EPISTEMIC TRANSLATION IN LAW AND ECONOMICS: A TENTATIVE TYPOLOGY*

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ABSTRACT: The field called economic analysis of law or law and economics is an interesting case of epistemic translation, which illustrates well some of the difficulties involved and allows us to identify ways of performing it effectively. The economic analysis of law tends to irritate legal scholars, who complain that it disrespects legal discourses. The idea that this might be a form of translation has been invoked several times, in particular, to articulate the problem of how to transport knowledge from the realm of economics to law: how to make economic insights legally relevant. The following four techniques have been used to solve this interepistemic translation problem: implicit translation; regimentation; terminological approach; inferentialist approach. This article presents these techniques and examples of their application in the economic analysis of law, before going on to discuss their relationship with the conceptual foundations of the epistemic translation.
KEYWORDS: Epistemic Translation; Law and Economics; Interepistemic Translation Problem; Irritation; Relevance; Equivalence

1. Introduction: the troubled field of law and economics

This article explores the opportunities to improve the quality of research in the economic approach to law enabled by the concept of epistemic translation, as articulated by the EPISTRAN Project,[1] currently under way at NOVA University of Lisbon (Bennett, 2024; Bennett and Neves, 2024). The long-term objective is to trigger a linguistic and, more precisely, 'translational turn' (Bachmann-Medick, 2009) in the economic approach to law.

In fact, the term 'epistemic translation' suggests an endeavor focused on the process of translating or transferring knowledge across different fields or between different epistemic communities, with an emphasis on retaining the integrity and nuance of the original. The use of expert testimony from different specialist fields in legal proceedings (eg, Haack, 2014; Giocoli, 2020; Canale, 2021) may be considered a case in point.

The economic approach to law (also known as the economic analysis of law, or law and economics; see Calabresi, 2016; Esposito, 2017) looks at legal institutions (provisions, norms, decisions, reforms, etc.) from an economic point of view, fundamentally anchored in economic efficiency and total or social welfare maximization. This perspective, principally developed by scholars such as Ronald Coase (1960, 1990), Richard Posner (2011), Guido Calabresi (1970, 2016), Bob Cooter and Thomas Ulen (2011), views legal norms and institutions as tools to achieve economic goals via, first and foremost, an optimal allocation of resources.

Economists find in this approach a fertile ground for both applying and testing economic theories, thereby enriching economic discourse with complex legal phenomena

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and improving the social impact of their discipline (Klammer and Scorsone, 2022; Esposito, 2022). Legal scholars, when economic analysis is used properly, benefit from the persuasive articulation of the existence of social problems in need of intervention. The development of 'theories of harm' in both competition and consumer law is a pivotal example of this (see on competition: OECD, 2023; on consumer law: Gamper, Siciliani and Riefa, 2019; Esposito, 2021; Esposito and Grochowski, 2022).

However, the economic analysis of law has not been universally welcomed within legal circles. Accused of economic reductionism, it has been criticized for marginalizing the nuanced and multidimensional ethos of law, which traditionally encompasses justice, fairness, and moral principles (see below, Section 2).

Moreover, a series of internal critiques have been recently made of the economic approach to law on its own terms, highlighting its limitations from an analytical point of view (eg, Calabresi, 2016; Kwak, 2017; Garoupa, Gómez Ligüerre and Mélon, 2016; Esposito and Tuzet, 2019, 2020; Klammer and Scorsone, 2022; Tuzet and Esposito, 2023; Bayern, 2023; Esposito and Scorsone, forthcoming).

Against this background, anecdotal evidence and pivotal examples suggest that the economic approach to law irritates significant parts of the legal scholarship. The irritation seems readily accountable from a translation studies perspective, since economic language is injected into the discussion of legal issues without much regard for the communicative expectations and cultural models characteristic of legal communities. This approach thus violates the principle of loyalty in translation activities (Nord, 1991, 2007).

What is more, proponents of the economic analysis of law have presented it as a legal innovation or commodity that the law community should consume because it is good for them (e.g. Garoupa and Ulen 2008). However, as discussed below, legal scholars often lament that the 'innovation' actually amounts to poor quality legal analysis. Thus, in Nord's (1991, 2007) terminology, economists are disloyal to their clients.[2]

Against this background, this article is structured as follows. Section 2 provides illustrative examples of legal irritation with the economic analysis of law, while Section 3 gives a rational justification for it, suggesting that it rests on a semantic misunderstanding. Building on this finding, Section 4 proposes, as a way forward, to move from a conceptual to a linguistic separation, opening the space to introduce, in Section 5, two accounts of the translation problem from economics to law. Section 6 presents and illustrates four approaches that could solve the translation problem, while Section 7 concludes, suggesting venues for future research on epistemic translation.

[2] Similarly, when legal scholars use economic terms, they have to comply with the same constraints. For example, I have dedicated a lot of effort to using economic arguments and references to economic literature to claim that 'allocative efficiency' is ambiguous in economics and then offer a legal perspective on this disagreement (Esposito, 2022).

2. Legal irritation

The purpose of this section is to provide illustrative examples of the 'irritation' caused to legal scholars by the exposure to economic analysis and even language. In Europe, this has led to a situation of "polite marginalization" (Alemanno and Sibony, 2015, p. 22). In the United States, on the other hand, the economic approach to law has resulted in the birth of an antagonistic movement in top law schools called (ironically) Law and Political Economy, which aims at doing political economy without economic analysis (Britton-Purdy et al., 2020) – something that is arguably counterproductive and ultimately self-defeating (Woodcock, 2022).

More precisely, the Law and Political Economy movement represents a critical response to the dominant framework of the economic analysis of law, which traditionally emphasizes efficiency, market rationality, and the neutrality of legal mechanisms in economic optimization. This movement emerged from a growing discontent with how traditional approaches to law and economics tend to abstract law from its social and political context, often prioritizing economic efficiency over equity, democratic values, and social justice.

Let us consider some additional examples, namely issues related to the incorporation of economic analysis in comparative law research as well as the normative foundations of contract law, competition law and the EU internal market.

The field of *comparative law* is the one where the supporters of the economic approach have been most self-critical about the difficulties they face in convincing traditional comparative law scholars of the usefulness of economic analysis for comparative law (Garoupa and Ulen, 2021; Vargas Weil, 2022). In particular, critics lament a lack of respect for crucial legal concepts and the use of implausible analytical frameworks (e.g. Kischel, 2019).

In the contemporary debate on 'contract law', the debate on efficiency breach provides clear examples of irritation. Contract lawyers have lamented that the defense of an immoral practice such as breaches of contract (and of promises) is indefensible on moral grounds (eg, Friedmann, 1989). Yet, that is exactly what mainstream economic analysis has been advocating for a long time, more or less explicitly (e.g. Posner, 2010; Klass, 2014).

'Competition law' is, around the globe, the field of law where economic analysis has had the most influence. Indeed, economically oriented scholars in this field are explicitly critical of fairness discourse in the field (e.g. Ducci and Trebilcock, 2019; Colangelo, 2023). The main contention is that fairness is too vague as a term to justify policy. This claim keeps circulating even if the field can rely on a rather distinctive notion of fairness, namely competition on merits (Pera, 2022; Esposito, forthcoming).

Finally, in 'EU private law', the so-called instrumentalization critique is another example of the irritation caused by economics. A number of authors (see Burgers, Bartl and Mak, 2022, p. 11) are very critical of private law being instrumentalized by EU law to achieve the goal of the internal market. According to Christoph Ulrich Schmid (2011, p.22), national private law rests on a specific type of justice, namely commutative justice or justice

between the parties, which should not be instrumentalized by "external considerations" or "external collective goals".

An important, but implicit step in this claim is the answer to the question of what justifies the creation of an internal market. More precisely, what are the 'external collective goals' mentioned by Schmid? We assume that it is the goal of an allocative efficient market, which mainstream economists say means to maximize total welfare (the 'size of the pie'). It follows, quite straightforwardly, that we face a conflict between normative views: justice between the parties versus the maximization of total welfare (the 'external consideration'). Thus, the whole internal market project is met with skepticism by many legal scholars.

However, the opposition disappears when allocative efficiency is expressed in consumer welfare terms.[3] In what follows, I shall attempt to show how this skepticism about the use of economic insights in legal analysis rests on a faulty assumption (the 'Conceptual Separation Assumption'), which in turn rests on a semantic misunderstanding.

3. Efficiency, the conceptual separation assumption, and the semantic misunderstanding

Mainstream economic analysis of law considers the efficient allocation of resources to be the primary task of the legal system (Kaplow and Shavell, 1994). In this account, an efficient allocation of resources is one that maximizes social or total welfare or, in other words, the (in)famous size of the pie. This account causes some linguistic tension because it rests on a separation between the legal system and the tax and subsidy system, which is patently superficial from the legal perspective: taxes and subsidies are part of tax law and, therefore, of the legal system. Be this as it may, a large part of the scholarship uses this and similar clear-cut institutional divisions of labour to attribute to parts of the legal system efficiency as their main goal. The consequence is that considerations of distribution, equity, and fairness are relegated to 'somewhere else'. In Kaplow and Shavell's (1994) influential account, the 'legal system' focuses on efficiency, while 'equity', 'fairness' and the like are relegated to a complementary 'tax and subsidy system'.

This 'efficiency vs approach' rests on what can be called the 'Conceptual Separation Assumption': the idea that allocative efficiency as a social value is distinct from equity, fairness, justice – in other words, the economic justification for legal norms is necessarily different from the moral justification thereof. This assumption underscores much of the friction between economic analyses and legal scholarship by suggesting an inherent incompatibility in their respective objectives (and languages).

Mainstream scholarship in favor of and against the economic analysis of law builds on this assumption. Supporters of the approach propose different ways in which economic concepts can relate to legal and moral ones (e.g. Kraus, 2001). Yet, as discussed below, the mainstream harbours an approach which is not really, or at least not necessarily, based on this opposition, the 'regimentation' approach (see Section 6.2). Critics of the approach instead use the opposition as a sufficient reason to reject efficiency and, by implication, the

[3] I have argued this in detail elsewhere (Esposito, 2022, 2023). See also Gómez Liguerre, 2023; Garoupa, 2024; Calderai, 2024; Sibony, forthcoming.

product of economic analysis built on it (e.g. Dworkin, 1980; Coleman, 1980; Mestmacker, 2008).

Despite its foundational role in defining the boundaries of the opposing epistemic communities (each of which exists in its own 'bubble'), the 'Conceptual Separation Assumption' will, in this article, be rejected as false or at least subject to critical scrutiny in the light of the apparent counterevidence. In fact, the 'Conceptual Separation Assumption' falters if we consider the existence of underlying equality norms that support economic efficiency as a social goal.

Elsewhere I have argued that while the current mainstream defines allocative efficiency in terms of total welfare maximization, a long-standing tradition of mainstream economists dating back to Adam Smith, understands allocative efficiency as the property of a market that maximizes the benefits for the consumers on that market (Esposito, 2022, pp. 19-61). As Adam Smith (2007 [1776], p. 426) put it himself in *The Wealth of Nations*:

> Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer. The maxim is so perfectly self-evident, that it would be absurd to attempt to prove it.

Allocative-efficiency-as-total-welfare-maximization rests on the following equality norm: every individual is entitled to respect from others; therefore, distributive effects between market participants shall not matter because benefits to one group are equal to the losses to the other group. Therefore, the two cancel each other out from a moral point of view, making alternatives incomparable. Nevertheless, it is possible to stigmatize an inefficient allocation of resources because fewer resources are available to everyone; accordingly, even ignoring distributive effects, it is possible to identify one inefficient market in a market that does not maximize total welfare, irrespective of its distributive effects.

Instead, allocative-efficiency-as-consumer-welfare-maximization rests on the following equality norm: "all agents are equal because they are sovereign when they act as consumers and they are subject when they act as producers" (Esposito, 2024, p. 231). The idea of consumer sovereignty, if properly understood (Hutt, 1936; Penz, 1986; Esposito, 2022), puts the interest of consumers at the core of the moral justification of markets, as suggested by Adam Smith.

The most important point here is that, no matter the welfare standard, allocative efficiency rests on 'a commitment to equality among market participants', although the commitment and therefore the equality norm is different depending on the considered welfare standard (Esposito, 2024).

Given the centrality of the idea of allocative efficiency in modern economic analysis in general, and of law in particular, the relationship between allocative efficiency and the moral commitment to equal respect should be sufficient to demote the idea of a conceptual separation between efficiency and the normative concept that legal practice has imported

from moral discourse from an assumption to something in need of proper contextual justification.

A shallow exploration of other economic expressions is sufficient to collect additional evidence against the 'Conceptual Separation Assumption'. Mainstream economics uses terms like 'moral hazard', 'parasitic and opportunistic behaviour', 'rent-seeking', 'free rider', 'predatory pricing', among others, which clearly convey some degree of moral disapproval of the agent acting in such a way.

The 'Conceptual Separation Assumption', therefore, simplifies the complex relationship between law and economics, overlooking shared normative commitments. At the same time, it causes a tunnel vision effect, directing attention toward ways to manage the conflict instead of searching for meanings of economic terms fitting with meanings of legal terms (Calabresi, 2016; Esposito, 2019, 2022; Esposito and Tuzet, 2019, 2020).

Thus, the 'Conceptual Separation Assumption' rests on a semantic misunderstanding, namely, the belief that certain concepts are inextricably bound to certain forms or terms, without taking account of the possibility that the same concept may be expressed using other formulations.

4. From conceptual to linguistic separation

Since the 'Conceptual Separation Assumption' does not offer plausible grounds for the economic approach to law, it seems interesting to look at how the economic approach to law might instead be received by the legal community as a linguistic problem. In other words, the hypothesis is that we are dealing with a linguistic separation instead of a conceptual separation, in that the two communities may in fact be referring to very similar ideas but using different terms.. This 'Linguistic Separation Assumption' is supported by the following considerations.

First, as noted, different conceptions of allocative efficiency in economics are connected with different conceptions of equality. Second, much of the normative resistance to the economic approach to law rests on the idea that total welfare maximization as the sole or at least primary social goal for market-related institutions fails to give due consideration to the distributed concerns that are apparent in the law. From this point of view, efficiency is ultimately treated as a normative concept and then rejected as a poor one (Dworkin, 1980). Third, the concept of allocative efficiency is actually malleable in many respects, which leads to different normative standards and tests. At the same time, the normative vocabulary used in philosophical, political, and legal discourses is evidently not well regimented (e.g. Dunne, 2020; Hesselink, 2021).

Therefore, different meanings of an economic term will relate differently to different meanings of a legal term applicable to the same class of conducts, suggesting that, "the transfer of information between different 'epistemic systems'" can be meaningfully analyzed as a linguistic problem (Bennett, 2024, p. 6).

Indeed, scholars advancing internal critiques of the economic approach to law have framed their concerns along similar lines. In 1986, Yale Law School Professor Ackerman

(1986, p. 930) observed a general tendency in the economic approach to law to "manufacture jargon", suggesting that this would do little harm if it were the result of "a simple process of coded displacement", since it could be overcome using a simple glossary (a crucial tool for interdisciplinary translation):

> If the lawyer-economist were to deploy the N-term [new term] precisely on those occasions where the traditionalist uses the familiar T-term [traditional term], the relationship between the two terms could be expressed by compiling a simple codebook (Ackerman, 1986, p. 931).

More recently, Guido Calabresi (2016), former Yale Law School Dean and founding father of the economic approach to law, has called for the systematic search of economic theories that 'fit' with the law. I myself (Esposito, 2019) have explained why this fitness check must be understood as the search for concepts used in both economic and legal discourses to count, as Calabresi intends, as something different from the mainstream. In the context of epistemic translation, Calabresian fitness may be understood as a matter of equivalence (see below, Section 6.3). Bayern (2023, p. xi), who is skeptical about the innovativeness of much economic analysis of law, observes: "Speaking about legal problems only in economic terms changes the language of the debate, perhaps unduly and destructively, but it is largely a linguistic translation".

In light of the above, it is possible to identify a translation problem in the economic approach to law. Section 5 presents two accounts of it, and Section 6 describes four ways to address it.

5. The translation problem

The translation problem in the economic approach to law may be defined as "the problem of translating interdisciplinary propositions from economics into law" (Esposito, 2020a, p. 291). In this section, I will reproduce an account of the translation problem which I initially addressed to the legal community, and in particular, legal theorists (Esposito, 2018a, 2020), before attempting to generalize from it, building on Brandom's inferentialism and its applications in legal theory by Canale and Tuzet.

The problem of translating from economics to law is different from the problems normally associated with interlingual translation, which are concerned with the relationship between a source text and a target text. In this case, the relationship is not between two texts but between "different epistemic systems" (Bennett and Neves, 2024, p. 1; see also Robinson, 2024).

Building on Gile's (2009) model of translation can perhaps shed light on some of the specificities of epistemic translation. Gile distinguishes between the comprehension and production phases of the translation process. Comprehension concerns the translator's understanding of the "translation unit", while production involves creating a text in the target language that "complies with fidelity requirements" (Gile, 2009, p. 104). In my view, epistemic translation is primarily concerned with enabling the comprehension of a concept from the source episteme by members of the target epistemic community. If this activity is

performed well, then members of the target epistemic community will be enabled to use the concept from the source episteme in their own community. In other words, the production of the text is not the primary concern of epistemic translation; instead, the translator shall explain to the members of the target episteme how to use the concept from the source episteme.

5.1 The original account

My original account of the translation problem was addressed to the legal community and, in particular, to legal theorists. To this end, I built on the influential use by Dworkin (1978) of the idea of propositions of law (Mason, 1971) as a way to speak about the legal validity of a norm – that is, the idea that a certain norm belongs to a certain legal system.

To illustrate, let us consider Article 3 of the *Code of Hammurabi*, which states: "3. If any one bring an accusation of any crime before the elders, and does not prove what he has charged, he shall, if it be a capital offense charged, be put to death" (King, 2008). If this norm were enforced, it would mean that, during the Kingdom of Hammurabi, a farmer that accused a merchant of theft in front of the elders and failed to prove the charges would be executed. Of course this would not be applied today in a country like Portugal, for example. In fact, Article 24(2) of the current Portuguese Constitution expresses a proposition of Portuguese law that explicitly prohibits the death penalty.

It follows that different legal systems identify different legal norms as valid; in other words, different propositions of law are true in different legal systems.

However, it should be pointed out that propositions *of* law are different from propositions *about* the law (King, 1951; Patterson, 1993). Propositions about the law are usually theoretical propositions purporting to describe the conceptual structure of legal systems (e.g. Hart, 1960) or legal relationships (e.g. Hohfeld, 1913; Duarte d'Almeida, 2016). Thus, they require two discourses: legal discourse, in which propositions *of* law are expressed, and the meta-discourse, which expresses propositions *about* law.

A proposition about law is, therefore, an "interdisciplinary proposition": "a statement that is warranted (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"(Esposito 2020a, p. 284). Examples of interdisciplinary propositions of economics about law include: 'Article X of the Civil Code contributes to the efficiency of voluntary transactions' or 'Article Y of the Constitution leads to an inefficient allocation of resources'.

Interdisciplinary propositions are of great interest in the context of epistemic translation. In fact, the truth conditions (correctness, warranty, etc) of a proposition *of* law are different from the truth conditions (correctness, warranty, etc) of a proposition of economics *about* law. A proposition of law is 'true' when it is justified using criteria that are accepted in a certain legal community (indeed, how to properly justify propositions of law is the subject of a sub-field of legal studies called 'legal argumentation'). A proposition of

economics is 'true' when it is justified using criteria that are accepted in a certain economic community.

An important difference between the two disciplines is that legal discourse includes a special sub-discourse in which the correct use of legal arguments is particularly important, namely judicial discourse. Lawyers addressing judges and, in particular, judges writing opinions to justify their decision of a case, have to use proper legal arguments to justify their conclusions. The former must do it as a matter of diligence toward their clients, the latter as part of their duty to respect and apply the law, enshrined in the duty to give reasons (Staiano, Palombino and Rossi, 2022).

In contrast, legal academics, especially when they propose legal reforms, enjoy more rhetorical discretion in choosing the disciplines from which they can draw arguments to support their positions. If specific arguments are accepted in legal academia, they will gradually become more relevant to judicial discourse (after all, judges read legal scholarship and often take classes from legal academics who use arguments that are uncommon in judicial discourse).

The problem of translating from economics to law is thus a matter of determining when a proposition that is true in economics is relevant to legal discourse in the sense that it can contribute to making a proposition of law true.

In fact, the threshold is actually low. Failing to warrant the truth of a proposition of law does not mean that the proposition is irrelevant. In every legal dispute decided by a judge or a jury in which there is a dispute on the content of the applicable norms (a large part thereof), the parties present their arguments, trying to warrant the propositions they need to win the dispute. Legal systems recognize that sometimes a legal claim can make no sense (that it is manifestly inadmissible, etc) and may even go as far as punishing the party for a frivolous lawsuit. Still, these cases are the exception rather than the rule.

The best way to solve the translation problem from economics to law is thus to incorporate a proposition of economics into an argumentative scheme justifying a proposition of law (Esposito, 2018a, 2020a). For example, literal arguments from expert language can be used to give prominence to the interpretation of a certain term that has clearly originated in economics, such as 'predatory pricing' (Papayannis, 2013). However, the problem is that economic terms are typically functional, which means that the function assumed by those developing the concept will greatly influence its meaning and, ultimately, its acceptability.

Mindful of this fact, Craswell (1993), one of the most prominent scholars in the economic analysis of contract law, has suggested that every economic argument that starts from the premise that the goal is the maximization of total welfare should be understood as coming with a 'jurisprudential preface', which would state 'to the extent that the maximization of total welfare is legally relevant, the following proposition of law should be true'. This is particularly plausible if we consider that another economic goal – the maximization of consumer welfare – seems to have a higher degree of fit with legal discourse (Esposito and Tuzet, 2019, 2020).

5.2 An attempt to generalize the translation problem in inferential terms

Brandom (1994, 2000) has developed an account of linguistic practices where the content of an expression is determined by the set of correct inferences that can be performed using it. Utterances have two fundamental deontic statuses in this account: commitments and entitlements. An utterer is committed to the correctness of the inference made using a certain expression. If the other participants accept the commitment, it becomes an entitlement. Brandom calls this approach 'score-keeping'. The idea is that participants in a linguistic exchange keep score of each other's commitments and entitlements.

Canale and Tuzet (2007, 2008, 2009) and Canale (2022) have developed an inferentialist account of legal practice. In particular, in a trial, the controversy is progressively shaped by the parties' respective commitments and entitlements about the meaning of the relevant legal provisions. To mark the indebtedness to Brandom, Canale and Tuzet labeled their approach 'judicial score-keeping'.

Building on these ideas, my colleagues and I (Esposito, 2020b, 2022; Esposito and Tuzet, 2019, 2020) have developed and applied an approach to test the fit of economic concepts with a form of legal reasoning called 'reverse-engineering legal reasoning'. This approach is described in Section 6.4.

In inferentialist terms, we can say that the translation of concepts and propositions from economics to law does not require that the one claimant be given an entitlement concerning the correctness of the inference made. As noted in Section 5.1, legal practice is full of proper legal arguments that fail to make a proposition of law true – that is, fail to earn the status of an entitlement. Thus, the translation problem can be framed in inferentialist terms as a situation where a claim is denied the status of a commitment regarding the meaning of an expression because that utterance lacks the requirements to count as a commitment in the relevant linguistic practice.

In other words, the situation where an economic proposition remains untranslated is similar to a situation in which, say, a person claims that (1) the Earth is flat (2) because 'green shacked with milk gives airplanes funny gloves'. That is to say, claim (2) does not come even close to count as a reason for believing that the Earth is flat, and the counterparty refuses to engage with it, refusing to give claim (2) the deontic status of a commitment according to inferentialism.

6. Solutions to the translation problem: A tentative typology

An engagement with epistemic translation via the EPISTRAN Project has prompted me to pursue a more systematic and technical exploration of how to translate key knowledge from the domain of economics to law (Esposito, 2018a, 2020a). Indeed, the theoretical frameworks described in Section 5 are deeply influenced by developments in the philosophy of language.

Members of the EPISTRAN Project suggested that my approach to the 'translation problem' might be terminological. In other words, it would seek to identify economic terms (source language-episteme) that could be said to have some equivalence to legal terms

(target language-episteme) (Cabré, 1999; Montero-Martínez and de Quesada, 2003; Vakulenko, 2014; Rabadán Álvarez, 2022).

As this section tries to show, the set of options is broader and often more informal than a mere terminological approach. However, it is indeed the case that two of the four techniques I describe below seem to fit into the idea of a terminological equivalence.

Briefly, the four techniques are:

1. Implicit translation, or 'cruise mode': the economic concept and/or the term expressing it are smoothly integrated into legal discourse.
2. Regimentation: the economic concept and/or the term expressing it are used to enrich the meaning of a legal term (weak regimentation) or to propose a complete delegation to economic theory of the meaning of the term (strong regimentation).
3. Intensional or terminological approach: a certain economic term has the same definition as a legal term.
4. Inferentialist approach: the inferences made in a certain legal domain fit with those that would be made if a certain economic concept were to be used (this approach works best to compare the fitness of different economic terms).

It should be pointed out that this is a tentative typology. These four approaches are an attempt to address the problem of translating from economics to law, but of course, others may exist, or different names could be used (as is often in the discussion of translation solutions, techniques, strategies, etc). Let us look at each one in more detail.[4]

6.1 Implicit translation or 'cruise mode'

In some situations, the economic proposition can be implicitly translated into a legal one (Craswell, 1993; Esposito, 2020a; Hubkova, 2020). This solution matches what Anthony Pym calls "cruise mode" (2018, p. 45) and Chesterman (2016, p. 87) calls "smooth, 'automatic', patches of activity". For example, Hubkova (2020) proposes the legal principle of procedural economy as an example of a situation where judges use, perhaps unknowingly, economic thinking to make decisions about how many witnesses to hear, where to join cases raising similar issues, etc.

As seen above, Craswell (1993) proposed considering standard economic analysis as having a 'judicial preface' (or 'implicit premise'), stating that the argument should be understood as a prudential argument or argument from consequences, which is a typical legal argument. However, we have questioned the effectiveness of this view: since a disagreement exists in economics on the meaning of allocative efficiency, one cannot enter into cruise mode until it is clarified what the relevant concept of allocative efficiency is in a certain context (Esposito and Tuzet, 2019, 2020).

[4] For reasons of space, the second step remains mostly implicit in this article, but adequate bibliographical references support it.

Similarly, I have criticized Papayannis's (2013) claim that it is sufficient to accept the mainstream economic understanding of a legal term simply because it is the mainstream interpretation; one needs to be careful, as the economic understanding may rest on a premise that is rejected in legal discourse (Esposito, 2020a). Often, the economic understanding is functional and the implicit function may be incompatible with the relevant legal values. I simply am advocating for a case-by-case analysis. For example, I noted that one of the most prominent legal philosophers of the last century, Hart (1960) proposes a functional classification of legal norms based on the distinction between primary and secondary norms. Primary norms tell people what they are obliged to and prohibited from doing. Secondary norms correct a series of defects of primary norms, namely that they are static, uncertain and ineffective.[5] A legal system with these characteristics is obviously defective and it is therefore apparent that adaptability, certainty and effectiveness count as plausible candidates to be considered legal values.Thus, an implicit translation takes place when it is apparent that a certain economic idea should count as a reason to make a proposition of law true. The epistemic communities are particularly close to each other, and their boundaries can be cruised smoothly.

6.2 Regimentation (weak or strong)

Regimentation (Ebbs, 2009) is a definitional strategy that, in extreme cases, leads to stipulative definitions unrelated to prior uses of the *definens* (Gupta and Mackereth, 2023). In other occasions, more modestly, the regimentation is meant to clarify the meaning of the term or sentence. Let us call the former strong regimentation and the latter weak regimentation.

The analysis shows that weak regimentation can be useful and count as a proper translation, whereas strong regimentation is highly problematic in terms of epistemic injustice (Kidd, Medina and Pohlhaus, 2019) and economic imperialism (Ackerman, 1986; Mäki, 2009) as well as, in terms of epistemicide and cognitive injustice (Santos, 2016; Bennett, 2024). Let me illustrate.

A historically significant example of weak regimentation is represented by the so-called 'Hand Formula'. This expression refers to the definition of 'negligence' given by Judge Learned Hand (his real name) in the case *United States v. Carroll Towing Co*.[6] Judge Hand explained:

> Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the

[5] Actually, Hart uses the term 'efficient'. However, he is referring to the lack of means to settle disputes which, in current European legal discourse is a problem of effective judicial protection (Article 47 of the Charter of Fundamental Rights of the European Union). Moreover, in the context of this text, 'efficiency' is used as an economic term. Hence, the substitution is both justified and advisable.

[6] *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

> burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i. e. whether B > PL.

Economic analysts soon 'found' an 'ambiguity' in Judge Hand's ruling. As Richard Posner (2011, pp. 214-215) put it:

> There is, however, an ambiguity both in Hand's formulation and ours … . (E)xpected damages and costs must be compared at the margin, by measuring the costs and benefits of small increments in safety and stopping investing in more safety at the point where another dollar spent would yield a dollar or less in added safety. … The Hand Formula in its correct marginal form …

Indeed, according to mainstream economics, under ideal conditions, one should act in such a way that no additional social benefits could have been obtained by investing a little more in precautions. On these grounds, scholars started to demand that the Hand Formula be given a marginalist interpretation. This attempt to achieve strong regimentation does not clarify the meaning of 'negligence' in legal discourse as Judge Hand originally tried to do; rather, Posner is proposing a different meaning of 'negligence', with no legal grounds. The justification for his choice is that standard economic analysis demands that 'damages and costs must be compared at the margin'.

From a translation study perspective, Judge Hand increased the density (Pym, 2018) of legal texts using the expression 'negligence' and its cognates. Posner's proposal is, instead, a significantly more invasive way to relate economics and law. In fact, since Posner is proposing to change the meaning of 'negligence', rather than specifying it, we can more precisely say that he is performing a "material change" (Pym, 2018, pp. 44-45) or "information change" (Chesterman, 2016, p. 106).

Another example from a different field is the theoretical account of proportionality reasoning given by Alexy (2002). Alexy used a series of economic concepts, including indifference curves, marginal utility, Pareto efficiency, and value maximization to provide a rigorous account of the steps involved in legal reasoning when it pertains to balance conflicting legal values (eg, legal certainty vs equity). Alexy uses economic concepts carefully and analogically, to identify and elucidate the activity performed by judges. However, in the subsequent literature, less careful scholars writing on proportionality reasoning started to treat economic concepts and legal ones as identical even when they are not. They effectively attributed to the latter features that they actually did not have, but that were attributes of the economic concepts used (Esposito, 2017b).

These examples clearly illustrate the existence of weak and strong cases of regimentation. They also support my position about the fundamental difference between the two. On a case-by-case basis, weak regimentation may or may not improve the quality

of legal reasoning by increasing its density. However, strong regimentation is too disrespectful of legal discourse to be typically useful.[7]

6.3 Intensional definition or terminological approach strictu sensu

An intensional definition specifies the characteristics that an entity must have for the term to apply correctly (Gupta and Mackereth, 2023). Similarly, a crucial passage in a terminological translation is paying due attention to the definition of a term in both languages. It follows that terms with the same definition have the same meaning and, thus, allow for an epistemic translation. As seen above, Ackerman (1986) and Bayern (2023) see this as a desirable, or at worst, innocuous result, if it were possible. Similarly, I have spoken of porous concepts that can be used to "incorporat(e), introduc(e) and translat(e) [economic insights] into claims and arguments that are legally relevant" (Esposito, 2018b, p. 67).

As seen, two conceptions of allocative efficiency are connected to two different conceptions of equality. These connections establish a relationship of equivalence between the source episteme and the target one.

> (E1) 'allocative efficiency' means 'the maximization of total welfare'
> (M1) 'the principle of equality is respected by a market that maximizes total welfare because the gains and losses of everyone matter the same'
> (C1) 'allocative efficiency respects the principle of equality'

Crucially, (C1) connects (E1) and (M1), showing that the Conceptual Separation Assumption is false for (E1) and (M1). At the same time, the other conception of allocative efficiency is connected to the other conception of equality.

> (E2) 'allocative efficiency' means 'the maximization of consumer welfare'
> (M2) 'the principle of equality is respected by a market that maximizes consumer welfare because everyone maximizes their welfare when they act as consumers and do not do so when they act as producers'
> (C2) 'allocative efficiency respects the principle of equality'

Moreover, (C2) is semiotically but not semantically equivalent to (C1). (C2) connects (E2) and (M2), showing that the Conceptual Separation Assumption is false for (E2) and (M2). The same point is also illustrated by the concept of 'consumer weakness' in the case law of the Court of Justice of the European Union on EU consumer law. In this case law,

[7] Of course, academics can and shall argue for the change of the meaning of legal terms, but they need to do it by appealing to legally relevant reasons. When they do so, the meaning of legal provisions can radically change, though the change will normally take the form of a specification of the previously accepted meaning of the provision.

(L1) 'consumers are the weaker contractual party due to asymmetries of information and of bargaining power'
(L2) 'the law intervenes to protect consumers from contractual weakness'
(E3) 'asymmetries of information and of bargaining power are market failures'
(E4) 'market failures cause allocative inefficiency'
(C3) 'the law intervenes to protect consumers from allocative inefficiency'

This inferential chain is longer to aid readers, but (C3) achieves the same result as (C1) and (C2). In this case, asymmetries of information and of bargaining power act as inferential bridges connecting contractual weakness to market failures, which are then connected to the ideas of consumer protection and allocative inefficiency, leading to the conclusion that the law intervenes to protect consumers from allocative inefficiency. In this way, equivalence is established.

6.4 Inferentialist approach

The last approach is the most sophisticated and subtle. In fact, it focuses on identifying situations where an inference formulated in one language fits with an inference made in another language. As discussed below, contrary to the method discussed in Section 6.3, the inferentialist approach is not upfront in determining a connection between an economic term and a legal one.

In my research monograph (Esposito, 2022), I have used this approach to test the degree of fitness between the above-mentioned conceptions of allocative efficiency (total vs consumer welfare maximization). The idea is to test the extent to which one can make sense of legal practice, assuming that this practice has allocative efficiency as its central goal.

The focus is on four important passages in legal reasoning:

1. Why does the law protect a certain type of economic agent from harm?
2. How are defences and exceptions to the application of norms justified?
3. What is the purpose of the applicable sanctions?
4. Which role is played by certain specific economic concepts in legal reasoning?

The two conceptions of allocative efficiency justify incompatible answers to these questions. The activity is then to compare the content of actual legal reasoning (when an answer is being provided to these questions) with the content of the answer that each conception of allocative efficiency provides.

Legal reasoning is often too shallow to decide which conception is better connected with legal reasoning. Still, in relation to each question, with a large enough number of cases, it is possible to find decisions that can be explained very well by one conception of allocative efficiency, but fail to be explained by the other. More precisely, the consumer welfare standard performs better than the total welfare one.

On these grounds, we can conclude that economic arguments with consumer welfare as maximand can, in the analyzed branches of EU law, be used to formulate interpretive arguments along the lines proposed by Craswell (1993), while economic arguments with total welfare as maximand cannot.

Recalling Gile's (2009) distinction between the comprehension and production phases of translation, I would say that the present inferentialist analysis is meant to increase our comprehension of the inferential properties of two different conceptions of allocative efficiency. In particular, the analysis increases our understanding of their fit with a specific legal practice. By showing that one conception fits smoothly with said legal practice and the other does not fit at all, the analysis identifies a series of expressions in the target episteme that can be used to express the smoothened conception of allocative efficiency.

7. Discussion

As noted above, members of the EPISTRAN Project suggested that the solutions to the translation problem from economics to law are terminological. Indeed, the second and third approaches seem to be terminological. Traditional terminological approaches have been criticized for having an *a priori* notion of equivalence, among others, by Toury (1995). However, the first and fourth approaches seem to go beyond a terminological approach. Indeed, the implicit translation moves from the *ex-post* observation that certain economic concepts are *de facto* accepted as relevant to legal discourse – they are, in other words, intuitively accepted as capable of contributing to the argumentation making a proposition of law true.

The situation is more subtle in the case of the inferentialist approach, which effectively reverse-engineers legal reasoning. In this case, the analysis shows that the inferences made in legal discourse – that is, the propositions of law that are considered true – have a good fit with propositions of economics with such-and-such characteristics. Thus, the inferentialist approach increases our comprehension of how to translate a proposition of economics into a proposition of law.

Section 6 has discussed the connection between the first, second, and third solutions to the translation problem to translation strategies as classified by Pym (2018) and Chesterman (2016): the first, implicit translation, was connected to the 'cruise mode' or smooth activity; the weak version of regimentation is a form of density or abstraction change, while strong regimentation implies a material or information change in legal discourse. The third, the terminological approach, focuses on the equivalence between expressions in the source language-episteme and in the target one, mediated by the use of the same definition for both terms.

The fourth approach, the inferentialist one, does not connect readily with any of the translation solutions proposed by Pym or Chesterman. The reason has probably to do with the object and the purpose of epistemic translation. While conventional interlingual translation focuses on a text, epistemic translation focuses on the transfer of knowledge

from one episteme to another (Bennett and Neves, 2024; Robinson, 2024). The epistemic transfer takes place between epistemic communities, not between texts. The focus is not on producing a target text that translates the source text. Instead, the focus is transferring concepts from a source community to a target community. For example, an economic expert testifying in legal proceedings is transferring knowledge (concepts, ideas), but they are not translating a text.

The inferentialist approach is thus best understood by way of reference to the distinction between the comprehension and productive phases of a translation (Gile, 2009). The comprehension strategies focus on the understanding of the source text and enable one to find an appropriate reformulation in the target language-episteme. The specificity of the inferentialist approach is that it establishes the connection between multiple existing texts in the source and target languages-epistemes. In so doing, it establishes the conditions for future successful uses of knowledge from the source episteme in the target epistemic community. In particular, the inferentialist approach increases the acceptability of regimentation and terminological approaches in situations where implicit translations are unavailable because the target community is not 'ready' to accept a concept from the source epistemic community. Ideally, the inferentialist approach should make the cruise mode eventually available to members of both the source epistemic community and the target one.

Where should research on epistemic translation, especially with a focus on economics and law go from here? I see at least two directions.

The findings of this article confirm the overarching hypothesis behind my interest in the emerging field of epistemic translation studies: translation scholarship offers a wealth of theoretical insights to better understand the problems in the field of law and economics. First, translation scholars can offer the field of law and economics research methods to search for appropriate epistemic translations between law and economics (e.g. corpus studies). Second, I see it as highly relevant to focus on the cognitive dimension of translation. In fact, perhaps except for the first approach, none of the approaches surveyed in this article pays attention to the cognitive dimension of language (Muñoz Martín, Sanjun Sun and Defeng Li, 2021). However, this dimension is probably crucial to ensure a widespread acceptance of epistemic translations. Given the irritation of legal scholars (Section 3), investigating the cognitive dimension of epistemic translation is essential to the success of the translational turn in the economic approach to law. In particular, the systematic identification of situations where implicit translations are successful could shed great light on the contextual conditions enabling smooth interepistemic communication.

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