

SOME NOTES ON INTERDISCIPLINARY THEORETICAL DISAGREEMENTS BETWEEN LAW AND ECONOMICS

ALGUNOS APUNTES SOBRE DESACUERDOS TEÓRICOS
INTERDISCIPLINARIOS ENTRE EL DERECHO Y LA
ECONOMÍA

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Abstract:

The starting point of this essay is the question “Under what conditions is the legal practitioner justified in ignoring the economic point of view?”. This question leads to an inquiry of the relation between the disagreements economists have with the law and theoretical disagreements. The essay makes two main claims. First, the disagreements economists have with the law can originate a particular kind of theoretical disagreement – an interdisciplinary theoretical disagreement. Interdisciplinary theoretical disagreements pre-suppose the solution of a translation problem from economics into law. The translation problem is solved when a proposition of economics becomes part of the external justification of a legal norm. It makes sense to use the expression 'interdisciplinary translation' because meaning is moved from one practice to another. Second, the various positions with regard to the relation between law and morality are also a problem of interdisciplinary translation – this time from morality to law. In light of this insight, the essay concludes with the hope of more interest by philosophers of law and legal theorists for the relation between law and economics.

Keywords: *Interdisciplinary Theoretical Disagreement; Interdisciplinary Translation Problem; External Justification; Law and Economics; Law and Morality*

Resumen:

El punto de partida de este ensayo es la pregunta “¿Bajo qué condiciones se justifica que quienes ejercen derecho ignoren el punto de vista económico?”. Esta pregunta nos lleva a una investigación

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sobre la relación entre los desacuerdos que los economistas tienen con el derecho y los desacuerdos teóricos. Este ensayo hace dos afirmaciones principales. En primer lugar, los desacuerdos que los economistas tienen con el derecho pueden originar un tipo particular de desacuerdo teórico: un desacuerdo teórico interdisciplinario. Los desacuerdos teóricos interdisciplinarios presuponen la solución de un problema de traducción desde la economía al derecho. El problema de la traducción se resuelve cuando una proposición de la economía se convierte en parte de la justificación externa de una norma jurídica. Tiene sentido utilizar la expresión 'traducción interdisciplinaria' (pero también transportación, transferencia) porque el significado se traslada de una práctica a otra. En segundo lugar, las diversas posiciones respecto de la relación entre el derecho y la moral son también un problema de traducción interdisciplinaria - en este caso desde la moral al derecho. A la luz de esta comprensión, el ensayo concluye con la esperanza de que los filósofos del derecho y los teóricos del derecho se interesen más por la relación entre el derecho y la economía.

Palabras clave: *desacuerdo teórico interdisciplinario; problema de traducción interdisciplinaria; justificación externa; derecho y economía; derecho y moral*

I. INTRODUCTION

Economists, like everyone else, happen to disagree with what the law requires them to do. What characterizes economists and, in a sense, makes them a little special, is the union of a notorious intellectual arrogance¹ (the so-called “economic imperialism”)² with a strong reluctance to discuss questions of value because they are not scientific. The consequence is an approach to legal studies that is typically unidirectional, from economics to law.³

In this article, I investigate the relationship between the disagreements that economists have with the law and the type of disagreement that Dworkin

1 The best manifestation of this circumstance is perhaps the question “are you an economist” proffered in inter-disciplinary conferences by economists who present an economic analysis of law without, obviously, “being jurists”.

2 See, for example, MÄKI (2013) and LEPENIES & MALECKA (2015).

3 This point is at the centre of the discussion of the “economic jurisprudence” offered by CALABRESI (2016). For a useful and agile discussion of Calabresi’s analysis, see CHIASSONI (2016). I have explored the depth and breath of Calabresi’s contribution to law and economics in ESPOSITO (2017) and ESPOSITO (2019).

has called (not too happily)⁴ theoretical disagreement. At the center of this investigation is the question: “which are the circumstances in which the jurist is justified to disregard the economic perspective?”. I have two main theses. First, the disagreements of economists with the law may give rise to a particular kind of theoretical disagreement, which I call interdisciplinary theoretical disagreement. However, for this type of disagreement to rise, it is necessary to solve a problem of interdisciplinary translation, from economics into law. This problem can be solved by incorporating an economic proposition into the external justification of a legal proposition. In this perspective, one can speak of interdisciplinary translation (or even transition, transport, transfer) because meaning is moved from one linguistic practice to another.

Second, the theoretical views on the relationship between law and morality are also a problem of interdisciplinary translation, this time from morals to law. This leads me to suggest to philosophers and theorists - of law - the opportunity to become more interested in the relationship between law and economics. The following considerations are in fact just one of the examples of the fact that the conceptual baggage of the philosophy and the theory of law represents an extremely valuable source for the study of the relationship between law and economics.

The essay is structured as follows. I begin by introducing in § 2 some simple examples of interdisciplinary propositions, followed by an account of the interdisciplinary disagreements between economics and law. In § 3, I give a brief overview of the Dworkinian criticism of how positivists have explained theoretical disagreements as well as of the main positivist replicas. This allows me to distinguish two types of interdisciplinary disagreements: *a*) interdisciplinary theoretical disagreements; and *b*) purely interdisciplinary disagreements. Participants in legal practice can peacefully disregard purely interdisciplinary disagreements. This answer is not satisfactory, however, as long as one does not exclude the possibility that a disagreement that appears purely interdisciplinary may not become, after a translation, an interdisciplinary theoretical disagreement. The problem of interdisciplinary translation must therefore be addressed.

Papayannis has recently dealt with the translation problem. He dealt with it with particular regard to functional economic analyses of the law. In § 4, I note that Papayannis admits the possibility of translation, but does not adequately investigate the point. It is therefore useful to consider a debate between Patter-

4 RATTI & DOLCETTI (2013), p. 305. Observe in particular that this expression “evokes the idea of a scientific explanation of a certain phenomenon; however, the phenomenon of legal disagreements is the result of a divergence between evaluative doctrines (i.e. normative theories) regarding the sources and their meaning”.

son and Craswell on the translation of the concept of incomplete contracts from economics into law. In this case too, the conclusion regarding the possibility of translation is positive. However, attention is put on the need to warrant (or validate) economic propositions according to the warranty procedures of legal discourse. In the light of this, I conclude that interdisciplinary translation concerns the relevance of an economic proposition for the external justification of a proposition of law.

In § 5, I proceed to defend the second thesis of this essay - the debate on the relationship between law and morality can be reformulated in terms of theoretical positions with respect to the conditions under which it is possible to translate (or even transit, transport, transfer) a proposition from morality to law. On the basis of this result, I make two considerations: *a*) philosophers and theorists of law can make an important contribution to the study of the relationship between law and economics; *b*) the translation problem of interdisciplinary propositions is a problem that deserves more attention.

II. INTERDISCIPLINARY ECONOMIC PROPOSITIONS: WHEN ECONOMICS SPEAKS OF LAW OR TO LAW

An interdisciplinary proposition is the content of a statement that is warranted⁵ (considered valid, true, correct) according to the rules of a practice, but that concerns another practice, which is therefore the object of the interdisciplinary proposition. In the perspective of the object practice, the interdisciplinary proposition is therefore a meta-proposition, as it belongs to a meta-language. In our daily lives, we habitually use a wide range of interdisciplinary positions: “the Juventus uniform is horrible” is an aesthetic proposition concerning the game of football; “if you bathe after eating, you get a stomach-ache” is a medical proposition (or of an apprehensive parent) concerning the activity of bathing.

There may of course also be interdisciplinary disagreements. In general, there is a disagreement when, in relation to something, an assertor A1 asserts (or implies) a proposition *P* while an assertor A2 asserts (or implies) a proposition

5 I use “warranty” in accordance with HAACK (2015), pp. 19-21. Otherwise, the inferentialist distinction between commitment and entitlement could be used. On this point, see CANALE & TUZET (2007) and CANALE & TUZET (2007b). The shortcoming of this approach for the present purposes is mainly to shift the attention from assertions and propositions to participants and to the “scorekeeping” between them.

different from P.⁶ For example, someone could argue that “the Juventus uniform is beautiful” or that “having eaten light, I won’t get stomach-ache if I bathe”. Accordingly, we have a disagreement with those who believe that the Juventus uniform is horrible and with those who claim that bathing after eating makes you sick even if you have eaten lightly. In the interdisciplinary disagreements just seen, there are two propositions *P1* and *P2* belonging to a practice having as object a proposition *Px* belonging to a different practice: *P1(Px)* vs *P2(Px)*. More succinctly, there is an interdisciplinary disagreement when there are two discordant interdisciplinary propositions having as their object the same proposition of the object practice.

A different kind of interdisciplinary disagreement arises, for example, if to the question “mister, don’t you think that the new Juventus uniform is horrible? Wouldn’t it be better to change it?”, the coach replied “the club has made its evaluations and chosen this uniform; whether you like it or not, for the current season the uniform will not change”. In the first case – in which A1 claims that the uniform is horrible and A2 claims instead that the uniform is beautiful – we’re in the middle of a merely aesthetical disagreement about the game of football. In this case, the object practice (the game of football) remains completely inert. From an aesthetic point of view, this is an intra-disciplinary disagreement, while from the point of view of the object practice the disagreement is meta-disciplinary. Instead, when the Juventus coach (A3) observes that “the club has made its evaluations and chosen this uniform; whether you like it or not, for the current season the uniform will not change” something more complex happens. A1 argues that the aesthetic argument is a reason to change the uniform, while A3 argues that the aesthetic argument is irrelevant (at least for the current season) from the perspective of the game of football. In this case, A1 claims the relevance of the aesthetic proposition for the game of football, while A3 observes that, from the point of view of the game of football, the aesthetic proposition of A1 is not relevant. I will call this disagreement “interdisciplinary disagreement in the strict sense”. In general:

1. meta-disciplinary disagreement: A1 asserts (or implies) a position *P1(Px)* while A2 asserts (or implies) a proposition *different from P1(Px)*;

⁶ For a more elaborate definition, see KOCZOGH (2013). The author moves from the distinction, used by Searle, of four conditions of linguistic acts (preparatory, propositional, sincere and essential). I limit myself to a definition based on a slightly modified version of the first preparatory condition and that condition. The reason is that two assertors may disagree without knowing it and also the disagreement may be fictitious, because the parties believe they disagree but in reality they are not.

2. interdisciplinary disagreement in the strict sense: A1 asserts (or implies) a proposition $PI(Px)$ as a reason to warrant Px in the object practice while A2 asserts (or implies) that $PI(Px)$ does not count as a reason to warrant Px in the object practice.

Note that a meta-disciplinary disagreement could be combined with an interdisciplinary disagreement in the strict sense, thereby generating a complex interdisciplinary disagreement. Returning to the relationship between aesthetics and football uniforms, you might disagree about the beauty of the Juventus uniform and also about the relevance of this disagreement from the point of view of the game of football. Think, for example, of the case of someone claiming that the team with the most beautiful uniform should start with a goal advantage.

In this essay, I focus my attention on interdisciplinary disagreements in the strict sense. The reason is that if we do not clarify how to resolve these disagreements in such a way as to make a meta-proposition relevant for the object practice, a possible meta-disciplinary disagreement remains irrelevant for the object practice. Having clarified what an interdisciplinary disagreement in the strict sense is, let us consider some of them in which economic propositions⁷ have as their object the law:

1. “Behavioural research shows that [...] contrary to the assumption [of the Court of Justice of the European Union] that the average consumer is ‘reasonably well informed and reasonably observant and circumspect’, consumers are often ill-informed and have difficulty fully seizing market opportunities”;⁸

2. “From an economic point of view, contractual remedies are desirable if they constitute a set of rules that generates efficient incentives⁹ [...]. Traditionally, legal theory does not give much weight to efficient incentives. The contractual remedies are rather aimed at offering protection to the party who suffers as a result of the non-performance of its obligation by the other party. Nevertheless, the legal perspective does not conflict with the economic perspective”;¹⁰

7 It should be noted that the following are strictly speaking statements. However, these statements are sufficiently clear to affirm that they express propositions that are *prima facie* coincident with the statements of which they are the propositional content.

8 ALMEIDA *et al* (2016), p. 9.

9 Schweizer defines an efficient allocation as “if there is no other possible allocation that is preferred by all parties involved”.

10 SCHWEIZER (2009), p. 2.

3. “competition [law] is primarily concerned with economic efficiency and aims to increase the overall well-being of society by maintaining rivalry between enterprises”.¹¹

Proposition 1 is a statement in a report published by the Joint Research Centre, “the European Commission’s in-house scientific service”.¹² Proposition 1 argues that the reasonable consumer paradigm introduced by the European Court of Justice in its jurisprudence is contrary to the results of behavioural research. This is a kind of descriptive disagreement: it concerns how consumers actually are and therefore how the world actually is. Proposition 2, on the other hand, contrasts the economic and legal views about the purpose of contractual remedies. From the economic perspective, this aim is to provide efficient incentives. For the legal perspective, however, the aim is to protect against non-performance. At the same time, however, there is no practical conflict between the two perspectives. In this case there is a disagreement on the purpose of contractual remedies: efficient incentives for the economy and protection against breach of law. Incidentally, however, the two views would converge on the desirable rules. Finally, Proposition 3 refers to a legal practice, competition law. The language used clearly suggests that this is an economic proposition but, unlike in Propositions 1 and 2, there is no disagreement. However, consider also the following proposition:

3’ “The goal of competition law is to protect the market as a means of enhancing consumer welfare”.¹³

It is clear that there is a disagreement between those who, like Cseres (and many economists) support Proposition 3 and those who, like the Director General of the European Commission Lowe, support Proposition 3’. Again, the disagreement concerns the goal of the law.

Now, imagine you’re a judge. What if someone claims that Proposition 1 is a reason to decide a case differently from the relevant precedent? Or if you are dealing with a complex argument where, for example, someone invokes the application of punitive damages in order to provide efficient incentives despite this goes beyond the protection of the claimant against the defendant’s breach

11 CSERES (2005), p. 405. In the original quote, the subject is competition. However, it is clear from the context that the author intends to refer to competition law.

12 ALMEIDA *et al* (2016) p. 1. The Joint Research Centre is not the official position of the European Commission. On the impact of behavioural economics on the economic theory of consumer protection, see ESPOSITO (2017b).

13 LOWE (2007). For a much more in-depth investigation of the purpose of EU competition law, see HILDEBRAND (1998).

of contract? Or, again, if an application of competition law is criticised because it reduces overall welfare even if it increases consumer welfare? In all these and similar cases, the problem to be addressed is as follows: is there any reason to take the economic proposition into account in the legal argument or can it be considered irrelevant?

Intuitively, the third case seems the simplest. EU law has adopted a position different from Proposition 3: Proposition 3 is thus legally irrelevant. However, a doubt arises: if it is true¹⁴ that for economists competition must maximise overall welfare, why has EU law taken a different stance?

Maybe jurists have not fully understood the economic purpose of competition in the market. Or it could be that, seen in its best light – as Dworkin recommends – competition law is aimed at maximising overall welfare. Even with Proposition 2, things are not much better. If there is convergence between the function of protecting against default and providing effective incentives, typically,¹⁵ could it not be that jurors are confused and that they are actually acting to formulate efficient incentives? What do the judges at the Court of Justice of the European Union know about the real behaviour of consumers? Why should we trust their opinion instead of that of the behavioural scientists who have been studying consumer behaviour scientifically for years?

When you have doubts like these, you doubt whether economic propositions regarding the law can be used to warrant legal propositions. As we will see better in the next paragraph, this is a particular kind of disagreement: a disagreement that is both interdisciplinary in the strict sense and theoretical in the sense made famous by Dworkin - that is, an interdisciplinary theoretical disagreement.

III. THE SORE POINT OF THEORETICAL DISAGREEMENTS AND THEIR RELATIONSHIP WITH INTERDISCIPLINARY DISAGREEMENTS

In *Law's Empire*, Dworkin argued that legal positivism cannot adequately account for what, according to him, is a central aspect of legal practice, namely

14 Although this position is clearly majority in economic theory, there are alternative positions which tend to shift the focus from overall welfare to consumer welfare. I discuss it in ESPOSITO & GRUNDMANN (2017) and in ESPOSITO & ALMEIDA (2018).

15 By “convergence” I mean that the same conclusion is reached, but on the basis of different reasons.

theoretical disagreements. Theoretical disagreements are disagreements about the conditions that need to be met to make a proposition of law true.¹⁶ They must be distinguished from empirical disagreements, which occur when there is agreement on what conditions should be met, but it is not clear whether they have occurred. Rather than the concept of truth, I prefer to use the epistemic concept of warranty, in accordance with the stipulation proposed by Susan Haack. Haack identifies three components of the warranty offered by evidence for a claim: supportiveness, independent security and comprehensiveness.¹⁷ I find Haack's concept of warranty interesting for three reasons. First, she offers a general theory, applicable to any kind of evidence and assertions. This is particularly useful here, where the interest lies in the relationship between different disciplines. Secondly, the concept of warranty is more practical than that of truth. For example, even if it were considered that it is uncertain that the Earth rotates around the Sun, it could still be assumed that the assertion that the Earth rotates around the Sun is better warranted by the available evidence than the assertion that it is the Sun that rotates around the Earth. Finally, the concept of warranty shifts attention from the warranted claim or proposition to the argument that warrants it. This, as we will see better below, is exactly the kind of perspective that allows - or at least this is the position defended in this essay - to account for the problem of interdisciplinary translation:

Theoretical disagreement: A1 asserts (or implies) that a proposition of law is warranted if condition *C* occurs and A2 asserts (or implies) that a proposition of law is warranted if condition *different from C* occurs.

According to Dworkin, the problem with legal positivism is that considering law as a conventional practice distorts what happens when lawyers disagree on what the law establishes. If the law is a set of conventional social facts, when there is disagreement about what these conventional facts are, then there is no law. Thus, jurists would be mistaken or intellectually dishonest in claiming that there is a conventional social fact in support of their claims about what the law establishes. Legal positivism therefore fails to account for the *face value* of the legal practice. As is well known, in 2007 Shapiro claimed that positivists had not offered an adequate response to this criticism.¹⁸

16 DWORKIN (1986), pp. 4-5.

17 HAACK (2015), pp. 19-21.

18 SHAPIRO (2007).

In the positivist field, two main strategies can be distinguished to replicate to Dworkin.¹⁹ We owe one to Leiter. Leiter, in a nutshell, formulates two replicas. First, the phenomenon of theoretical disagreements is by no means pervasive but concerns only the top of the legal pyramid. It is therefore not a central aspect of legal practice. Consequently, considering that overall the positivist approach manages to account for legal practice better than Dworkin's theory, it would be preferable even if it were unable to offer a convincing explanation of theoretical disagreements. Second, theoretical disagreements are quite well explained in terms of intellectual error and dishonesty.²⁰ The second strategy is in particular due to Shapiro and Ratti (and his co-authors Dolcetti and Béltran). These positivists focused their attention on the centrality of legal interpretation.²¹ To underline the centrality of interpretation, Shapiro has even abandoned the expression theoretical disagreements in favour of the expressions "interpretative disagreements" and, then, "(meta-)interpretative disagreements" in *Legality*.²² There are certainly no major differences between the positions of these authors. Ratti and Ferrer even maintain that Shapiro offers a normative theory instead of a descriptive one – which would be, moreover, incompatible with exclusive positivism, in the version previously defended by Shapiro.²³ Be this as it may be, these authors agree that the use of arguments or interpretative canons plays a central role in the explanation of theoretical disagreements. In fact, Dworkin's explanation - based on interpretation as an activity aimed at putting the law in its best light - also focuses on the theme of interpretation. There is therefore broad theoretical agreement that interpretative arguments play an important role in identifying legal standards. In other words, interpretative arguments are important to warrant a proposition of law.

Let us now return to the question of the relevance for the law of interdisciplinary agreements; that is, to the question "under what conditions is the lawyer justified in disregarding the economic perspective?". On the grounds of the above-articulated considerations about the relationship between interpretive arguments and the warranty of legal propositions, lawyers are interested in for-

19 For a more accurate overview of positivist responses, as well as the formulation of a further pluralist response, see RAMÍREZ (2016).

20 LEITER (2009).

21 A noteworthy aspect of this answer - though irrelevant for the present purposes - is that this second line of argument is willing to accept the empirical observation that theoretical disagreements are a central phenomenon.

22 SHAPIRO (2011).

23 See in particular the criticisms made by Ratti and Ferrer to Shapiro in RATTI & FERRER (2013).

mulating interpretative arguments capable of warranting propositions of law. Therefore, the obvious answer seems to be that an interdisciplinary disagreement that is not also a theoretical disagreement - therefore: a purely interdisciplinary disagreement - is a disagreement irrelevant to the jurist who wants to warrant propositions of law. This jurist is in fact interested in interdisciplinary disagreements that are both interdisciplinary and theoretical, i.e. interdisciplinary theoretical disagreements. What he or she is interested in is whether or not the economic proposition is relevant to warrant a proposition of law:²⁴

Interdisciplinary theoretical disagreement: A1 asserts (or implies) that the proposition $PI(Px)$ is part of the condition C to warrant Px in the object practice while A2 asserts (or implies) that the proposition $PI(Px)$ is *not* part of the condition C .

The problem now becomes understanding when a disagreement is purely interdisciplinary and when, instead, it gives rise to an interdisciplinary theoretical disagreement. In order to clarify this, we need to focus on the problem of translating propositions from economics into law.

IV. THE TRANSLATION PROBLEM, THAT IS WHEN WHAT ECONOMISTS THINK MATTERS

In this paragraph, I intend to answer two questions relating to the distinction between purely interdisciplinary and interdisciplinary theoretical disagreements, i.e. the problem of translating interdisciplinary propositions from economics into law: a) “what is the problem?”; b) “how is it dealt with?”.

I begin by commenting on some of the theses put forward by Papayannis that are relevant to the subject. Papayannis believes that when the law uses economic terms, e.g. predatory price, “the significance [of the term] seems to undoubtedly depend on considerations proper to economic theory”.²⁵ Papayannis seems to be in favour of the use of an expertise-based literal argument, according to which the meaning of a term is the meaning of that term according to experts (in this case, economists). Let’s not forget the problem - well exemplified by the troubled

24 On the other hand, there would be an empirical-interdisciplinary disagreement if it were not certain that the interdisciplinary proposition, if guaranteed, would render the condition C verified. In the interdisciplinary theoretical disagreement, instead, the problem concerns the relevance of the interdisciplinary proposition for the occurrence of condition C .

25 PAPAYANNIS (2013b), p. 73.

history of expert testimony in the United States²⁶ - of disagreements between experts.²⁷ I find this comment on technical terms unfounded. Papayannis seems to establish an arbitrary interpretative hierarchy in which the expertise-based literal argument prevails. This arbitrary hierarchy ends up denying the distinction between internal conceptual explanations and functional explanations Papayannis himself discusses at great length.

I find Papayannis's position to be explained by the fact that he accepts Proposition 3, or a very similar one, as an example of internal conceptual explanation. Papayannis calls internal conceptual explanations those analyses deploying concepts belonging to a practice; and he calls functional those external to the practice because they are carried out by using concepts typical of another practice. The nodal point is that the economic meaning of a term is typically established within a functional analysis. More precisely, economists usually define the meaning of terms such as "predatory prices" or "market failures" in an analysis in which they assign a function²⁸ to the modelled practice. Therefore, when functional analysis does not become an internal conceptual analysis - in the terms of this essay, when it produces pure meta-disciplinary propositions - to accept the economic meaning of a term, one must accept the function assigned to the object by the economists. This means implicitly translating the economic function into a legal concept. For example, imagine that a judge rejects Proposition 3 because of Proposition 3'. However, the same judge accepts an economic meaning of 'predatory price' which is justified by the very same Proposition 3. The resulting norm would be functional to maximising overall welfare. This means that the purpose of the provision, as interpreted, would not be to maximise consumer welfare, but to maximise overall welfare.

To explain the error that Papayannis (allegedly) makes and to progress in the investigation, one can start from the conclusion that he draws from the example about the meaning of 'predatory price': "economic factors have an impact on the interpretation of terms with economic content. And whether a term has an economic content depends on how the practice has developed in this regard".²⁹ The central problem seems to me to be that the practice that determines whether a legal term has economic content cannot be economic practice - for it all terms have economic content - but must be legal practice. In the language

26 On this point, see HAACK (2015), pp. 157-205.

27 PAPAYANNIS (2013), pp. 73-74.

28 The function of a practice is typically represented by the function (mathematical)-objective which is intended to maximize its value.

29 PAPAYANNIS (2013), p. 74.

introduced in § 2, in constructing his argument in favour of the legal use of the economic meaning of ‘predatory price’, Papayannis too hastily accepts that a meta-disciplinary proposition is a reason for warranting a proposition of law. How does this acute scholar make that mistake? I think the reason is that, for Papayannis, there is contingently no interdisciplinary disagreement about the fact that competition is aimed at achieving the “wealth maximization”,³⁰ which - in Richard Posner’s terminology - coincides with Proposition 3. As noted, however, an interdisciplinary disagreement does exist. On this basis, Papayannis’s thesis about the meaning of ‘predatory price’ is explained as the consequence of the acceptance of the translation of Proposition 3 from economics into law. Therefore, the expertise-based literal argument is justified by an implicit interdisciplinary teleological argument, consisting in the fact that the economic function of competition and its legal purpose coincide. This is also indicative of a further limitation of Papayannis’s analysis, which allows us to identify an important aspect of the translation problem, namely the possibility of implicit translations.

Papayannis believes that the classification of an explanation as functional implies that this function is “opaque to the participants”.³¹ He does not consider the possibility that an interdisciplinary proposition is so obvious that it is perceived by the participants in a practice as internal to their own practice even if it is not presented as such. I will call the phenomenon in question ‘implicit translation’. As we have just seen, I believe that Papayannis’s argument about ‘predatory price’ is the result of an implicit (wrong) translation. The author’s further mistake is then to have generalized this conclusion to all economic terms.

Consider a classical legal positivist thesis such as that of (modern) law as the union of primary and secondary norms.³² Papayannis considers Hart’s analysis of secondary norms as an example of functional but not internal conceptual analysis.³³ On this basis, he concludes that it is wrong to consider the analysis of the function of secondary norms as an internal one. As is well known, for Hart, primary norms are those that establish the criteria of conduct of the subjects. Secondary norms, on the other hand, correct defects in a legal system consisting solely of primary norms. These defects are uncertainty, static nature, and inefficiency. A system of only primary norms is uncertain because it lacks of norms to recognise primary norms; it is static because it lacks of standards to amend primary norms; and finally, it is inefficient because it lacks of norms for settling disputes relating to breaches

30 PAPAYANNIS (2013b), p. 109.

31 PAPAYANNIS (2013b), p. 126

32 HART (1994), pp. 91-97.

33 PAPAYANNIS (2013b), pp. 125-127.

of primary norms. The type of secondary norm addressing uncertainty is the rule of recognition; the one that addresses static nature is the rule of change; finally, inefficiency is addressed by a type of secondary norm that Hart calls rule of adjudication. This is not the place to study this classification in depth.³⁴

What interests us here is suggesting that the defects identified by Hart are problems so typical for legal practitioners that it seems artificial for a jurist to consider them as interests or values external to legal practice. In fact, lawyers are clearly committed to legal certainty, but also to the adaptability of the law, as well as to avoiding the waste of resources allocated to resolving disputes. With reference to the Italian legal system, these interests or values are exemplified by the *riserva di legge** and the prohibition of analogy in the criminal law (certainty), by the rules governing the legislative process and private autonomy (adaptability) and by the principle of good performance of the public administration (efficiency). It seems to me that these are interests and values that are so obvious to the jurist that he or she clearly considers them relevant.

Again with reference to Hart's theory, similar considerations apply to the five truisms on which the "minimum content of natural law" is based. The truisms are "elementary truths concerning human beings, their natural environment, and aims", which "afford a *reason why*, given survival as an aim, law and morals should include a specific content".³⁵ The fact that Hart identifies these theses as truisms clearly indicates that they are so obvious that it seems difficult to deny them.

Far from the positivist tradition, a similar phenomenon is found in Alexy's thesis that the value of principles varies in accordance with the economic assumption that marginal utility is typically decreasing.³⁶ Here again, it seems entirely reasonable to think that small increases in the degree of satisfaction of a principle which currently gets little satisfaction by the legal system are, *ceteris*

34 See, for example, SHAPIRO (2009), and PINO (2015). I think that PINO's proposal to consider the recognition standard as a criterion for applicability, as well as validity, and to link its study to the theory of legal reasoning is well in line with the perspective adopted in this essay.

* Translator's note: in the Italian legal system, 'riserva di legge' refers to those subjects that can only be governed via statutes. In other words, the use of administrative regulations, law decrees and other sources of law that are not the result of the ordinary legislative procedure is forbidden for these subjects.

35 HART (1994), p. 193.

36 ALEXY (2002), pp. 102-109. For a comprehensive analysis of the connections between Alexy's theory and economic concepts, see ESPOSITO (2018).

paribus, more important than smaller increases in the degree of satisfaction of a principle which is currently largely satisfied.

At a deeper level, although Papayannis admits the possibility of translation, he does not elaborate on the mechanism making it possible.³⁷ On the contrary, he seems to believe that the translation problem is of little interest to the jurist because it does not allow him to obtain “any other knowledge in addition to that provided by an internal conceptual explanation”.³⁸ Evidently, this is not the perspective adopted in this essay: the translation of interdisciplinary propositions from economics into law is an important aspect of the relationship between law and economics. It is therefore necessary to specify more clearly how this activity is possible.

We have already encountered the thesis that some interdisciplinary propositions are so obvious that they can be implicitly translated from economic to legal practice. However, it is not yet clear what exactly is done with the ‘translation’ or how it is done.

A useful starting point for reflecting on this issue is offered by a debate between Patterson and Craswell on the use of economic arguments for the settlement of disputes relating to incomplete contracts. Patterson begins by introducing the distinction between “propositions of” and “propositions about” a practice. The distinction is important, observes Patterson, because the propositions of a practice are warranted according to the rules of warranty of that practice. Therefore, an economic proposition about law - such as Proposition 1 - is to be warranted according to the rules of warranty of economic practice. When this proposition is used in legal practice, this is not enough: the proposition must be warranted according to the rules of warranty of legal practice. If this is not the case, the proposition is not legally relevant.

Patterson also argues that the main way to make an economic proposition concerning the law legally relevant is to consider it as a prudential argument,³⁹ i.e. a consequentialist argument.⁴⁰ In replying to Patterson, Craswell concedes that

37 PAPANANNIS (2013) pp. 78-79. However, in PAPANANNIS (2013b), the author asserts that the “external explanations [...] are based on a methodology that makes it impossible to determine the content of the right”, p. 121.

38 PAPANANNIS (2013) p. 83.

39 PATTERSON (1993), p. 278. For a reconstruction of the debate and its development with reference to the distinction from deontic and consequentialist arguments, see CSERNE (2011).

40 PATTERSON (1993), p. 276. More recently, PATTERSON defined “prudential argument” as an argument aimed at over weighing or screening the consequences (in terms of “costs”)

economists should engage more in trying to translate economic propositions, but he also adds two important clarifications. First, the connection between the economic proposition and the prudential argument suggests that any economic proposition concerning the upright should be conceived as preceded by the ‘implicit premise’ that such a proposition is to be understood as a prudential argument. Second, Craswell believes that Patterson is too pessimistic about the possibility of translating economic propositions.⁴¹ In fact, Habib’s doctoral thesis - of which Patterson was the supervisor - provides a clear example of this second clarification.

Habib wants to draw our attention to the fact that there is a way of thinking characteristic of private law that is becoming progressively marginalized. Among other theses, Habib notes that private law allows the translation of economic propositions into private law propositions. As an example, Habib discusses the economic proposition put forward by Eisenberg that there is a type of ‘promissory structure’, which HABIB calls the interested promise, characterized by the fact that one party makes a promise that increases the probability of the exchange, but such a promise does not require in return either a promise or an act.⁴²

Habib shows that while Eisenberg does not argue in favour of the (legal) obligation of an interested promise with legal arguments, these arguments can be constructed - or at least this is Habib’s attempt. More precisely, Habib argues in great detail that there is an exchange of values between the promisor and the promisee and, as a result - this is the nodal point - the alleged obligation of the former to the latter has a commutative cause. Therefore, the proposition “an interested promise is a source of obligations” must be considered as a warranted legal proposition. In other words, HABIB argues that, under private law, any interaction with a synallagmatic cause is a source of obligations and that, as a result, an interested promise is a source of obligations under private law. At this stage, it would seem useful to clarify the rationale justifying the conclusion that the interested promise is a legal source of obligations:

L1 the commutative cause is a source of obligations;

L2 a synallagmatic exchange has a commutative cause;

E1 in an interested promise there is a synallagmatic exchange;

of a certain rule, PATTERSON (2005), p. 248.

41 CRASWELL (1993).

42 HABIB (2016), esp. pp. 35-51.

C the interested promise is a source of obligations.

In Habib's reasoning, the first two premises (L1) and (L2) and the conclusion (C) are legal, while only the third premise (E1) is economic. The reasoning shows three important aspects of translation problem. First, the fact that a proposition is translated does not mean that the conclusion of the reasoning is legally correct because one can always doubt the legal validity of the premises. For example, you could refuse (L1) or (L2) or hold that 'synallagmatic exchange' has a different meaning in (L2) and (E1). But if you accept the premises, logic requires you to accept the conclusion. Secondly, a translation can also take place through an argument - such as that of Habib, which is conceptual - very different from a prudential argument. Thirdly, and in general, translation occurs when an economic proposition is integrated into the warranty of a legal proposition.

Before wrapping up, it seems useful to recall the model of judicial reasoning introduced by Wròbleski.⁴³ Wròbleski starts from the well-known model of judicial syllogism introduced by Beccaria, in which the decision of the concrete case follows deductively from a greater premise in law and a lesser premise in fact:

1. major premise in law;
2. minor premise in fact;
3. decision.

Wròbleski observes that legal reasoning cannot be reduced in an exhaustive way to this inference, as it excludes a series of important operations carried out by the jurists which are responsible for the justification of the premises. Therefore, the model must be enriched with the stage of justifying the premises:

1. major premise in law ← external justification in law;
2. minor premise in fact ← external justification in fact;
3. decision.

Here, we are not interested in investigating whether a relation exists and, if so, which one between the justification of the premise in fact and that in law. What must be observed is that the translation from the practice of economics to

43 WRÒBLESKI (1992). For a review of the evolution of the debate, see CANALE (2013).

the practice of law occurs only when the economic proposition becomes part of the external justification in law.⁴⁴ Indeed, only the elements of the external legal justification can be relevant to warrant the major premise in law. If the translation does not take place, the economic proposition remains completely irrelevant for the purposes of identifying the law to be applied in the specific case.

In the light of the above considerations, the questions opening this paragraph allow the following answers:

1. What is the translation of translation from economics into law? The problem is to determine whether an economic proposition is relevant for warranting legal propositions;
2. How do we deal with the translation problem from economics into law? The problem is addressed by integrating the economic proposition into the external legal justification of a legal proposition, i.e. by arguing that legal practice makes it possible to incorporate the economic proposition into the reasoning for the identification of a legal proposition.

It is important to note that solving the problem of interdisciplinary translation does not mean that the legal proposition supported by the economic proposition is sufficiently warranted to be applied, but only that the economic proposition is relevant to the justification of the rule to be applied. In fact, even after the translation, one may still disagree that the proposition of law supported by the proposition of economics is the one to be applied. In particular, in the event of disagreement as to the conditions which must be met in order for the proposition of law to be warranted, there will be a theoretical disagreement. However, since the disagreement over the legal relevance of the economic proposition has been overcome, the disagreement is no longer an interdisciplinary theoretical one.

On the basis of these reflections, I believe that the first thesis of this essay is adequately warranted: the disagreements between economics and law can give rise to interdisciplinary theoretical disagreements if and only if economic propositions are translated into the external justification of propositions of law.

44 One should also ask whether economic propositions can be used both to identify sources and to interpret them, but such an in-depth examination is not permitted in the space of this essay.

V. DISAGREEMENTS ON THE RELATIONSHIP BETWEEN LAW AND MORALITY AS A TRANSLATION PROBLEM

In the previous paragraph it was seen that the translation problem from economics into law is a problem about the relevance of an economic proposition for the external justification of a legal rule and that the solution of this problem depends on the way in which the legal practice is carried out in a given case. An objection - one could say - 'identitarian' consists in affirming that this type of information does not fall within the scope of the themes that the theory and philosophy of law are called upon to deal with. Personally, I believe that this remark is conceptually uncharitable and historiographical inaccurate, but I do not wish to oppose it at the historiographical level. I prefer to show how some well-known theoretical propositions about the relationship between law and morality can be effectively described as a problem of translating interdisciplinary propositions from morality to law. I refer in particular to some versions of the connection (C) and separability (S) theses between law and morality:⁴⁵

C1. strong natural law thesis: immoral law is not law;

C2. weak natural law thesis: intolerably immoral law is not law;

C3. neo-constitutionalist thesis: in constitutional states, immoral law is not law;

S1. thesis of inclusive legal positivism: the immoral law can be law;

S2. weak exclusive positivist thesis: the law can allow the application of moral standards;

S3. strong exclusive positivist thesis: immoral law is law.

It can be immediately observed that the two extreme theses, that is the strong natural law thesis and the strong exclusive positivist thesis, are two categorical but opposed views about the relationship between law and morality. The first thesis always admits this relationship as relevant to law and is in fact also called the thesis of the necessary connection between law and morality. The second thesis always denies this relationship as relevant to law and is in fact also called the thesis of the necessary separation between law and morality. At the same time, the four intermediate theses all admit limited forms of connection between law and morality:

⁴⁵ For a discussion of these and other theses on the subject of connection and separability, see, for example, BARBERIS (2011).

for the weak natural law thesis, the limit consists in the threshold of tolerability; for the neo-constitutionalist thesis, it is found in the constitutional character of the legal system; for inclusive positivism, the question admits a factual answer. Finally, even for the weak exclusive legal positivist thesis, the question admits a factual answer: it must be observed whether in a given legal system the law allows morality to be applied.

Up to this point, I have just summarised a number of positions typically discussed in legal theory in the terms in which they are usually discussed. I now want to show that these considerations can be reformulated in terms of the relevance of morality to the external justification of legal rules. If this is the case, the above-listed theses are different answers to the question “under what conditions is the jurist justified to disregard the moral perspective?” and are therefore related to the translation problem, this time from morality to law.

In order to ascertain this, consider the case where a lawyer claims that “norm N, invoked by the other party as the legal norm to be applied in the present case, is contrary to moral norm M”. The reaction of a legal practitioner to this assertion allows us to make inferences about the thesis on the relationship between law and morals she accepts. This thesis concerns the determination of part of the conditions that must be met to warrant a proposition of law. More precisely, in the legal reasoning aimed at establishing the norm to be applied to the case, the various versions of the connection and separability theses set out the conditions under which the existence of a moral norm M contrary to an allegedly legal norm N is relevant to the establishment of its legality.⁴⁶

This is nothing but the reformulation of the translation problem. In fact, disagreements between the supporters of the various versions of the connection and separability theses are theoretical disagreements that, at the same time, concern interdisciplinary propositions and are therefore interdisciplinary theoretical agreements. In order to observe this, it is appropriate to break down the assertion A on the relationship between M and N into three simpler assertions:

A1. “Counterparty argues that N is the legal norm to be applied in the present case”;

A2. “there is a moral norm M applicable to the present case”;

A3. “M is against N”.

⁴⁶ This is a simplification because, for example, on the basis of A, it could be assumed that N is a legal provision but that it is inapplicable or not compulsory.

Let's start with the extreme theses, C1 and S3. According to the strong natural law thesis C1, if the judge shares A1-A3, then N is not a legal norm. On the contrary, according to the strong exclusive positivism thesis S3, the judge sharing A1-A3 would be irrelevant since A3 is legally irrelevant. In the case of the intermediate theses, however, the lawyer's statement is incomplete and can be considered relevant by the judge only if more specific conditions are met. According to the weak natural law thesis C2, the lawyer must support something more precise than A and in particular of A3, namely A3': "M is intolerably against N". The neo-constitutionalism thesis C3, instead, requires a reformulation of A2, because it is not enough that the moral norm M exists for it to be relevant, but it must be constitutional law to determine its relevance and therefore applicability. This requires a different formulation of A2, as A2': "there is a moral rule M applicable to the present case by reason of constitutional law". The inclusive positivist thesis S1, similarly to neo-constitutionalism, modifies A2, but draws more attention to the criteria of warranty (or validity) established by the rule of recognition and to the fact that it involves the incorporation of a moral norm into law; A2'': "There exists a moral norm M applicable to the case in question as it is incorporated into law". Finally, also for the weak exclusive positivist thesis S2, A2 must be modified. This time, however, the modification does not determine the incorporation of the moral norm, but only its applicability; A3' "There exists a moral norm M applicable to the present case in so far as the law makes it applicable".

The above analysis shows how the different theses on the connection and separability of law and morality represent different criteria for determining whether, and if so, under what conditions, morals are relevant in legal argumentation. This means that these theses represent different answers to the translation problem from morality to law. In fact, these theses are criteria for considering whether or not a moral proposition about law is relevant in legal argumentation. In other words, they are all aimed at establishing whether a moral proposition about law is a purely interdisciplinary proposition or whether it may lead to an interdisciplinary theoretical disagreement.

VI. CONCLUSION

In this essay, I addressed a central problem in the relationship between legal and economic practices, which I then showed to be similar to a central problem for legal theory. More precisely, the translation problem of a proposition from economics to law is similar to the much discussed problem of the relationship between morality and law. Disagreements regarding the conditions of relevance

of interdisciplinary propositions are in fact in both cases interdisciplinary theoretical disagreements.

In the course of the analysis, I argued that the translation problem requires making the economic (or moral) proposition part of the external justification of a legal norm, i.e. transforming the interdisciplinary proposition into a legal argument. The conclusions concerning the problem of translation make it possible to determine whether an interdisciplinary disagreement in the strict sense is, or is not, also a theoretical disagreement, thus giving rise to an interdisciplinary theoretical disagreement.

From a more general perspective, a noteworthy aspect of the analysis offered in this essay is having linked typical themes of philosophy of law and legal theory with a central aspect of the relationship between law and economics. For this reason, it seems reasonable to me to suggest to philosophers and theorists of law that they should be more interested in the relationship between law and economics.

A clear limitation of the analysis, however, is that it is far from providing an account of the ways in which the problem of interdisciplinary translation can be addressed. However, I believe that this is one aspect of the translation problem which is contingent and therefore requires an analysis that cannot be provided here.

In any case, the above considerations have highlighted two aspects of the translation problem that can certainly represent important starting points for more in-depth investigations. This is, on the one hand, the possibility of “implicit translations”. This phenomenon has been claimed to be relevant also for the elaboration of authors such as Hart and Alexy. On the other hand, the analysis of Habib’s investigation has shown that translation can be carried out at a conceptual level and therefore not only through some form of consequentialist argument, as suggested by Patterson. In this regard, the criticism of Papayannis’s reflections has shown that it is necessary to be careful when carrying out translation activities because often economists determine the terms they use within functional analyses that can well assume a function for a regulated practice different from that the law assigns to that practice. This calls for caution. It is important to ensure that functions which conflict with those assigned by law do not end up determining the latter’s content by reason of a translation error, especially if it is implicit. Because of the tendency of economists to be reluctant to take into account the point of view of jurists, it seems plausible to expect that the linguistic therapy identified in this essay falls, in practice, on the shoulders of jurists. Thus, among the jurists, philosophers and theorists of law - especially the analytical ones - are in a privileged position to contribute to a better dialogue between law and economics.

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