Comment: Putting Professor Crespi's Question In Context

Stuart Anderson*

Why indeed the gap? At Otago Law & Economics is seen as a desirable optional paper, but not essential. It is on the books, so to speak, but runs only when there is someone qualified and interested to teach it - like many other optional papers. When staff vacancies arise we tend to advertise without subject preference unless we have a pressing need in a core area or there is a strong student demand, believing that that is the best route to maintaining a strong faculty. The other New Zealand law schools seem to operate in much the same way.

Absence of student demand is interesting. Professor Crespi evidently disbelieves it, and there is doubtless some truth in the argument that if a paper were available, and if students knew what the discipline offered, demand would grow. Still, Otago developed a paper on Gender and the Law because students asked for one, whereas there has been no expressed student demand for Law & Economics. Further, Professor Crespi somewhat cavalierly brushes aside evidence of low participation in suitable papers offered by other departments at some New Zealand universities on the *a priori* ground that that must be because they are not taught by specialist lawyers. Yet at least some students eligible for these papers will be taking conjoint degrees involving economics (and all students have the opportunity to do that - conjoint degrees are the norm rather than the exception these days.) So low participation may reflect low demand, for all Professor Crespi's wishful thinking.

I doubt that politics has much to do with the absence of Law & Economics papers. New Zealand law faculties seem to me to conceive of themselves as resolutely apolitical and even atheoretical, to the chagrin of a few of their members.[1] Professor Crespi's hint that the political preferences of faculty members may be so deeply buried in their consciousness that they themselves are unaware of the real reasons for their (supposed) hostility is exactly the sort of unfalsifiable assertion that gets enthusiasts a bad name. The point, however, cuts both ways. Just as I doubt that politics is a reason for keeping the discipline out, so I doubt that many faculty members would agree with Professor Crespi that adoption of Chicago School economics by our political masters is a reason for putting it in. This may be a weakness, but if it is it stems from a vision of law and law teaching quite different from that espoused by American law schools.

Professor Crespi implicitly compares New Zealand's law schools with the "major" American law schools. While flattering, such a process isolates the respective law schools from the legal cultures that support and sustain them,

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* Dean and Professor of Law, University of Otago.

1 Jane Kelsey, 'Closure of debate about restructuring in tertiary education', Socio-Legal Newsletter number 19, p 4 (1996), noting also the marginal nature of socio-legal research in New Zealand law schools.

leading to a superficial comparison that conceals more than it illuminates.[2] Three differences are especially significant. American law schools teach at graduate level, New Zealand at undergraduate; secondly the "major" American law schools are relatively autonomous of both university and profession, New Zealand's are not; thirdly the nation from which those American law schools draw most of their students is fragmented into 50 state jurisdictions, whereas the New Zealand law schools draw overwhelmingly from a single jurisdiction and teach the law of just one place. In consequence the top ranks of American law schools teach 'the law' of no particular place, but instead must necessarily present students with a range of competing solutions to what they present as core problems. Further, the realist revolution of the 1930s generated in the law schools a belief that their role was to elucidate in a systematic way a broad understanding of law and legal doctrine as instruments of social policy and reflections of public values.[3] The thrust of the education they provide is thus primarily evaluative: any particular law or legal doctrine can and should be measured against an ideal conception of 'the law' and discarded or reformed if found lacking. (Law &) Economics provides a currently acceptable framework for such an analysis, to the point where its language and tools have become 'an almost elementary feature of American legal education'.[4] So, for example, Professor Susan Rose-Ackerman wrote recently in the Victoria University of Wellington Law Review's special number on law and economics that 'an economic analysis of the Common Law suggests that it cannot be an all-purpose resolver of the problems of the modern capitalist welfare state.'[5] What New Zealand (or Australian, or English) law professor, I wonder, would have imagined that it might be, or that, from within a law school, it might be their role to solve those problems?

By contrast New Zealand's law schools (and Australia's), in this respect much closer to the English tradition, experienced no realist revolution and have remained broadly faithful to the Benthamite distinction between law as it is and law as it ought to be. The broad diffusion of social science insights through American law schools has not been replicated in New Zealand. The thrust of the education provided in New Zealand is predominantly descriptive, leavened by the sorts of analysis acceptable to an appellate court in the Anglo-New Zealand mould. Where the policy role of (many) American law professors generates research that is broadly based even when it is not empirical, the much more narrowly professional outlook of New Zealand's legal academics generates

2 P S Atiyah and R S Summers, *Form and Substance in Anglo-American Law* (Oxford, 1987), chapter 14.

3 I have taken this commonplace from George L Priest, 'The growth of interdisciplinary research and the industrial structure of the production of legal ideas', (1993) 91 Michigan LR 1929, 1931, which was one of a large number of replies to Judge Harry T Edwards's essay, 'The growing disjunction between legal education and the legal profession', (1992) 91 Michigan LR 34. The debate is intriguing for anyone interested in the elite end of American legal culture.

4 Neil Duxbury, *Patterns of American Jurisprudence* (Oxford, 1995), p 419, citing Bruce Ackerman, (1985) 85 Columbia LR 899, 900. Duxbury's book is essential reading for an understanding of contemporary American legal education, particularly his chapters 'Economics in Law', and 'Uses of Critique'.

5 'Economics, Public Policy and Law', (1996) 26 VUW LR 1, 15.

doctrinal writing. Further, it is barely a decade since changes to Council of Legal Education regulations shrunk the compulsory core of the LLB to the point where students may craft their own degree and faculties could even begin to sketch a distinctive individuality for themselves. Meanwhile socio-legal research of any sort is unusual in New Zealand's law schools, empirical research rare. New Zealand's law schools match England's; in William Twining's words, they are primary schools for the profession[6], albeit that in an age of mass tertiary education many, perhaps a majority, of their graduates are unlikely to work in that profession.

Could it be different? My suggestion has been that the Benthamite tradition of separating law from policy is deeply rooted in English-based common law jurisdictions. I surmise that Benthamism, Parliamentary democracy, strong central bureaucracies and an un-reified, unromantic, conception of law form a close fit. I think it no accident that whereas by Professor Crespi's count the American directory of law teachers lists over one hundred academics claiming an interest in Law & Economics, by my count the English and Australian/New Zealand directories list fewer than half a dozen each.[7] Law & Economics forms an interesting area for research for some, but to law schools as presently conceived it is peripheral.

English experience, though probably not exactly transferable to New Zealand, is illuminating.[8] In 1972 the Social Science Research Council was persuaded to fund a Centre for Socio-Legal Studies at the University of Oxford which, after rather an unfocused start, adopted something of a preference for economic analysis of law. Yet it found that UK economists were uninterested in and unconvinced by the American Law & Economics literature. Perhaps as a result the Centre's researchers engaged in little normative analysis of law and made next to no contribution to the canonical literature, which remains stubbornly American. Valuable work was done on framework analysis of particular legal doctrine, explaining its development in economic terms, and also some useful positive analysis of the economic impact of various rules, using detailed empirical surveys. The Centre's commitment, however, is to a multi-disciplinary, social science approach[9] in which economics must take its place alongside sociology, social policy, anthropology, psychology and social history in the scramble for intellectual primacy and project funding. The Centre may have seeded Law & Economics research by English legal academics, but not so as to turn it into the key to everything, as the more dedicated American writers would have it. On the other hand the Centre's research has made a difference to the sort of material available for teaching students, and there is no doubt that many of its former

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6 'Remembering 1972: The Oxford Centre in the context of development in higher education and the discipline of law', (1995) 22 Jo Law & Soc 35, 44.

7 As with Professor Crespi's estimate, these figures from the 1993 Directory of the Society of Public Teachers of Law and the 1995 Directory of the Australasian Law Teachers Association are very inexact, membership of the associations being voluntary and patchy. Nonetheless each directory contains hundreds of names, so they give a reasonable indication of the difference between these jurisdictions and the USA.

8 A I Ogus, 'Law and Economics in the United Kingdom: past, present and future', (1995) 22 Jo Law & Soc 26. I owe this reference to Professor David Campbell.

9 D J Galligan, 'Introduction', (1995) 22 Jo Law & Soc 1, 7.

members have taken their 'law and ...' preferences with them to their posts in conventional English law schools. Even so, socio-legal studies, and *a fortiori* Law & Economics, remain vulnerable, easy targets for cuts if financial exigency forces law schools to contract.[10]

What chance then for an indigenous New Zealand Law & Economics? Many of the country's brightest young lawyers have for some time sought their graduate training in America and, on return, have sometimes brought with them a determination to see American Socratic teaching methods used in their law school classrooms.[11] Hitherto, however, the content of the teaching, and the content of the research, has remained doctrinal and professionally oriented - because that is how New Zealand's legal culture has been. Now, however, as Professor Crespi notes, a Law and Economics Association of New Zealand has been founded. Unlike the UK economists mentioned above, New Zealand's Treasury does have an enthusiasm for the Chicago School, which at the moment at least includes sympathy for its Law & Economics. Some short research studies have been published.[12] And that, surely, will be the test for the durability of Law & Economics in New Zealand law schools: can a research base be funded and maintained? If it can, then the insights gained may spread out into legal education generally to influence the way all students see law. But if it cannot, then Law & Economics is likely to remain what it is now: all very well if one of the staff is fascinated by it, but dispensable.

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10 W Twining, note 6 above.

11 K J Keith, 'The impact of American ideas on New Zealand's educational policy, practice and theory: the case of Law' (Fulbright Seminars, 1988), (1988) 18 VUW LR 327.

12 See for example the papers in the special Law and Economics edition of the VUW Law Review, (1996) vol 26, number 1.