THE BARBARIANS AT THE GATE
C.W. MAUGHAN AND S.F. COPP[1]

[This version reflects the text of the article as published in (1999) 19 Society of Public Teachers of Law Reporter 17 - 19 but is not a facsimile copy of it.]

In an article entitled *The Academic and the Practitioner,*[2] Professor Peter Birks[3] remarked that, 'The self-image of the common law as judge-made is incomplete. It is judge- and jurist-made. The common law is to be found in its library, and the law library is nowadays not written only by its judges but also by its jurists.' Later in the same article[4] he states, 'It was the common law's faith in the new armour of reason that brought forth the university jurist'. Later still, after a section on the stresses placed upon the law by a pluralist, secular and sophisticated democracy, and after a tilt at legal education as milch cow and rite of passage, he adds that '[t]here has been a fight to establish the intellectual respectability of the law. University lawyers have to mix it with economists, natural scientists, medics, and philosophers'[5].

The implication is clear (at least in relation to the common law). Jurists are important for the interpretation and development of the common law: jurists are university scholars whose views are to be found in law libraries: jurists are lawyers. Indeed, Professor Birks says as much by noting explicitly that 'University scholars have to be very good lawyers.'[6]

There is, however, a flaw in this argument. If jurists are university lawyers (and presumably other scholarly lawyers); and if the writings of these lawyers are to be found in the law libraries, and if lawyers must 'mix it' with '... economists, natural scientists, medics and philosophers ...', then what are we to make of the writings of these self-same economists, natural scientists, medics and philosophers that are also found in the law libraries?[7] Are these writings simply an irritation for the true jurist, a grain of sand with which he or she might create a pearl of juristic thought? Or are they perhaps more sinister? Are they perhaps the work of lay persons who may also be jurists? If so, the barbarians are no longer at the gate: they are already inside, either emulating the legal

---

1 Respectively Reader in Law and Economics and Senior Lecturer in Law, School of Finance & Law, Bournemouth University.

2 Abridged from the 1997 Twenty-First Mann Lecture, and first published in the *SPTL Reporter* of Spring 1998, p. 21 at 22.

3 Regius Professor of Civil Law, Oxford University.

4 Above n.2 at 22.

5 Ibid. at 24.

6 Ibid. at 25.

7 See, for instance, *Journal of Law and Economics*, *Journal of Legal Studies*, *Journal of Law, Economics and Organisation* and the *Journal of Interdisciplinary Economics*.

scholars, or tugging at the beards of those eminent personages, and wondering whether to decapitate them should one of them make an incautious move.

Consider, for instance, the following quotation from Professor Richard Epstein of the University of Chicago, an eminent university jurist who often sides, as do many American legal academics,[8] with the barbarians. Professor Epstein is quoted in the report *Accident Compensation: Options for Reform* prepared by Credit Suisse First Boston for the New Zealand Round Table[9] as saying:

> Around 1970 Guido Calabresi came out with a famous cost minimisation formula [in relation to the costs of accidents] in which the objective was to minimise the sum of the costs of accidents, the costs of administration, and the costs of prevention, subject to a constraint of justice. We have now waited over 25 years to see how the last constraint influences the first three elements of the analysis, and no-one has yet provided a strong and clear example of where four variables give us a better analysis than three.

In other words Epstein's view is that in choosing liability rules, the dominant, perhaps the only, criterion the state should use is that of economic efficiency, not some ill-defined concept of justice. At the least Epstein's proposal suggests that the old order in tort needs to be challenged: at the most it suggests its abolition. Surely such a challenge must be recognised by the legal profession? Surely it must reply?

Epstein is not alone. In areas of constitutional law,[10] contract law,[11] criminal law,[12] property law,[13] company law,[14] competition law,[15] civil procedure,[16] law of evidence,[17] and indeed in every branch of the law, economists and other lay-persons are challenging

---

8 R.A. Posner, Professor of Law at Chicago University, and Chief Judge of the US Seventh Circuit Court of Appeals is the most notable example of a jurist who is sympathetic to the use of economic analysis of the law.

9 *Accident Compensation: Options for Reform,* report prepared for the NZ Round Table by Credit Suisse First Boston, November 1998 at 97. For a summary and a critique of this report see C.W. Maughan *Whither ACC?* [1999] NZLJ 221.

10 See, for instance S. Gordon, 'The New Contractarians' (1976) 84 *Journal of Political Economy* 573.

11 See, for instance, A.T. Kronman and R.A.Posner, *The Economics of Contract Law* (Little Brown and Co., 1979).

See, for instance, V.S. Khanna, 'Corporate Criminal Liability: What Purpose does it Serve?' (1996) 109 HLR 1477.

13 See, for instance, E.G.Furubotn and S. Pejovich, 'Property Rights and Economic Theory: A Survey of the Recent Literature' (1972) X JEL 1137.

14 See, for instance, B.R. Cheffins, *Company Law: Theory, Structure and Operation* (Clarendon, 1997).

15 See, for instance, R.H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 1978 (Basic Books, 1978).

16 See, for instance, R.D. Cooter and D.L. Rubinfeld, 'Economic Analysis of Legal Disputes and Their Resolution' (1989) XXVII JEL 1067.

17 See for instance, B. Robertson and T. Vignaux, 'Explaining Evidence Logically' [1998] NZLJ 131.

much of the traditional juristic thinking, and asking a series of fundamental questions about the nature and purpose of the law. What normative goals are we trying to achieve with the law? What positive models must we use to evaluate our attainment of these goals? Who are 'we'? The challenge is so pervasive that we now find the Law Commission explicitly and extensively incorporating economic analysis and comparative law into its latest consultation document.[18]

We (in this instance, the authors) believe that the challenge must be recognised and that legal academics must reply.[19] It is no longer adequate for legal academics to rely for their normative beliefs on the endogenous adjectival rules of the legal system. The substantive and exogenous axioms and models on which those rules depend must be much more clearly articulated. The weights that need to be attached to justice also need to be clearly stated. In fact, jurisprudence needs a good 'rethink'.[20] Similarly, legal scholars need to use their skills to build better predictive (i.e. positive) models of justice. It simply is not good enough to advocate the reform of a law, or indeed the retention of a law, without reference to the likely outcome of retention or of a particular reform.[21]

For those of us who side with the 'law and economics' barbarians, articulation and justification of an appropriate normative and positive model are relatively easy. The micro-economic model is already specified and can be used to analyse almost any human activity that involves choice: hence of course our inroads into analysis of the law. However, few if any of us (although perhaps we speak too rashly in the light of Posner's writings[22]) would argue that efficiency, the outcome of our model, should be the only set of values society should consider. Economic efficiency is at heart utilitarian; and truth, beauty, love, honour and justice, to name but a few of the non-utilitarian values, alongside religious values, are of equal or greater importance to many people. A decision therefore to 'sing along' with Epstein and focus solely on the input of economic thinking into the law must surely be a mistake.

Nevertheless, we would argue that a high weighting must be given to efficiency in evaluating the law and that 'law and economics' thinking needs to be introduced into the university law school syllabus in order to provide students with a rigorous model by which to consider the consequences of legal rules. By focusing on one social goal and testing the law by reference to it, students are encouraged to consider what other social goals are important and how they should be weighted. A mental framework is accordingly developed to evaluate the law, facilitating the conscious choice of alternative goals. Indeed, we would go further than this. The recent adoption by the Law Commission of economic analysis and the possibility of the extension of this into other law reform

---

18 For a detailed analysis, see C.W. Maughan and S.F. Copp 'The Law Commission and Economic Methodology: Values, Efficiency, and Directors' Duties' (1999) 20 *The Company Lawyer* 109.

19 Some, of course, have done so: see, for example, the excellent article by B.R. Cheffins, 'Using Theory To Study Law: A Company Law Perspective' (1999) 58 CLJ 197.

20 For an excellent example of the benefits of rethinking the basics of land law, see K. Gray, *Elements of Land Law* (Butterworths, 1993).

21 See, for a good example, *Accident Compensation: Options for Reform,* above n. 9.

22 See, for example, R.A. Posner, 'A Theory of Primitive Society, With Special Reference to Law' (1980) JLE 1.

deliberations means that law students will be ill-equipped to understand the thinking of one of the principal institutions in their own country crucial to their own discipline without an understanding of law and economics. To mischieviously transpose the words of Lord Denning, when European Law was in its infancy, into this context: 'But when we come to matters of with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.'[23]

Should law students (and more to the point legal academics) then become 'amphibious'? For a law student to obtain an adequate understanding of law and economics requires that law and economics, perhaps as part of an enhanced unit on jurisprudence, should be mandatory on LLB programmes and perhaps on many postgraduate courses where there is a substantial legal element. We believe that the SPTL could play an important role in encouraging this. As a first step we are proposing the formation of a 'Law and Economics' section of the SPTL to bring together a broad grouping of legal academics, not just with a specialist interest in what may be termed micro-economic analysis of law, but also to consider the wider impact of economics and economic thinking on law, at a domestic and an international level.[24] We would sum up the role of such a section by another quotation, from Calabresi and Melamed.[25] Discussing property and torts from a 'law and economics' perspective, they stated that their article was '... only *one* of Monet's paintings of the Cathedral at Rouen. To understand the Cathedral one must see all of them.'

23 *Bulmer Ltd v. Bollinger SA* [1974] Ch 401.

24 The authors' contact details are as follows. Dr Bill Maughan: tel. (01202) 595374; e-mail: bmaughan@bournemouth.ac.uk. Stephen Copp: tel. (01202) 595237; e-mail: scopp@bournemouth.ac.uk.

25 G. Calabresi & A.D. Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' 85 (1972) Harvard Law Review 1089 at 1090.