one might argue that selfish and profit-oriented behaviors may well be conceived as the result of specific institutional frameworks, rather than the

[82]For a more detailed analysis, see Giorgio Resta, *Gratuità e Solidarietà: Fondamenti Emotivi e 'Irrazionali,'* 25 Riv. Crit. Dir. Priv., 2014.

[83]*See* Uri Gneezy & Aldo Rustichini, *A Fine Is a Price,* 29 J. Leg. Stud. 1 (2000).

[84]*See* Daniel Ariely, Predictably Irrational: The Hidden Forces That Shape Our Decisions 85 (2010).

[85]*See* Armin Falk & Nora Szech, *Morals and Markets,* 340 Sci. 707 (2013); *see also* Emanuel V. Towfigh, *Rational Choice and Its Limits,* 17 German L. J. 763 (2016).

[86]Falk & Szech, *supra* note 85, at 708.

[87]*See* Richard Titmuss, The Gift Relationship: From Human Blood to Social Policy (1971).

[88]*See, e.g.*, Bruno S. Frey & Felix Oberholzer-Gee, *The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out,* 87 Am. Econ. Rev. 746, 749, 753 (1997); Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory: A Survey of Empirical Evidence,* 15 J. Econ. Surv. 589 (2001); Ariely, *supra* note 84, at 79. For an overview and a more cautious assessment of the experimental results in the field of health-behavior, *see* Marianne Promberger & Theresa M. Marteau, *When Do Financial Incentives Reduce Intrinsic Motivation? Comparing Behaviors Studied in Psychological and Economic Literatures,* 32 Health Psych. 950 (2013).

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substantive justification for the introduction of market mechanisms. As Marcel Mauss wrote, "l'homo oeconomicus n'est pas derrière nous, il est devant nous."[89]

F. Concluding Remarks

What is to be learnt from the previous paragraph? I would suggest that, if NPLT aims to provide a radical counternarrative to the economic analysis of law, it should expand the critique of the epistemological model behind it and namely of what Polanyi called the "economistic fallacy,"[90] by proposing an alternative paradigm: *Homo juridicus,* to say it with Alain Supiot, instead of *homo oeconomicus*.[91] The inherent flaws of such model limit its ability to provide—in isolation from competing paradigms—analytical tools for the explanation of existing private law rules, as well as for their reform. Assessing the desirability of legal institutions—and arguing for their adjustment—based on a preconceived self-interest paradigm may lead to a self-fulfilling prophecy: Humans behave selfishly because institutions have been shaped with the aim of fostering utility-maximizing behaviors.[92] By contrast, several studies arrived at the conclusion that if institutional settings are properly adjusted, other-regarding behaviors may even crowd out the purely selfish one.[93] Choosing the proper analytical framework is therefore particularly important whenever private law institutes should be designed to achieve specific aims, such as fostering cooperative behaviors, reducing unnecessary waste, preserving the commons, or keeping certain goods or relationships beyond the reach of the market-rhetoric.

I would not like to give the false impression that this is beyond the scope of the book. Indeed, both chapter sixteen on digital architecture and chapter twenty-seven on social embeddedness are focused on the critical question of how a specific institutional design may influence behaviors in a way consistent with basic constitutional values. Particularly important, from this point of view, is the discussion of how on-line anonymity frequently leads to harsh speech and utter disrespect of other persons, and how the adoption of different default rules could contribute to prevent such results.[94]

Coherently with the overall approach of the book, I am not at all advocating an abandonment of the law and economics methodology, but rather its enrichment by means of alternative, possible more critical, perspectives, such as economic sociology and economic history, cultural anthropology, and comparative law. Indeed, it is worth noting that some of the most interesting studies on the motivations of behavior and the maximizing hypothesis openly take a cross-cultural perspective.[95] They show that the deviations from the REMM model vary quite significantly depending on

[89]Mauss, supra note 68, at 238 ("Ce sont nos sociétés d'Occident qui ont, très récemment, fait de l'homme un 'animal économique'. Mais nous ne sommes pas encore tous des êtres de ce genre. Dans nos masses et dans nos élites, la dépense pure et irrationnelle est de pratique courante; elle est encore caractéristique des quelques fossiles de notre noblesse. L'homo oeconomicus n'est pas derrière nous, il est devant nous; comme l'homme de la morale et du devoir; comme l'homme de la science et de la raison. L'homme a été très longtemps autre chose; et il n'y a pas bien longtemps qu'il est une machine, compliquée d'une machine à calculer.").

[90]Polanyi, *supra* note 78, at 6.

[91]*See* Alain Supiot, Homo Juridicus: Essai sur la fonction anthropologique du Droit (2005); *see also* Towfigh, *supra* note 85.

[92]Polanyi, *supra* note 78, at 7–10.

[93]*See* above in this article, ¶ 5.

[94]*See* Grundmann, Micklitz, & Renner, *supra* note 1, at 510.

[95]*See, e.g.,* Joseph Henrich, Robert Boyd, Samuel Bowles, Colin Camerer, Ernst Fehr, Herbert Gintis, Richard McElreath, Michael Alvard, Abigail Barr, Jean Ensminger, Natalie Smith Henrich, Kim Hill, Francisco Gil-White, Michael Gurven, Frank W. Marlowe, John Q. Patton, & David Tracer, "*Economic man" in Cross-cultural Perspective: Behavioral Experiments in 15 Small-scale Societies,* 28 Behav. Brain Sci. 795 (2005); Joseph Henrich, Robert Boyd, Samuel Bowles, Colin Camerer, Ernst Fehr, Herbert Gintis, & Richard McElreath, *in Search of Homo economicus: Behavioral Experiments in 15 Small-scale Societies*, 91 Am. Econ. Rev. 73 (2001); Raffaele Caterina, *Un approccio cognitivo alla diversità culturale*, *in* I fondamenti cognitivi del diritto: Percezioni, rappresentazioni, comportamenti 205 (Raffaele Caterina, ed. 2008).

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the specific institutional and cultural background. This is a further element that suggests broadening the scope of NPLT beyond the conceptual boundaries of the Global North, to encompass different worldviews as well as perspectives about private law. But this is a point that will be touched by Ralf Michaels in his contribution and on which there is no need to spend further considerations.

In conclusion, I think that the pioneering work written by Hans, Stephan, and Moritz has set the stage for a truly innovative rethinking of private law theory, possibly also in a trans-national perspective. It includes an extremely rich variety of theories, approaches, and intellectual perspectives. As the authors recognize at the outset, "[a] large variety implies width in countries and traditions of thought on which we draw. A large variety also implies that we want to integrate as many insights as possible that might be relevant for legal thinking from all neighboring disciplines. A large variety further implies that this aspiration is *per se* unattainable, and certainly so in one book and for three authors. This book can only constitute an attempt to set a first map, to throw a stone into a pond, with a lot of *terra incognita* still to be discovered in response to this first approach."

In the same spirit, this article tried to point out some of the challenges raised by a pluralist approach to private law theory, with the aim of continuing along the valuable path opened by the authors and taking it even further.

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