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Efficiency in Legal Transplants: an Essay in Comparative Law and Economics

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***3 EFFICIENCY IN LEGAL TRANSPLANTS: AN ESSAY IN COMPARATIVE LAW AND ECONOMICS**

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It is the aim of this paper to throw some light on the role of economic efficiency in explaining in a comparative perspective patterns of legal change. In doing so I will try to use the tools of law and economics and comparative law, two of the most interesting general approaches to legal scholarship within the western legal tradition.

In the first two sections of this paper I will introduce two theories of legal change that have been developed in comparative law and in law and economics. I will then describe and discuss, in the light of economic efficiency, the development of some analogies and differences between legal systems in the law of property. Indeed, in this field it is manifestly not the case that most changes in the laws of a country result from imports from other legal systems, even if it is also true that there is nothing very uncommon in such importations. Thinking in terms of efficiency may therefore offer some clue to understanding convergences and divergences in property law.

In this paper, I will consider Comparative Law and Economics a positive discipline, which--from the standpoint of efficiency--"deals with the transplants that have been made, why and how they were made, and the lessons to be learned from this." Comparative Law and Economics, on the other hand, may be considered a practical study, which--again from the efficiency point of view--"deals with the transplants which are appropriate and how they should and can be made." [\[FN2\]](#) In the language common among law and economics scholars, I can say that there may be both a positive and a normative version of Comparative Law and Economics. [\[FN3\]](#)

1. Legal Change, Legal Transplants, and Comparative Law

Comparative law has reached an important conclusion in its more recent and sophisticated developments. In most cases changes in a legal system are due to legal *4 transplants. [\[FN4\]](#) "The moving of a rule or a system of law from one country to another" [\[FN5\]](#) has now been shown to be the most fertile source of legal development since "most changes in most systems are the result of borrowing." [\[FN6\]](#) Comparative lawyers have been prolific in amassing evidence for this somewhat paradoxical conclusion. Indeed, it would be impossible to understand the very idea of a Western legal tradition without acknowledging the enormous variety of legal rules and styles that are common within it, not only within the civil law and the common law orbits, of course, but also across the borders of these legal families. [\[FN7\]](#) Such analogies are the results of legal transplants, ancient as well as recent.

This enormous quantity of evidence, however, has not been explained in a satisfactory way.

Indeed, the few attempts to explain legal transplants from one system to another have relied on the largely empty idea of "prestige." [\[FN8\]](#) This shortcoming is due to the fact that comparativists who have been working on legal transplants are less interested in a theoretical explanation of why a legal borrowing happens than in observing its occurrence. This concern is the result of their desire to accumulate evidence to challenge the widespread paradigm of contemporary legal theory according to which law is the result of the "felt social needs" of a given society. [\[FN9\]](#) The result of this situation is that "we are still at the stage where even the basic factors of legal change are not understood." [\[FN10\]](#) Such lack of a theoretical explanation, however, sometimes makes the very theory of legal transplants unsatisfactory. In many cases there is no evidence of legal transplants and indeed a convergence occurs. Sometimes a legal change happens because minority views in a country become the rule; and not rarely minority views from another country, which never become law there, may also be imported.

2. Legal Change: The Efficiency Explanation

More or less during the same period in which comparative lawyers have been working out their theory of legal change based on transplants and borrowings, Law and Economics scholars have been attempting their own explanation of why a change in legal institutions happens. Some of their efforts have been brought together in a symposium organized at the University of Chicago by Mario J. Rizzo. [\[FN11\]](#) That meeting turned out to be a confrontation between committed lawyer-economists and some of their opponents, which became "an evaluation of the economic efficiency approach to the study of law." [\[FN12\]](#) This was to be expected. In many of the papers delivered there, to explain the observed pattern of change economists claimed "there is whether by conscious choice or by social necessity a strong tendency for the common law to adopt efficient legal rules." By so doing economists were echoing "one of the most persistent themes in the legal literature ... that the common law grows and matures in response to social change.... Older principles are distinguished away or swept aside by judges who recognize their obsolescence." [\[FN13\]](#) By so doing law and economics has taken the approach to legal change challenged by comparative law. It is no surprise that this happened unconsciously, given the compartmentalized growth of legal scholarship. Indeed the analysis of legal change offered by Watson and others was completely neglected in the whole symposium. But, nevertheless, changes in such areas of the common law as contract, or torts, or even property will prove nonsense if a parochial approach is taken. [\[FN14\]](#) On the other hand, the comparative literature on legal change has not paid any attention to the results reached by lawyer-economists. Yet some of the papers delivered in Chicago tended to reject the simplistic story of the changes in the law following the social needs. [\[FN15\]](#)

3. Convergences: The Example of Takings

In comparative law jargon a convergence is defined as the phenomenon of similar solutions in different legal systems. [\[FN16\]](#) In France there is no ex post judicial review of constitutionality. [\[FN17\]](#) In Germany and Italy there are special Constitutional Courts. [\[FN18\]](#) In the United States any judge may strike down an act or decision as unconstitutional. [\[FN19\]](#) *6 In the United Kingdom there is not even a written constitution to apply. [\[FN20\]](#) Despite these huge divergences in the relevant institutional background, the law of takings may be considered largely convergent in these systems so far as the underlying principles are concerned. [\[FN21\]](#)

Such a convergence may be explained by using both legal transplants and economic efficiency. Indeed, the guarantee of private property against the State, theoretically described by the natural law and embodied in the revolutionary Declaration of Human Rights, has been one of the cornerstones of modern political as well as legal doctrine. From France it has found its way directly to America and to Italy, [\[FN22\]](#) and more indirectly, to England (via Blackstone) [\[FN23\]](#) and to Germany (via America). [\[FN24\]](#) Its content has been clear enough to lay the foundations of a somewhat common law (necessity of public use; compensation). It has been flexible enough to allow historical

divergence, particularly as to the amount of compensation, although the trend is towards market value. The concept of legal transplants is useful in informing us that all this has happened and the pattern to which happening belongs. But why did it happen?

Legal questions of tremendous importance are faced by any legal system that for the first time has to confront the problem of takings in the light of a guarantee for private property. Is private taking allowed? If not, what are the standards for public use? Is compensation to be paid? If yes, how much? The explanation of prestige may suggest to us, in general terms, that when a legal problem is confronted: "the overwhelming tendency is to turn to a more developed legal system. Great disparity in legal structure or sophistication is no bar to borrowing. But the more complex law is likely to have been the product of a more developed economy: The custom of Paris is looked to by small rural southern French towns; the law of thriving Magdeburgh, by remote Polish settlements; Roman law by wandering German tribes" [\[FN25\]](#); more recent examples may be drawn from the tremendous prestige of the French Code Civil, copied throughout the civil law tradition; from German nineteenth-century pandectist scholarship, imitated not only in the civil law but also in the common law world [\[FN26\]](#); from modern American law, which is looked to from Europe to Japan.

Sometimes, however, particularly if we consider the modern western legal systems, we may see that the borrowing is by no means limited to models coming from one system. Modern Japanese law, for example, is as much influenced by American legal culture as by German or French. The new Dutch Civil Code is filled with rules borrowed *7 from France, Germany, and the Common Law. The same may be said of Israel, Italy, and even England since its law has entered its new European dimension. It is not then the prestige of a certain legal system that we must look at, but the prestige of the legal culture of certain portions of a particular legal system. For example, German administrative lawyers are very prestigious in Japan, whereas in corporation law American legal culture has the lead. Italian criminal law and administrative law are still German, whereas most of the more recent influence on the private law is Anglo-American. French and even Italian administrative law are at work in Great Britain, where a clear influence of American models may be detected in jurisprudence. All of this, of course, is a matter of prestige, but when we face all these complex sets of sectorial transplants the problem remains of finding the reason for each of them. A subject like takings, for example, cannot strictly be classified as public law or private law. Why, then, was the particular solution borrowed in Japan, for example, taken from Germany and not from the United States, given the fact that both legal cultures are very prestigious?

As I hope the example of takings makes clear, each single legal transplant has its own peculiarities that make it different from every other. It can be more or less general, more or less confined to a superficial level of the legal system; it can be within an area of the law, or it can be at the crossing of two areas in which different "prestige" models are at play; it can affect areas of the law more or less pregnant with policy reasons. We should therefore distinguish a legal transplant from another or, more generally--since we may be in an area of the law where no transplants happened at all--a pattern of legal change from another.

Takings gives us an example of a convergence by no means limited to a small number of systems. It exhibits a general trend in the law that may help comparativists in the somewhat emphatically stated task "to discover the forces that are permanently and universally at work in all systems of law." [\[FN27\]](#)

Can one of these forces be economic efficiency?

If we examine the problem of takings, there can be no serious doubts that there are strong economic reasons to compensate at market value private property sacrificed for public use. As far as the public use requirement is concerned, the economic theory of public goods provides both a justification and a limit. [\[FN28\]](#) The justification is that the government needs to be able to acquire the inputs that are necessary to provide public goods for which the market cannot easily provide. The limit is set by the consideration that any private use of the power of eminent domain will be inefficient since it produces a result that private parties were not able to reach by bargaining. The forced sale, in other words, would move the property from a higher valued use to a lower valued use.

Compensation should be paid for takings to avoid externalities. It is inefficient to compel a private property owner to pay alone for benefits that are enjoyed by the whole community. Moreover, the costs of governmental action should be internalized. In a public use of eminent domain, however, it is inefficient to allow the private property owner to force the government to pay the reservation price for his property (i.e., the subjective value that he could insist on obtaining from a private person) *8 because this would make the governmental supply of public goods utterly impossible. Every single owner whose property is involved would overestimate the value and, moreover, would have an incentive to be the last person to settle. The efficient outcome is therefore guaranteed by paying the objective market value.

This short economic analysis suggests that the general convergence of modern legal systems, despite the large variety of institutional backgrounds, could be explained as a movement towards efficiency. In this case there seems to be a synergy between the efficient model and the "prestigious" model. Efficiency may be used to evaluate legal transplants. The following pages will be an attempt to develop a rudimentary typology of different legal changes in order to get some insights into the role played by economic efficiency within them.

4. Competitive Models: The Example of Trusts

In a former paper written with an economist, I have argued that the framing of legal rules may be explained as the outcome of a competitive process. [\[FN29\]](#) Indeed, the analysis of legal transplants may be enriched by such an approach. We may imagine that every legal system or every component of it produces different legal doctrines or techniques for the solution of a given problem. All these different inputs enter what we may call the market of legal culture. Within this market the suppliers meet the need of the consumers. This process of competition may determine the survival of the most efficient legal doctrine.

There are several difficult problems that we must face in order to prevent this simple model from becoming simplistic. First, we must consider that in the market of legal culture, suppliers and demanders may be the same. Secondly, the so-called legal tradition, or worst, legal parochialism, may restrict the market unduly and so failures result. As to the first point, for example, it is clear that a judge may be at the same time a supplier and a consumer of a given legal doctrine. During her decision-making she can create a new legal rule or she can apply a legal rule already created by someone else (another judge, a statute, or a law professor). Most of the time she will do both things together. Of course, lawyers and their clients are the most obvious consumers in the market of legal doctrines. It would, however, be artificial to consider them as the only ones. [\[FN30\]](#) Sometimes legislatures are consumers and law professors suppliers, as obviously happens in most major codifications, both in the civil law and in the common law.

As Hayek has shown, it is the competitive process that creates knowledge among consumers. [\[FN31\]](#) This is also true in the market of legal ideas, but we must consider that so-called legal positivism, an approach to the law that has followed the birth of the modern State, has built up a

commonly perceived difference between the market of commodities and the market of legal doctrines. What we could express in economic terms as mercantilistic and protectionistic policies, aimed to protect a particular market *9 from foreign competition, became the rule in the market of legal ideas after the birth of the modern State. Lawyers commonly feel that the extent of the market for legal doctrines is limited by the borders of the State where legal rules are "binding." Markets for commodities, on the other hand, tend to be universal. Of course, all the comparative work on legal transplants has shown that legal positivism falls short of making political frontiers waterproof. However, since knowledge of foreign doctrines is what makes transplants happen, original (or even deliberate) legal ignorance due to parochialism should be considered in our picture.

Let us now take an example where competition made a transplant occur. It is well known that the appearance of trusts is an incident of the very peculiar dual institutional arrangement of common law and equity. [FN32] Trusts are an institution of property, an area of the law where most of the notable differences between the common law and the civil law can be found. Historically, by creating uses and trusts the common lawyers have been able to obtain a number of institutional arrangements that were precluded by the continental unitary theory of property rights. Continental property law developed without the flexibility created by trusts because lawyers could rely on a general theory of obligations that allowed them by using the law of contracts to construct most of the technical arrangements that common lawyers were making by using the law of property. We should consider, moreover, that the common law developed without a general theory of contract for all its formative period. [FN33] This very different historical development created very different legal institutions. As a result, today the beneficiary of a trust is much better off than his civilian counterpart who entered into a so-called fiduciary relationship. [FN34] Law and economics teaches us to consider the bundles of rights, powers, and liability protected by the legal system in the same way as any other commodity and to focus on their desirability. [FN35] Now if we follow this approach we may easily see why a consumer in the market of legal doctrines would rather buy a trust than one of its civilian counterparts. Indeed, the beneficiary of a trust is protected by a very effective property rule (ex ante injunctive relief plus tracing), whereas his counterpart may, if at all, obtain only a liability rule protection.

As a matter of general policy, moreover, since transaction costs are likely to be low in a trust situation, a property rule is also commended by the "normative Coase Theorem," which suggests that one "structure the law to remove the impediments to private agreements." [FN36] Moreover, the common law institutional arrangement favors the circulation of wealth since it gives an incentive to risk-averse investors by guaranteeing them the effective protection of the law. Comparative lawyers, of course, have been attracted by this legal institution and have created the minimal knowledge *10 that is necessary for a transplant to happen. It is no wonder, therefore, that, despite the very peculiar institutional background in which the law of trusts has developed, as soon as its potentialities became clear to the economic and legal community, this institution became very fashionable. Many mixed jurisdictions-- like Louisiana, Quebec, and Scotland--even if very keen on protecting their civilian heritage, have never resisted the use of trusts. Many South American civilian systems have adopted the institution of trust by legislation. The same has been done in Japan and Lichtenstein. [FN37] After a period of technical gestation, in 1985 in The Hague civil law and common law countries entered a convention on the recognition of trusts and the law applicable to them. [FN38] Trust has obtained an easy and well-deserved victory in the competition in the market of legal doctrines. [FN39]

To be sure, if we proceed outside of the law of property, the explanation for efficiency formulated in terms of competition could be developed more in such fields as international commercial contracts and multinational corporations. In the former case, these contracts normally specify a forum for the resolution of disputes that coincides with the choice of law to govern the

contract: to attract such provision, legal systems will compete to provide legal principles that meet the demand of the contractors. A similar competitive mechanism takes place because multinational corporations will choose a legal establishment that maximizes legal benefits.

5. Tradition, Ideology, and Ignorance: The Example of Building on Someone Else's Land

If a transplant happens in a competitive scenario, it is likely that--as in the hypothesis of trust just discussed--the transplanted rule or doctrine is more efficient than other possible alternatives. Conversely, one could argue that if a doctrine enjoys a wide success in the competitive arena of international legal thinking and practice, this means that it is more efficient than its alternatives. [\[FN40\]](#)

We have incidentally already noticed that legal parochialism may limit the scope of the market of legal doctrines to a single legal system. In such cases, a change in the law may happen (if it happens) without any legal transplant. Even a convergence may occur without legal transplants as a result of what Professor Rudolph B. Schlesinger [*11](#) calls the rediscovery of the wheel. We could argue that legal parochialism is inefficient in itself, since even when efficient legal solutions are attained, they could have been achieved in a cheaper way, taking advantage of the so-called economies of scale. As a matter of fact, however, when we face legal systems converging on an efficient rule, knowing how it happened (if by means of a transplant or by rediscovery of the wheel) may be interesting from a positive perspective. Much more important from the normative point of view is what Comparative Law and Economics may say about divergent legal rules.

First of all, let me state clearly that divergences in different legal systems do not imply inefficiencies. Indeed, if there is a prima facie case for the efficiency of a legal doctrine on which there is a large agreement within the competitive market of legal theory and practice, this does not mean that there is just one legal rule efficient for each legal problem. Different legal traditions may develop alternative solutions for the same legal problem that are neutral from the standpoint of efficiency.

We could state, however, that when a legal culture is particularly parochial or, which may be another way of putting the same idea, when a legal tradition is particularly strong in a certain area of the law, there may be monopoly problems (due to the ignorance of alternatives) that may encourage the survival of inefficient legal rules. In this case Comparative Law and Economics should give a second look to legal solutions that are likely to be inefficient.

Let us again give some examples. A problem that all legal systems have to face is the following: A is the owner of Blackacre; B is the owner of Greenacre, a neighboring lot. A builds his home but inadvertently trespasses and builds a few inches of a support wall on Greenacre. B asks A to remove its encroachment on her property. It is impossible to remove it without destroying the building just completed.

We find a variety of solutions to this problem. Let us consider five different legal systems: Italy, France, Germany, the United States, and Great Britain. [\[FN41\]](#) Four legal systems out of five, the sole exception being France, do agree that when the builder is in good faith and the trespass is not substantial, he should be entitled to maintain the building. These systems, therefore, by using different techniques, give the property right to A. Italian law [\[FN42\]](#) and German law [\[FN43\]](#) consider this problem in different articles of their civil codes, while American law works out a number of doctrines, the [*12](#) most interesting of which for our purposes is that of easement in invitum. [\[FN44\]](#) Such a doctrine is unknown in England, where, however, the problem is handled

either by means of estoppel or by refusing the injunction, despite the fact that good faith does not excuse trespass. [FN45] French law, on the other hand, considers such an invasion of the property right to contravene Art. 545 of the Code Civil, [FN46] which provides that takings can only be for public use. As a result it gives the property rule to B.

The Coase theorem will tell us that, no matter who as between A and B is entitled to the benefit of a property rule, the parties will bargain out the efficient solution provided transaction costs are low. [FN47] In our hypothesis we are not facing problems related to a complex fact situation as when a large number of parties are involved. Indeed, A and B may bargain out their efficient legal solution just by walking to the fence of their respective gardens and talking to each other. In a case like this we could consider transaction costs low enough to meet the Coase requirement. Law and Economics will therefore tell us that a French-like solution (property rule to B) is as efficient as its alternative (property rule to A). Comparative Law and Economics, by considering historical experiences and not abstract models, enriches the picture with the information that four legal systems sharing with France the economic background have converged on a different allocation of property rights. Indeed, within these four systems two (Germany and Italy) do share with France also the civil law tradition. We should then give the picture a second look. We could proceed by taking account of the advantages of the French rule and then comparing them to those of the alternative rule, applying therefore a cost-benefit analysis. [FN48] We could thus establish that the major costs of the French solution are to be faced in the event of a breakdown of the bargaining process. Indeed, the building must be destroyed to be rebuilt a few inches backwards with all the costs and wastes that entails. [FN49] To evaluate this hypothesis, we must then consider that we are discussing rules by looking backwards, since the good faith and the lack of negligence of the builder A are a prerequisite to our discussion. In other words, the milk is already spilt and the decision about how to clean the table will have no influence on the future occurrence of the same disaster. The shift in property rights involved in the Italian-German-Anglo-American solution is therefore practically costless.

Moreover, in a case like this, transaction costs may rise for the very reason that neighbors are involved. The western legal tradition envisions a world in which neighbors *13 are on bad terms. It is enough to consider how much scholarly effort has been devoted to doctrines like spite fences, abuse of rights, *aemulatio*, intentional nuisances, *troubles de voisinage*, and so forth to take care of cases in which neighbors deeply dislike each other. What a good occasion for B to compel A, whom she hates, to face an economic disaster! A and B may not even talk to each other, as is not at all unusual between neighbors. Indeed, we are discussing a rule that a court is called on to apply in a costly and time-consuming judicial process, the very existence of which is evidence of the inability of A and B to bargain out a solution to their problem. The wasteful destruction of the building will end the suit if A and B are French. The same result will not occur if they are Americans or Germans or Italians or even English. In its normative dimension, Comparative Law and Economics will therefore suggest to a new codifier that he should not follow the French solution. It will suggest that it is inefficient since it is wasteful.

Indeed, to suggest the efficient solution of the conflict between A and B from the standpoint of comparative law and economics we should also consider liability rules. From this point of view, German, Italian, and Anglo-American law lose their previous uniformity. Only Italian, German, and English law protect B with a liability rule. A can maintain his building but will have to pay compensation to B. Italian law does specify that A should pay to B double the market value of the piece of land encroached on by the building (Art. 938 Codice Civile). German law offers B the choice between receiving a permanent rent from A, to be paid annually in consideration of the servitude imposed on Greenacre (par. 912 BGB), or forcing A to buy the invaded land at market value (par. 915 BGB). The English Court, when refusing the injunction against A, has already

granted damages for trespass or, if not, has considered the possibility (reluctantly) of providing damages in lieu of injunction under Lord Cairns' Act. [\[FN50\]](#) American law, on the other hand, refuses, under the doctrine of easement in invitum, any serious relief to B since damages provided for are nominal. [\[FN51\]](#)

The fact of allowing A to maintain his building is per se a redistribution of property rights. It may be seen as a private taking [\[FN52\]](#): When certain conditions are met, land is transferred from B to A in order to favor its more efficient use. Should this transfer take place for free? Let us state clearly at the outset that when a resource is used by someone without paying the price of it we are facing an externality. No system of law that considers efficiency a desirable goal should allow externalities. In view of this general assumption, the protection of B by means of a liability rule is more efficient, since it internalizes the external costs created by A's action. It should be considered that, with the exception of France, A has the choice between maintaining his building or removing it. To be efficient this choice should take account of all costs. The negative impact of externalities on the efficient outcome of the confrontation between A and B, in other words, remains despite the innocent nature of A's encroachment. The American rule on easements in invitum seems therefore inefficient *14 if compared to the German-Italian-English alternative. Finally, there are no efficiency reasons for A to pay double the value of B's land. Indeed, this sort of "punitive element" in an innocent situation seems difficult to explain, even as a matter of justice. As far as efficiency is concerned, it will lead to an inefficient result in all the cases in which the cost of removing the building falls in between the market price of the land and double its value. The German rule, as well as the English, [\[FN53\]](#) seems therefore more efficient than the Italian counterpart.

At this point in our analysis we may therefore rank, as a matter of comparative efficiency, the legal systems so far analyzed in the following order: 1. German-English rule, 2. Italian rule, 3. United States rule, 4. French rule.

Something interesting may emerge from a final comparison between France and the United States. Indeed, we may be curious to know why the two systems have followed such inefficient paths. One explanation can be, of course, that we are faced with a problem of ignorance due to parochialism. Or, without any problem of ignorance, we may be confronting solutions technically demanded by the internal fabric of French or American law. We may therefore be surprised to know that in the strictly similar economic problem arising when A builds a house right in the middle of Greenacre, in a good faith belief that he owns it when instead it belongs to B, both French law and American law abandon their extreme positions and do make use of liability rules.

Indeed Art. 555 of the French Code Civil gives to B the property right in the building but gives A compensation in the lesser amount of the increased value of the land or of its expenses. An interpretation by analogy of Art. 555 could have created an alternative solution, neutral from the efficiency point of view when contrasted with the German one. By giving B the property right to the slice of the building and a liability rule to protect A, French courts could create a legal shadow to the Coasian pursuit of the efficient solution without the big risk of waste in the case of a breakdown in the bargaining process. [\[FN54\]](#)

The same more flexible attitude is shown by American courts dealing with the case of a complete building on someone else's land. Indeed, B acquires the property right to the building but the doctrine of promissory reliance and a series of so-called improvement statutes may protect A with a liability rule when, as in the case we are discussing, he is in good faith. [\[FN55\]](#) We can see a complete convergence reached by different *15 techniques in the common law, Germany, France, and Italy. Liability rules are used as a watchdog against externalities so as to arrive at an efficient and common result. [\[FN56\]](#)

Why does the same not happen when the invasion is only partial? It is easy to detect the ideological reason for this odd situation. Ironically, however, the same ideological concerns (the sanctity of property rights) do lead French and American law to opposite, but commonly inefficient, results. French lawyers and courts are worried about restrictively interpreting Art. 555 because they see the liability rule that protects A as a major exception to the sovereignty of B within the physical boundaries of her property. It is very significant that, lacking an ad hoc provision, they rush to apply Art. 545--the ideological flag of the sovereignty of the property owner. By so doing they argue that a different rule would be a private expropriation.

American law, concerned about the waste that would stem from absolutely protecting B in the idiosyncratic sovereignty of her will, does allow A to maintain the building. It nevertheless refuses to give B a serious remedy by a liability rule because this would sound too much like compensation for a taking that American law forbids in the case of private use. Ironically, a liability rule to B would be ideologically subversive of the French-like protection of private property that Madison enshrined in the Fifth Amendment.

Both the French and the American solutions are inefficient because they take a black-or-white approach without making use of liability rules. When they are compared with each other, we may say that the *prima facie* comparative efficiency of the American solution vis-à-vis the French one may prove to be irrelevant since in the vast majority of the cases, at low transaction costs, A and B are likely to come to the efficient solution by bargaining. The American rule may still prove better as a default solution, but in a legal system seriously concerned with the protection of property rights, such an abrupt redistribution may find it difficult to obtain political and social support, may create tension and uncertainty, and may therefore be an even less efficient solution than the French one. The French and American solutions may therefore prove neutral from the efficiency point of view.

It is also important to consider that when bargaining the parties will offer money to each other in order to buy the entitlement. This is one more reason for a legal system that follows the normative Coase Theorem to avoid black-or-white solutions and to make use of liability rules.

We may summarize this section as follows: A mixture of transplants and indigenous solutions does characterize this area of the law where comparative knowledge, if not totally absent, is so much less developed than in the law of trusts discussed above. We have seen at play a number of efficient convergences, of divergences efficiency neutral, and of divergences not efficiency neutral.

Where ideological problems are less strong, as in the hypothesis of A building in the middle of Greenacre, efficient convergences are more likely to occur. In this case *16 there is no redistribution of property rights involved. When a redistribution is involved, and the lack of information inhibits the development of a competitive market of legal doctrines, ideology is likely to create an irrational constraint to the development of efficient solutions. It is interesting to note that inefficient results are reached in France and the United States, the two legal cultures that today are more affected by parochialism in the study of law.

6. Beyond Prestige: Efficiency in Legal Convergences

There are areas of the law where efficiency very clearly demands a certain solution. Sometimes, for accidental reasons, these areas are, so to say, "transplant resistant" for a number of reasons, the principle being that the different legal traditions have developed strong barriers without, at the same time, attracting as much comparative interest as happened in the law of trusts. Legal parochialism is therefore strong, and we face a monopoly-like situation due to the ignorance of possible

alternatives. It is of course difficult to find examples because legal transplants can be very hidden phenomena.

In these areas of the law, we may find legal change and eventual convergence due to a tendency towards efficiency that has nothing to do with the so-called prestige of the legal model on which convergence is eventually reached. In the areas of the law where important efficiency concerns are at stake, Comparative Law and Economics can play a crucial role in legal improvement. In its normative dimension it may work as a prestigious support to nonprestigious legal systems that have already reached the efficient solution without having the internal strengths to export it. In its positive dimension it helps to detect these phenomena at work.

Boomer v. Atlantic Cement Company, [FN57] the leading American case on industrial nuisances, is a very interesting example of rediscovery of the wheel. In that case an injunction was denied against a polluting cement firm while recognizing clearly the existence of the nuisance. The polluting activity was allowed to continue but a liability rule was used to protect the property owners affected by the pollution. This solution was clearly in accord with the assumption that externalities should be internalized and that liability rules are the most efficient solution when transaction costs are high. The earlier black-or-white solution, to enjoin the activity if unreasonable or to allow it if reasonable, which stemmed from traditional Common Law equity remedies, was obviously inefficient. American law has abandoned it only after a long process in which efficiency considerations have finally overtaken tradition. English law has not yet abandoned it despite the theoretical possibilities offered by the so-called Lord Cairns' Act. This resistance of the inefficient rule can be detected both in the usual resistance of the absolute conception of property against a private use of eminent domain and because nuisance is traditionally a tort. [FN58]

*17 Interestingly, the analysis of the civil law tradition, where *Boomer*-like problems have always been studied as belonging to the central core of the law of property, shows us that seventy years before the *Boomer* decision, German law reached the liability rule solution by applying Art. 906 BGB. [FN59] It has done so by following the balancing theory of the great nineteenth-century jurist Rudolph von Jhering. [FN60] This rule has been reproduced in Art. 844 of the Italian Civil Code [FN61] and has long since been the law in Austria and Switzerland as well. In the civil law tradition, therefore, the law has long since reached the efficient result.

Even if the balancing theories of Jhering have enjoyed a large success in America, endorsed as they were by Roscoe Pound, [FN62] in this particular aspect there has been no transplant from the civil law to the common law. Indeed, the First Restatement on Torts in which the black-and-white alternative was "codified" (Sec. 826), which was contemporary with the American influence of Jhering, contains the balancing test. However, the balancing test is used to determine the reasonableness of the polluting activity and not to determine the appropriate remedy. In this case convergence on the efficient rule was reached many years later without legal transplants. [FN63] This example shows how a potentially efficient doctrine may be deprived of any impact if it is introduced in an incompatible machinery of justice. Indeed, detecting these institutional constraints to the reception of efficient rules is another major challenge that faces Comparative Law and Economics.

A final interesting example of efficient convergence hidden by the different styles of legal systems, and therefore difficult to detect, has recently been discovered in the law of future interests. [FN64] Future interests are classified in the common law of property as nonpossessory estates in the sense that they are property rights that do not carry *18 with them the right to possession of property. If A conveys Blackacre to B for a term of years, B receives possession (a term of year is a

possessory estate) while A maintains a future interest in Blackacre, known as a reversion, which will give him back possession after the term of years expires. Reversions and remainders are the typical legal institutions cited by comparativists to show the oddities and the complexities of the common law of property. Within the exotic theory of estates, they seem to be the best example of how the old fabric of the common law "still rules us from the grave." A number of central differences between the civil law and the common law stand in the way of any kind of possible reception of such doctrines in a civil law context. Just to mention the more obvious, the civil law tradition adopts a strict *numerus clausus* theory of property rights that makes impossible a creativity like that of Anglo-American conveyancers. [FN65] The civil law simply ignores the notion of estates. The civil law has a system of land registration, [FN66] which makes it extremely unlikely that something like reversions and remainders would ever be recognized by our courts. All these deep historical and structural divergences inhibit a civilian from considering reversioners and remaindermen as holders of property rights.

We can, however, take a factual approach trying to go beyond formal jural classification and consider a reversion not as a particular legal institution but as a legal problem: What kind of legal remedies belong to A who has a future right in Blackacre (e.g., the lessor after the expiration of a lease) against B who is presently in possession of it? By a patient analysis of the law in action, it has been shown that no matter how we classify A's interest, A is protected against most dangerous and wasteful activities by B, even in the civil law, which has neither a legal institution known as reversion nor a formal doctrine of waste. [FN67] It is obviously inefficient to deny legal remedies to A, who in this case is acting in the interest of the integrity of Blackacre and more generally of the efficient use of resources.

The discovery of this common core of efficient principles hidden in the different technicalities of the legal systems may be another important aspect of Comparative Law and Economics. Indeed, seen from the standpoint of microeconomics (i.e., of individual preferences of different possible legal solutions), the law may already be more common beyond the boundaries of national legal systems than we would think by analyzing the different descriptions given by different municipal lawyers. [FN68]

7. Conclusions

Short of being an attempt to work out a unitary theory of the causes of legal transplants or even of being a systematic discussion of patterns of legal change, this paper has been an attempt to push legal scholarship a step forward by celebrating the methodological wedding between the two most interesting recent general attempts to understand the law: Comparative Law and Law and Economics.

***19** By using the tools of the comparativists together with those of lawyer-economists, we may be able to see if an institutional arrangement, a legal doctrine, or a legal rule of one legal system is more or less efficient than another. We may detect and explain phenomena of convergence. We may identify those aspects of a given legal system that stand in the way of the reception of an efficient solution. We may be able to foresee long-term efficiency consequences of a given legal arrangement that are impossible to identify if we do not have a term of comparison.

By using the comparative approach, we can even find a workable answer to the question of what is efficiency. From the point of view of a given legal system, efficient is whatever avoids waste; whatever makes the legal system work better by lowering transaction costs; whatever is considered better by the consumers in the legal marketplace; whatever, in other words, does not pointlessly foreclose the development of a better organized human society; whatever legal arrangement "they" have that "we" wish to have because by having it they are better off.

Of course, this is not a clear-cut standard but we may afford to be "indifferent, even condescending" toward the question of what efficiency is "rather like a composer's attitude toward music critics." For an economist "predicting market prices is far more important than philosophizing." [\[FN69\]](#) We are concerned with describing, explaining, and--why not?--predicting and leading legal changes and transplants.

[\[FN1\]](#) This paper has been prepared for the first Comparative Law and Economics Forum, Berkeley, CA, October 1992. The author wishes to thank Tony Weir, Tony Jolowicz, Antonio Gambaro, P.G. Monateri, Roberto Pardolesi, Mauro Bussani, Michele Graziadei, Robert Cooter, James Gordley, Tony Ogus, Rodolfo Sacco, the participants at the first Comparative Law and Economics Forum meeting, as well as two anonymous referees, for reading and commenting on previous drafts of this paper.

[\[FN2\]](#) Watson, *Comparative Law and Legal Change*, Cambridge L.J. 313 (1978) 318.

[\[FN3\]](#) R. Cooter and T. Ulen, *Law and Economics*, (1988) 8 ff. See for such a use of EAL, Mattei-Pardolesi, *Law and Economics in Civil Law Countries: A Comparative Approach*, 11 *Int.Rev.Law Econ.* 265 (1991), 271-272.

[\[FN4\]](#) The seminal book is by A. Watson, *Legal Transplants, An Approach to Comparative Law* (1974). A theory of legal change based on legal transplants is outlined in A. Watson, *Society and Legal Change* (1977); *id.*, *Comparative Law and Legal Change*; It is developed in R. Sacco, *Legal Formats, A Dynamic Approach to Comparative Law*, 39 *Am.J.Comp.Law*, 1991, 1 and 2.

[\[FN5\]](#) This is the definition given by Watson, *Legal Transplants*, [cit. 20](#).

[\[FN6\]](#) *Id.* at 94.

[\[FN7\]](#) To the works of Sacco and Watson just cited we can add Simpson, *Innovation in Nineteenth Century Contract law*, 91 *L.Q.Rev.* (1975); E. Agostini, *Droit Comparé* (1989); J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991); Monateri, *Legal Doctrine as a Source of Law, a Transnational Factor and a Historical Paradox*, *Italian National Reports*, XII Congress International Academy of Comparative Law, Sydney (1986); U. Mattei, *Common Law* (1992).

[\[FN8\]](#) Sacco, *cit. supra* nt. 5 at 398: "Usually, reception takes place because of the desire to appropriate the work of others. The desire arises because this work has a quality one can only describe as "prestige." This explanation in terms of prestige is tautological, and comparative law has no definition of the word 'prestige' to offer."

[\[FN9\]](#) This so to say the deterministic approach can be traced back mainly to Marx and Max Weber. Its classical deep treatment is W. Friedmann, *Law in Changing Society* (1959). It is of course still in vogue, particularly within American academia. For a recent use of such a paradigm in comparative law, M. Damaska, *The Faces of Justice and State Authority* (1986); for an opposite view, A. Watson, *The Evolution of Law* (1985).

[\[FN10\]](#) Watson, *cit supra* nt. 2 (1978), 320.

[\[FN11\]](#) M.J. Rizzo (ed.), *Change in the Common Law: Legal and Economic Perspective*, 9 *J.Leg.Stud.* (1980).

[FN12] Rizzo, Introduction, 9 J.Leg.Stud. (1980) 189.

[FN13] See Epstein, The Static Conception of the Common Law, 9 J.Leg.Stud. (1980) 253.

[FN14] See, e.g., Simpson, Innovations in Nineteenth Century Contract Law 91 L.Q.R. 247 (1975); M. Gordley, Book review, Gilmore, The Death of Contract, Harv.L.Rev.

[FN15] See particularly, Epstein, cit. supra nt. 14; Rizzo, Law Amid Flux: The Economics of Negligence and Strict Liability in Tort, 9 J.Leg.Stud. (1980) 291.

[FN16] For examples in different contexts, Schlesinger, Baade, Damaska, and Herzog, Comparative Law, V. ed. (1988), 390-391; 402-403; 422; 582; 644. See generally C.J. Bennett, Review article: What is Policy Convergence and What Causes it? Br.J.Pol.Sci. 215 (1992). C. Kerr, The Future of Industrial Societies: Convergence or Continuing Diversity? (1983) 3.

[FN17] Constitutional review there is exercised right after the enactment of a statute by a quasi-judicial body called the Conseil Constitutionnel. Once checked the statute is unchallengeable as a matter of constitutionality. See B. Rudden, A Source Book on French Law 3 ed. (1991) 50; P. Ardant, Institutions Politiques et Droit Constitutionnel 2 ed. (1990) 130.

[FN18] German Law, Art. 93 Basic Law. See A.T. Von Mehren and J.R. Gordley, The Civil Law System, 2 ed. (1977), 137 ff; Italian Law Art. 134 Constitution. See M. Cappelletti, J.H. Merryman, J.M. Perillo, The Italian Legal System (1967).

[FN19] [Marbury v. Madison 5 U.S. 137 \(1803\).](#)

[FN20] A.V. Dicey, Introduction to the Study of the Law of the Constitution, 8 ed. (1915).

[FN21] For an updated, systematically exposed outline of the law of compensation for expropriation, see G.M. Erasmus (ed.), Compensation for Expropriation. A Comparative Study (1990).

[FN22] Among the founding fathers, Madison was particularly influenced by French political thought. Until the enactment of the Fifth Amendment that he endorsed, private property was not introduced between the fundamental values of American law. See Bailyn, The Ideological Origins of the American Revolution, 34-93 (1967).

[FN23] Blackstone's scholarship was based on the same natural law literature that was the very cultural asset of the French Revolution. See Milsom, The Nature of Blackstone's Achievement, 1 Oxford J.L.Stud. 3 (1983).

[FN24] As all post World War II constitutions of defeated countries, and also the German Basic Law, are very much influenced by the U.S. Constitution.

[FN25] Watson, cit. supra nt. 7, 116.

[FN26] On the diffusion of the French code and of German scholarship, Sacco, cit. supra nt. 5, 396 ff.

[FN27] Watson, cit. supra nt. 5 (1978) at 320.

[FN28] See, for discussion, Cooter and Ulen, *Law and Economics*, cit. 86/20 nt. 3 at 191 ff.

[FN29] Mattei-Pulitini, *A Competitive Model of Legal Rules*, in Wintrobe, Galeotti, Salmon, *The Competitive State* (1990).

[FN30] For even simpler models see Rubin, *Why is the Common Law Efficient?* 6 *J.Leg.Stud.* 51 (1977); Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 *J.Leg.Stud.* 51 (1977); Goodman, *An Economic Theory of the Evolution of the Common Law*, 7 *J.Leg.Stud.* 393 (1978).

[FN31] F.A. Von Hayek, *Individual and Economic Order* (1949).

[FN32] J. Baker, *An Introduction to English Legal History*, 3 ed. (1990) 350 ss.

[FN33] See A.W.B. Simpson, *A History of the Common Law of Contract* (1987).

[FN34] Cfr. C. De Wulf, *The Trust and Corresponding Institutions in The Civil Law* (1965); Fratcher, *Trust*, *International Encyclopedia of Comparative Law*, VI Ch. 11, 84 ff.; Gambaro, *Problemi in materia di riconoscimento degli effetti del Trust nei paesi di Civil Law*, *Rivista Diritto Civile* 1984, 1, 93 ss; F. Weiser, *Trusts on the Continent of Europe* (1936); H. Kotz, *Trust und Treuhand* (1963).

[FN35] See, for a discussion of this approach, Cooter, *The [Best Right Laws: Value Foundations of the Economic Analysis of Law](#)*, 64 *Notre Dame L.R.* 817 (1989), 821.

[FN36] Compare Cooter, Ulen, *Law and Economics*, cit. supra. nt. 3 at 101.

[FN37] For references and details, see Schlesinger, Baade, Damaska, Herzog, *Comparative Law*, V (1988), 782.

[FN38] See the discussion in Gambaro cit. supra nt. 34. The author, a leading comparativist, has been the Italian delegate to that convention. A. Gambaro has developed the competitive framework in the study of the reception of trust in France in his contribution to the forthcoming P. Cendon (ed.), *Studies in Honour of Rodolfo Sacco* (1994).

[FN39] A very similar pattern of transplants by competition may be described in the European law of torts as far as no-fault products liability is concerned. A doctrine developed in America and endorsed by German and French legal scholars has found its way in the statute law of all European countries following a European Community directive. See the contribution by G. Ponzanelli in P. Schuck, *Tort Law and the Public Interest* (1990). Some doubts, however, have been advanced on the efficiency of such an approach; see Priest, *The Invention of Enterprise Liability, A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 *J.Leg.Stud.* 461 (1985). If Professor Priest has a case, we may conclude that in this episode (as in many instances of legal transplants) there has been a borrowing of what seemed efficient rather than what really was. Prestige would remain, then, the only explanation.

[FN40] Indeed, there is a prima facie case for the relative efficiency of no-fault corporate liability, which relies on deep-pocket principles and encourages the internalization of externalities.

[FN41] This is one of the topics of comparative property law that James R. Gordley and myself have been jointly teaching in the 1991-1992 academic year in the University of Trento. Some of the

ideas discussed here stem from this common experience. The responsibility for their misuse is, of course, only mine.

[\[FN42\]](#) In Italy Art. 938 Codice Civile reads: Occupation of portion of adjoining land. If a portion of the adjoining land is occupied in good faith in the construction of a building, and the owner of that land does not object within three months of the day on which construction began, the court, taking account of the circumstances, can attribute the ownership of the building and the occupied soil to the builder. The builder is required to pay the owner of the soil double the value of the area occupied, as well as compensation for damages. This translation is provided in M. Beltramo, G.E. Longo, J.H. Merryman, *The Italian Civil Code* (1969). This article is discussed, within a short general introduction to the Italian law of property, in A. Candian, A. Gambaro, U. Mattei, *Property Law in Italy*, in A. Pizzorusso (ed.), 1 *Ital.Stud.Law* (1992).

[\[FN43\]](#) In Germany Par. 912 B.G.B. reads: If the owner of a soil in the construction of a building has built beyond the border line without intention or gross negligence the neighbor must suffer the building unless before or right after the overtaking of the borderline he has objected. The neighbor must be compensated with a cash rent. For a short discussion of this article within a detailed introduction to German property law in English, see E.J. Shuster, *Principles of German Civil Law* (1907), 388. For a shorter introduction, see N. Horn, H. Kotz, H.G. Leser (T. Weir transl.), *German Private and Commercial Law: An Introduction* (1982), 169 ff.

[\[FN44\]](#) R.R. Powell and P.J. Rohan, *Powell on Real Property*, Abr. ed. (1968).

[\[FN45\]](#) On the way to create easements in England, see R.E. Megarry and H.W.R. Wade, *The Law of Real Property*, 5 ed. (1984), 855 ff.; G.C. Cheshire and E.H. Burn, *Modern Law of Real Property*, 14 ed. (1988), 503 ff. Estoppel, of course, only works, as in America, where A can be blamed to have created a reliance in B. As to good faith not excusing trespass, M. Brazier, *Street on Torts*, 8 ed. (1988), 69. Good faith, however, can be considered by the court of equity in exercising its discretion as if to grant injunction. See, in general, G.W. Keeton and L.A. Sheridan, *Equity*, 3 ed. (1987) 19 ff. See also *infra* note 68.

[\[FN46\]](#) Art. 545 reads: Nobody can be forced to give up his property if not for public use and after a just and previous compensation. Such a strict approach, constantly followed by the Cour de Cassation, is criticized by French scholars. See A. Weill, F. Terre, P. Simler, *Droit Civil. Les Biens*, 3 ed. (1985) 219. C. Atias, *Droit Civil. Les Biens*, Vol 2 (1982), 333-334.

[\[FN47\]](#) Coase, *The problem of social costs*, 3 *J.Law Econ.* 1 (1960).

[\[FN48\]](#) Cooter, *cit. supra* n. 37, 829.

[\[FN49\]](#) See Cooter, *The Cost of Coase*, 11 *J.Leg.Stud.* 1 (1982), according to whom the law should be structured to minimize the harm caused by failures in private agreements.

[\[FN50\]](#) See Jolowicz, *Damages in Equity: A Study of Lord Cairns' Act*, 34 *Camb.L.J.* 224 (1975); Pettit, *Lord Cairns' Act in the County Court: A Supplementary Note*, 36 *Camb.L.J.*, 369 (1977). Ingam Wakefield, *Equitable Damages under Lord Cairns' Act, Conveyancer and Property Lawyer* (1981), 286.

[\[FN51\]](#) [Hahl v. Sugo](#) 169 N.Y. 109; 62 N.E. 135 (1901); [McKean v. Alliance Land Co.](#) 200 Cal 396, 253 P. 134 (1927) 553.

[\[FN52\]](#) See C. Atias, *cit supra* nt. 56 at 334.

[\[FN53\]](#) See *Wrothan Park Estate Co. Ltd. v. Parkside Homes Ltd.* (1974) 1 W.L.R. 798, 812-816; *Bracewell v. Appleby* (1975) Ch 408. In this case the idea that the plaintiff should get nothing because he had suffered purely nominal damages was rejected. The rule here was laid down that a just substitute for the injunction was such sum of money as might reasonably have been demanded by the plaintiff from the defendant as a *quid pro quo* for relaxing the covenant.

[\[FN54\]](#) Art. 555 reads: If Plantations, constructions and buildings have been made by a third party with materials belonging to him the owner of the soil has the right ... either to keep them or to compel who made them to throw them off. If the owner of the soil wants them to be taken off this is done at the expenses of the maker without any indemnity to him. The maker can also be condemned to pay damages. If the owner of the soil prefers to acquire the ownership he must pay an indemnity ... If plantations and construction have been made in good faith the owner of the soil will be estopped from asking the removal and will have to pay an indemnity ... (computed as in previous paragraph). See, arguing for the extension of this article to the hypothesis we are examining, Weill, Terre, Simler, *cit. supra* nt. 53 at 220.

[\[FN55\]](#) See American Law Institute, *Restatement of the Law, Property, Servitudes* Tent. Dr. 1112 (1989). See also C.H. Donahue, T.E. Kauper, P.W. Martin, *Property* (1974) 1072 ss.; American Law of Property. A Treatise on the Law of Property in the United States (1952), 36.

[\[FN56\]](#) The text of Art. 936 *Codice Civile* as adopted in 1942 is very similar to Art. 555 *Code Civil* as amended in 1960 and reproduced *supra* at nt. 54. The same rule is contained in Art. 946 of the BGB: "If a movable thing is linked to a soil in such a way to become a constituent essential part of it, the ownership of the soil is extended to include this thing." The liability rule is offered by extension of the rules on unjust enrichment that is done by Art. 951 limited to a good faith hypothesis. It is interesting to notice that American law excludes the extension of unjust enrichment doctrines in this case and confines itself to a stricter doctrine of promissory reliance or to enacting an improvement statute.

[\[FN57\]](#) [26 N.Y.2d 219, 309 N.Y.S.2d 312,257 N.E.2d 870.](#)

[\[FN58\]](#) This is the reason why English law is so reluctant to apply to this area of the law the possibilities offered by the Lord Cairns' Act, the so-called "damages in lieu of injunctions." Indeed English law does not want to allow the rich defendant to buy its tort. See *Shelfer v. City of London Electric Lighting Co* (1895) 1 Ch. 287, 315-316. More recently *Kennaway v. Thompson* (1981) Q.B. 88, 92-93. See G.W. Keeton, L.A. Sheridan, *Equity*, 3 ed. (1987), 451. According to J. Fleming, *The Law of Torts*, 2 ed. (1985), 192, the reason for the English reluctance to take this step can be found in the different role of policy considerations in the English legal process: "English Courts, unlike some American ones, purport to exclude such considerations and treat the contest as purely inter-personal." Another explanation, suggested by an anonymous reviewer of my paper, is that also in England the right to be free from a nuisance is seen as a property right and the legal system does not permit private compulsory purchase of property rights without the authorization of Parliament. On these problems compare Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 *Va.L.R.* 1299 (1977).

[\[FN59\]](#) "The owner of a soil cannot prohibit the emission of gas, steam, smell, smoke, heat, noise, shakes or other influences coming from another soil if the enjoyment of his property is not affected or is only slightly affected by such activities or if they are produced by an enjoyment of the nearby land that according to the local conditions or those of likely situated land can be considered

common." No deep discussion of this article is available in English. See therefore, J.V. Staudingers, *Kommentar zum Bürgerlichen Gesetzbuch*, 12 Ed. (1989) Sub Art 906 (H. Roth).

[FN60] R. Von Jhering, *Zur Lehre von den Beschränkungen des Grundeigentümers im Interesse der Nachbarn*, *Jahrb. Dogm. Rechts*, 84, (1863).

[FN61] Emission: The owner of land cannot prevent the emission of smoke, heat, fumes, noises, vibrations or similar propagation from the land of a neighbor unless they exceed normal tolerability, with regard to the conditions of the sites. In applying this rule the Court should reconcile the requirements of production with rights of ownership. It can also take account of the priority of a given use. For a discussion in English, see Candian, *Gambaro, Mattei*, cit supra nt. 52.

[FN62] See, specifically, *La Piana, A Task of no Common Magnitude: The Funding of American Law Institute*, 11 *Nova L.R.* 1085 (1987) at 1111. U. Mattei, *Common Law* (1992), 281.

[FN63] See for a discussion of the steps to abandon the Restatement 1 solution, [Carpenter v. Double R. Cattle Co. Inc.](#), 669 P.2d, 643. See also *A.L.I. Proc.*, 76-79 (1971).

[FN64] A. Chiodi, *Situazioni prodromiche in Common Law e diritto italiano: uno sguardo comparativo su reversion, nuda proprietà ed aspettativa reale*, *Quadrimestre* (1991). A long discussion with Dr. Chiodi after he had delivered his paper in Trento on future interests stimulated me to prepare this paper.

[FN65] See Rudden, *Economic Theory v. Property Law: The Numerus Clausus Problem*, *Oxford Essays in Jurisprudence* 3d, 239 (1987).

[FN66] See, for a deep comparative discussion, E. Dowson and V.L.O. Sheppard, *Land Registration* 2 ed. (1956).

[FN67] See, on this peculiarly common law doctrine, R.E. Megarry and H.W.R. Wade, cit. supra nt. 55, 95 ss.

[FN68] See Sacco, *The Uniformization of Private Law*, in A. Pizzorusso (ed.), 1 *Ital.Stud.Law*, (1992).

[FN69] See Cooter, cit. supra nt. 44.