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Craven, R. and Hamlyn, Olivia (2022) 'Economics in Law: Law in Economics': introduction to the special issue. [Editorial/Introduction]

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Economics in Law: Law in Economics

This special issue presents a series of papers, each of which - in different ways - reflects upon the role of law in markets. Together, these papers throw light on the ever evolving relationship between legal studies and the discipline of economics. The special issue is based on a conference held at the University of Leicester on 11 July 2019, titled Economics in Law: Law in Economics.¹ The editors of this special issue, who organised the conference, are grateful to all presenters and discussants, and, in particular would like to thank Leicester Law School, the Independent Social Research Foundation, and the Association for Heterodox Economics for providing funding for the event.

The conference took place just over 10 years following the great financial crisis of 2007 and 2008. The crisis, whose eruption went largely unpredicted by mainstream economists, amplified long-standing, though often unheard or marginalised, criticism of orthodox economic approaches. In the decade since,² with the UK economy grappling with stagnant growth, debt and inequality, literature on the state and direction of the economics profession, and, for that matter, on the future of capitalism, has been abundant.³ There are calls for plurality in economics. Linked to this, are calls for interdisciplinarity in the formulation of economic policy prescriptions. In this regard, and in some ways paralleling a critique of legal formalism, the Nobel Prize winning economist, Jean Tirole - relating the debate to Isaiah Berlin's division of thinkers and writers into hedgehogs, those who know one big thing, and foxes, those who know many little things -⁴ has criticised how economists have all too often

¹ The conference is entirely separate to David Feldman's *Law in Politics, Politics in Law* (Hart 2013). The similar wording is accidental.

² For a quick overview reminder see A Beckett, 'The age of perpetual crisis: how the 2010s disrupted everything but resolved nothing' *The Guardian* (London, 17 December 2019) <<https://www.theguardian.com/society/2019/dec/17/decade-of-perpetual-crisis-2010s-disrupted-everything-but-resolved-nothing>> (accessed 7 February 2022).

³ Recent examples include P Collier, *The Future of Capitalism: Facing the New Anxieties* (Allen Lane 2018); D Coyle, *Cogs and Monsters: What Economics Is, and What It Should Be* (Princeton UP 2021); M. Mazzucato, *Mission Economy: A Moonshot Guide to Changing Capitalism* (Penguin 2021); B Milanovic, *Capitalism, Alone: The Future of the System That Rules the World* (Belknap Press 2019); T Piketty, *Time for Socialism: Dispatches from a World on Fire, 2016-2021* (Yale UP 2021).

⁴ I Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History* (Weidenfeld & Nicolson 1953).

resembled hedgehogs:⁵ they are monists, wedded to equilibrium analysis, when they need to be pluralists.

Despite perceived resistance to pluralism, over the past decade, there have been significant shifts within economics. There is movement away from ‘blackboard economics’, as empirical economics grows ever stronger. The increasing prominence of big data, and a ‘credibility revolution’ in econometrics, mean that modern economic research – both micro and macro – hinges less on abstract theories, but on the statistical analysis of real-world economic data.⁶ These developments, which are bringing into question core ideas, coincide with the re-evaluation of rational choice underway through behavioural economics, which involves mainstream economics engaging with the behavioural sciences (predominantly experimental psychology) in recognising the role of biases and heuristics in human behaviour.⁷ Beyond this, though, and still outside the mainstream, there exist alternative narratives. These narratives, which depart from the assumptions gathered in the concept of *homo economicus*, foreground power structures, institutions and networks, and accept non-market social and political values.⁸ There is a further point to pluralism, however, which, during the conference, Celine Tan sought to bring out: true pluralism is interwoven with decolonization,⁹ and argues that a neglect of global south perspectives diminishes our understanding of law and markets.¹⁰

With this backdrop in mind, it is worth asking what a pluralist law and economics might look like. This question arises frequently in the US and the answer typically reveals a rift. Chicago

⁵ J Tirole, *Economics for the Common Good* (Princeton UP 2017), 101-104. Tirole bases the discussion on the way Berlin’s categorisation is used by the political scientist Philip Tetlock, PE Tetlock, *Expert Political Judgement: How Good Is It? How Can We Know?* (Princeton UP 2005).

⁶ In 2021 the Nobel Memorial Prize in Economic Sciences was awarded to econometricians, David Card, Joshua Angrist and Guido Imbens.

⁷ For an introduction see D Kahneman, *Thinking Fast and Slow* (Penguin 2011). For a socio-legal lawyer’s critique of the celebration of behavioural economics see D Campbell, ‘Cleverer Than Command?’ (2017) 26(1) *Social & Legal Studies* 111-126.

⁸ See recently, S Picciotto and I Miola, ‘On the Sociology of Law in Economic Relations’ (2021) 31(1) *Social & Legal Studies* 139-161.

⁹ Aspects of Celine Tan’s conference paper appear in C Tan, ‘Beyond the “Moments” of Law and Development: Critical Reflections on the Contributions and Estrangements of Law and Development Scholarship in a Globalized Economy’ (2019) 12(2) *Law and Development Review* 285-321.

¹⁰ In this respect, it is welcome to see that fascinating ethnographic research into the central money exchange bazaar in Kabul, Afghanistan has recently been shortlisted by the Socio-Legal Studies Association for its annual best article prize: see N Choudhury, ‘Order in the Bazaar: The Transformation of Non-state Law in Afghanistan’s Premier Money Exchange Market’ (2022) 47(1) *Law & Social Inquiry* 292-330.

Law & Economics still characterises the law-economics relationship in the US,¹¹ where it dominates teaching and understanding law. However, in this post-financial crisis era, a ‘Law and Political Economy’ project is seemingly mobilising in opposition to Law & Economics.¹² By contrast, away from the US perspective, the above question has received insufficient attention, especially in the post-financial crisis era.¹³ It is this that motivates the special issue. The UK experience, for example, is quite different to that of the US. Despite efforts to foster a UK law and economics movement, US-style Law & Economics has struggled to gain any sort of foothold across UK law schools and, as such, the relationship between the two disciplines can be seen to have developed along a different path.¹⁴ In the UK, law and economics research appears to have arisen more sporadically, across a variety of areas, with legal academics resembling more Berlin’s foxes – utilising economics as and when needed. It already appears more plural, engaging with economic theory¹⁵ and econometric analysis¹⁶ on its own terms, or with economic perspectives deriving from elsewhere in the social sciences and humanities.¹⁷ In addition, evident in generalist UK law journals - even in relation to topics that lie at the intersection of legal and economic expertise, like economic regulation - is often a healthy scepticism in the way legal scholars approach the policy prescriptions of economists. The papers gathered in this special issue, which include two international contributions, reflect these attitudes and approaches and further explore what a pluralist law and economics could be, signalling a path ahead both for the UK and internationally.

¹¹ See D Campbell and S Picciotto, ‘Exploring the Interaction Between Law and Economics: The Limits of Formalism’ (1998) 18(3) *Legal Studies* 249-278.

¹² <<https://lpeproject.org/>> (accessed 7 February 2022).

¹³ Nevertheless, one example, pre-financial crisis, is M Richardson and G Hadfield, *The Second Wave of Law and Economics* (The Federation Press 1999)

¹⁴ See CG Veljanovski, ‘The Economic Approach to Law: A Critical Introduction’ (1980) 7(2) *British Journal of Law and Society* 158-193; Al Ogus, ‘Law and Economics in the United Kingdom: Past, Present, and Future’ (1995) 22(1) *Journal of Law and Society* 26-34; Al Ogus and R Amass, *Research Review on Law And Economics: State of the Art and Questions for the Future* (Great Britain. Lord Chancellor's Department 1997). See also Al Ogus, *Costs and Cautionary Tales: Economic Insights for the Law* (Hart 2006) - awarded the Socio-Legal Studies Association’s annual book prize in 2007.

¹⁵ See for example S Deakin and F Wilkinson, ‘The Law and Economics of the Minimum Wage’ (1992) 19(3) *Journal of Law and Society* 379-392; and D Campbell and R Lee, ‘“Carnage by Computer”: The Blackboard Economics of the 2001 Foot and Mouth Epidemic’ (2003) 12(4) *Social & Legal Studies* 425-459.

¹⁶ See for instance S Deakin, J Armour and A Singh’s path-breaking ‘Law, Finance and Development’ project (2005-2009): <https://www.cbr.cam.ac.uk/research/research-projects/completed-projects/law-finance-development/> (accessed 10 February 2022).

¹⁷ See for example D Ashiagbor, P Kotiswaran, and A Perry-Kessaris, *Towards an Economic Sociology of Law* (Wiley & Sons 2013); S Deakin, D Gindis, G M Hodgson, K Huang, and K Pistor, ‘Legal Institutionalism: Capitalism and the Constitutive Role of Law’ (2017) 45(1) *Journal of Comparative Economics* 188–200; R Dukes, ‘The Economic Sociology of Labour Law’ (2019) 46(3) *Journal of Law and Society* 396-422; A Perry-Kessaris, ‘The Case for a Visualized Economic Sociology of Legal Development’ (2014) 67(1) *Current Legal Problems* 169–198.

The conference sought to better understand the current state of the law-economics relationship, predominantly focusing on the UK experience. We structured the format of the conference, which involved speakers presenting their work and then participating in discussions with academic economists acting as discussants, with the aim of recognising new or overlooked directions and themes for research at the meeting-point of these two subjects as well as highlighting the richness of those interactions beyond the mainstream. It is with this narrative in mind that, in re-evaluating what law and economics is, we sought then and now, with the culmination of those papers in this special issue, to capture a variety of different perspectives on law and economics.

To round off the special issue, we include a book review and two case notes which examine themes complementary to those explored in the longer pieces. First, Moniza Rizzini Ansari, reviews Pistor's much-celebrated *The Code of Capital*.¹⁸ She points to how this monograph not only changes how we think about wealth but also calls for a rethink in how we approach poverty. Second, Guido Comparato, in his note on *Council v Chrysostomides*, sheds light on the role of informal intergovernmental decision-making regarding financial stability in the potential erosion of judicial protection for rights of a constitutional nature, at EU level in the wake of the Eurozone crisis. Finally, Flávia do Amaral Vieira, uses *Samarco vs Environment Council of Minas Gerais* – a case involving the licensing of mining operations following a mining catastrophe in Brazil – to illustrate how economic or commercial interests may take precedence over human rights and environmental interests in regulatory procedures.

We have divided the six articles into two loose groupings of three representing different themes. The first three explore alternative pathways for research on law and economics.

We start with Amanda Perry-Kessaris's paper. In this paper, she challenges the mainstream economics tendency to ignore the role of law in shaping economic life and, adopting a sociologically-informed perspective, highlights law's capacity to facilitate collaboratively-defined change in economic life. Taking Cyprus – where division and legal uncertainty disrupt and undermine island-wide economic life – as an example, she explores how a designerly approach – and in particular prefigurative design – could tackle the complexities

¹⁸ K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton UP 2020).

of econolegal change and enable articulation of a shared vision for the relationship between law and island-wide economic life. Such approaches, she shows, provide space for participatory exploration and making and communicating sense of alternative econolegal futures. Crucially, they allow participants to behave ‘as if’ such futures already exist, potentially increasing the likelihood that a broadly desired alternative future might emerge. Her piece serves as a valuable reminder of the contingency of the legal and economic *status quo* and therefore the possibility of change, as well as how change might occur.

Next, Sabine Frerichs’s piece provides an invaluable resource for those wishing to understand and engage with research at the intersection of law and economics, particularly where the focus concerns insights into law offered by the behavioural turn in economics. She sets out a masterful and nuanced account of this intricate disciplinary landscape by charting firstly, different strands of realist thought in economics – in particular behavioural and institutional economics – secondly, the evolution of legal realism and the various behavioural sciences it has drawn on, thirdly, the different traditions of realist thought in law and economics, again with a focus on behavioural and institutional economics, and finally, through a discussion of law and psychology, how both cognitive and social psychology can contribute to realism in law. Beyond that and most importantly, in response to claims that behavioural economics constitutes a new form of legal realism, exploring contributions from different strands of research in both economics and psychology, she shows that behavioural economics is one of many pathways by which realism may enter legal scholarship. Furthermore, by highlighting the tendency of behavioural economics to ignore institutional and social contexts, she reveals a potential tension between behavioural economics and legal realism.

In the third paper in this thematic grouping, Simon Deakin and Christopher Markou present an alternative model of legal evolution and argue for its use in describing the dynamics of legal change and the relationship between law and the economy. Through a discussion grounded in evolutionary biology, game theory and systems theory, they provide an account of inheritance, an element of evolution often ignored by research in legal evolution, traditionally concerned with variation and selection, and thereby develop a fuller model of legal evolution. The value of this model is not, as with previous understandings of legal evolution, to provide support for normative claims regarding the superiority of common law systems for promoting economic growth or legal ‘evolution to efficiency’. It is, instead, a descriptive theory, rather than a simple metaphor, which can generate claims regarding the

relationship between law and the economy amenable to empirical testing. A discussion of methodological issues across three different approaches illustrates the potential of this model to shape empirical research into the co-evolution of law and the economy including the relationship between law and economic performance.

The second three papers we present offer more specific investigations into law in the economy.

In a call to look beyond neoclassical economics orthodoxy, Frank Stephen's paper challenges the approach to economic development typically promoted by multilateral development agencies, founded on narrow Chicago Law and Economics and commitments in legal origin theory to the superiority of common law over civil law in promoting economic growth. Stephen grounds his challenge on insights from new institutional economics and cross-cultural psychology which, amongst other things, take seriously the relevance of context on the effectiveness of laws in driving economic development – the former focusing on legal environment; the latter on the overarching influence of socio-cultural context. Drawing together these insights along with evidence concerning the success (or otherwise) of transplanting investor and creditor protection laws from common law jurisdictions to developing countries, Stephen rejects legal origin theory assumptions that, regardless of context, transplants will necessarily generate economic growth. The paper offers an example of how, with the aid of wider social science disciplines, dialogues might fruitfully be opened up between the law and mainstream economics.

Next, and developing Ruth Dukes's previous work on an economic sociology of labour law, Dukes and Eleanor Kirk delineate a new pathway for labour law research which builds on earlier socio-legal scholarship and which harnesses, in particular, the contribution of legal consciousness research to enhancing our understanding of actors' everyday perceptions of, and interactions with the law, in processes of mutual influence and change in the context of work. In a further novel step, they direct their attention beyond workers to human resources (HR) professionals as a powerful source of worker and societal beliefs about what is legal, fair, reasonable or appropriate in workplaces. By exploring HR discourses, they show how applicable law, professional interests and managerial commitments to 'market realities' combine to produce legal ideologies which may shape workers' conceptions of legality while reinforcing capitalism more generally. In doing so, they establish a theoretical, socio-legal

foundation for empirical exploration of HR professionals' subjective accounts of the law and associated social and economic structures.

In the final paper, Bruce G. Carruthers examines claims that 'big data' has, in a sharp break with the past, helped usher in a new era of 'surveillance capitalism' characterised by the availability of an unprecedented quantity of information. Focusing on the role of information in both historical and current financial markets, he offers a detailed sociological analysis of the nature of information, exploring its velocity and variety – in terms of sources, formats, content and uses – as well as its volume. His analysis reveals continuities and discontinuities between past and present, both in the roles performed by information in financial decision-making and in the ways developments in information technologies test existing regulatory frameworks. The piece demonstrates the value of a sociological lens in enhancing and contextualising our understanding of 'big data'. In this instance it shows that, despite formidable challenges and contrary to dramatic claims that we are living in unique and novel times, in some ways, we have been here before.