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INEVITABILITY AND USE

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There are two standard jokes about economists. The punch line to the first joke is, “assume a can opener,” and the punch line to the second is “the light is better over here.” In these comments I am going to ask you to assume can openers, lots of can openers, and very large can openers. These remarks will not address the merits of the economic analysis of law as a critical study. My focus will not be on the usual criticisms of economic analysis and economics generally: the problems of methodology, the unrealistic assumptions made or the incompleteness of modelling techniques. I leave for another day the debate whether economic analysis will ultimately be found to be a fruitful field of study or whether it will prove to be barren.

Instead, these comments proceed on the assumption that economic analysis deserves some place in the law school curriculum simply because it is so prevalent and pervasive. Its currency and its prevalence entitles it to a place in the curriculum just as much as feminist theory or critical legal theory. Let us assume, therefore, that law and economics will be taught in law schools if for no better reason than as an example of the heresy of the age. Having chosen for myself a much simpler task than addressing the methodology of law and economics, I want to address two pedagogical issues which flow from the paper, [1] and to tie us back into the theme of the Conference, Theory in Legal Education. These remarks explore the values latent in the theory and elaborate some of the material spoken about earlier. [2] My basic question is simple to ask, is teaching economic analysis simply the indoctrination of an implicit conservative ideology?

ECONOMIC ANALYSIS AS THE INDOCTRINATION OF CONSERVATIVE IDEOLOGY

Teachers of law in universities are caught on the horns of a dilemma: they do not want to teach just rules — that is simply to regard law as a craft, a skill or trade. Instead they want to look for and to impart to students some notion of the policies that underlie the rules, some idea whether the existing rules coincide or conflict with those policies, how the rules influence the activities of citizens, and so on. Economic analysis promises a perspective on all of those things. Furthermore, it appears to be scientific — and we all know that science is value-free. It promises to solve difficult problems. It claims to be applicable to all sorts of areas of law. There is economic analysis of restrictive trade practices [3] and extra-marital affairs; [4] there is economic analysis of commercial regulation [5] and drug dependence. [6]

My suspicion is that for many law teachers the major problem associated with economic analysis is simply a belief,

which is possibly justifiable, that the appearance of a value-free method really masks conservative attitudes. In other words, the content of economic analysis of law is not value-free. It is value-laden and those values are conservative values. One need only to look at the results reached in some of the literature to realise that they track closely conservative ideologies.

Will the law teacher be teaching implicit conservative values? I want to suggest — and I do no more than suggest — two reasons why that might not be the case. The first is that any implicit values will emerge primarily from the use to which economic analysis is put. To what uses can it be put? There are at least three identifiable streams apparent in the literature. [7] The first stream is the positive or descriptive stream: economic analysis is used to describe the effects of rules in economic terms and to predict the effects upon people's behaviour of adopting or not adopting a certain rule. Further, this descriptive stream speculates on whether imposing the risk of loss on the cheaper risk bearer will produce efficient risk allocation and questions whether society has chosen inefficient means of deterring crime when more deterrence could be secured at less cost by different methods.

The second stream — the expositive stream — postulates that it may help our understanding of rules if we assess them as if rules were attempting to promote the efficient allocation of resources. So, for example, it has been argued that nineteenth century tort law — for example, nuisance law and the tests that were developed in those laws — can be understood as if they were an attempt to reproduce efficient results. [8] In case you think I have to go to the nineteenth century for this, I need only turn to *Wyong Shire Council v Shirt* [9] which is the modern *fons et origo* of negligence law in Australia. In one interesting passage Mason, J. says:

> In deciding whether there has been a breach of the duty of care the tribunal … must first ask itself whether a reasonable person in the defendant's position would have foreseen that his or her conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. The perception of the reasonable person's response calls for a consideration of the magnitude of the risk and the degree of probability of its occurrence along with the expense, difficulty and inconvenience of taking alleviating action. [10]

That is an economic test. It tracks very closely the test called the Learned Hand test in the *Carroll Towing* case [11] which is the basis from which the economic analysis of negligence proceeded in the United States. The Australian version has everything but the algebra.

Of course few judgments are as explicit in adopting an economic formulation for their test as is *Shirt*. Our legal culture is rightly suspicious and reluctant to converse too seriously about covert reasons and explanations. The problem of all covert explanations, whether they proceed from psychology, political theory or elsewhere, is that as long as the dialogue continues to be framed in terms of explicit reasons which do not include the implicit, our suspicions and our assumptions will be largely unverifiable. That is not an overwhelming problem — perhaps our knowledge about the process of law has grown — but until our culture changes there cannot be dialogue — there is simply monologue.

Finally we come to the third stream. This is the unashamedly normative or prescriptive use to which economic analysis can be put, where rules are analysed using their efficiency as the primary value. The normative position generally imputed to this economic analysis is that society should choose rules which would maximize social welfare, and in order to do so should adopt a rule according primarily only to its efficiency. Here economic analysis ceases to be systematic scepticism and becomes moral philosophy. Latent values become apparent and there is "the conversion of yardsticks to goals and assumptions to revealed truth." [12]

Let me suggest a second reason why some credence might be given to a belief that teaching economic analysis of law is not simply the inculcation of conservative ideology. That reason is, despite the appearance of the literature,

there are cases where the analysis leads to results which conservatives might find objectionable. In so far as economic analysis is determinate it need not generate results which are ideologically conservative. Let me give an example which comes from the economic analysis of criminal law. The economic analysis of criminal law models criminal behaviour essentially as a career choice, of greater or lesser longevity, depending on the success of the criminal. In making that career choice the rational criminal weighs costs and benefits. One of the costs which must be taken into calculation is the opportunity cost of what might be done by the criminal instead of crime. The model, therefore, implies that crime will be reduced by, for example, increasing the opportunity cost of crime. How might the opportunity cost of crime be increased? Job creation programmes might be one solution; another solution might be to make unemployment payments higher. Of course these solutions to crime are rarely suggested because they cost money. But do they cost more money than imprisonment? That question is rarely asked but the answer may be that the do not diverge a much as one would think. There is a role for economic analysis of law to suggest results such as that. Instead, much of the literature on criminal law tends to focus on deterrence and so on.

Let me bite the same bullet in another way — the bullet of values. If, as I am sure you must, you remain profoundly skeptical that economic analysis can ever amount to anything other than conservative ideology, perhaps this should be treated as a virtue rather than a vice. Law teachers undoubtedly concentrate on objectives in the cognitive rather than the affective domain. [13] Perhaps economic analysis is the ideal vehicle for reversing this circumstance and generating courses which have goals such as requiring our students to identify values, to organise those values into coherent systems and to analyse those values against other competing values. This process might ultimately produce students who have either adopted or — if students at Sydney Law School are any indication — violently rejected, economic analysis of law, and have, from whatever position, formulated a coherent theory which is identifiably their own. Perhaps economic analysis should be used as a course in The Political Values Emanating from Economic Rationalism. Producing students with articulated coherent opinions of whatever persuasion is something which might be sought by law teachers as much as achieving high-level cognitive skills, high-level cognitive analysis or high-level technical skills. Economic analysis of law might be an appropriate vehicle for achieving this goal because the normative stream of economic analysis is unarguably value-ridden.

We develop legal education by going beyond the practitioner's concerns with the heredity and status of rules, to equip students to respond not only with somewhat haphazard and intuitive notions of fairness but also (and here I am verging into the content of economic analysis) by giving them the further perspective and different tools which economic analysis offers. Economic analysis encourages them to ask different questions: will the proposed solution cost more than the harm that it is designed to solve; might the cost of the harm be remedied by another remedy which is cheaper and easier to administer; is the party who must bear the loss better able to prevent or minimise it than the other? It also requires the recognition of different values from those that their training in law school has equipped them to adopt. [14] Judgments that are made from an economic perspective will use different criteria, ask different questions and suggest different solutions from those that are traditionally ascribed to lawyers. The answers to those questions are a powerful ally to our intuitions of fairness where they coincide and more importantly, where they conflict, a deliberate and conscious ordering of values has to be made, and that can only help vigorous and informed debate.

BEYOND WELFARE ECONOMICS

One final observation is that economic analysis has been perceived as being only welfare economics. But just as there is more to psychology than running rats through mazes so also there is more for law in economics than just welfare economics. Even if we remain fundamentally unconvinced about the use of welfare economics as a tool for analysing laws, it would be a mistake to think that other areas of economics or its tools are similarly unfortunate elements of any law school curriculum.

One example will suffice. The use of econometrics and statistics deserves greater emphasis in the law school

curriculum. There is a large body of literature on the use of statistical methods of proof in litigation where empirical measures are necessary: such as race and sex discrimination. Notions of probabilistic causation are also feasible using economics rather than the confused view of causation traditionally adopted in areas such as torts, particularly in most tort actions.

Let me finish where I began. Perhaps by assuming that economic analysis and economics in a more general sense deserve a place in the law school curriculum, I assumed too much. By concentrating on the delivery rather than the message, some may suggest that I have given a working model of economic analysis — ignoring the central issue, proceeding by inelegant and inconclusive reasoning to reach conclusions which are beyond the predictive power of the tools. But, if I have ignored the central issue, as I noted at the beginning, "the light is better over here."

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[1] FH Easterbrook, The Inevitability of Law and Economics [1989] LegEdRev 2; (1989) 1 *Legal Educ Rev* 3.

[2] See A Duggan, Law and Economics in Australia [1989] LegEdRev 4; (1989) 1 *Legal Educ Rev* 37.

[3] See, for example, FH Easterbrook, Workable Antitrust Policy (1986) 84 *Mich L Rev* 1696.

[4] See, for example, GS Becker, *A Treatise* on *the Family* (Cambridge Massachusetts: Harvard University Press, 1981).

[5] See S Breyer, *Regulation and its Reform* (Cambridge Massachusetts: Harvard University Press, 1982); A Ogus & C Veljanovski, *Readings in the Economics of Law and Regulation* (Oxford: Oxford University Press, 1984) pt 111.

[6] See CS Becker & KM Murphy, A Theory of Rational Addiction (1988) 96 *J Pol Econ* 675. See also more generally R Cooter, Law and the Imperialism of Economics (1982) 29 *UCLA L Rev* 1258; J Hirshleifer, The Expanding Domain of Economics (1985) 75 *Am Econ Rev* 53.

[7] See Cooter, *supra* note 6.

[8] See Cooter, *supra* note 6, *at* 1265.

[9] [1980] HCA 12; (1980) 146 CLR 40.

[10] [1980] HCA 12; (1980) 146 CLR 40, at 47–48.

[11] *United States v Carroll Towing Co* (1947) F 2d 169.

[12] See A Duggan, *The Economics of Consumer Protection* (Adelaide: Adelaide Law Review Association, 1982) 144. I know that there are economists for whom the normative/ positive distinction is seen as having no merit just as there are lawyers who the content/process distinction in the same way. I cannot deal with that issue here — I ask you to assume yet another large can opener.

[13] See A Petter, A Closet Within the House: Learning Objectives and the Law School Curriculum, in N Gold ed, *Essays on Legal Education* (Toronto: Butterworths, 1982) 77.

[14] Ogus and Veljanovski are critical of the training of English lawyers observing:

The typical training of British lawyers does not adequately with the policy questions surrounding legal change and reform ... A major contribution of economics is the framework (or theory) systematically to evaluate legal policy, reveal important trade-offs and inter-relationships between goals, and trace through the probable effects, costs and benefits of different law.

See Ogus & Veljanovski, *supra* note 5, at 42. Their comments probably apply with equal force to the training of Australian lawyers.
