LAW IS A SOMETIME AUTONOMOUS DISCIPLINE

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I was deeply moved by the invitation to contribute to this Symposium on law and economics. Indeed, unable to recall ever having composed an original sentence on the subject of the Symposium, I was moved to wonder if the invitation was a mistake. I have, however, over the years been influenced by the work of others on law and economics and perhaps, like Molière's Monsieur Jourdain, who expressed astonishment on learning that he had been speaking prose for over forty years without knowing it, I have been talking law and economics all this time.[1] Or perhaps I am to provide comic relief.

In any case, I am to address the question: "Is law an autonomous discipline?" I understand this question in this context to ask: Does law function independently from economics? Such understanding as I have of law and economics is mainly limited to contract law, and my remarks will be largely confined to that field. I conclude that the answer is: sometimes YES and sometimes NO. But one might well reach a different conclusion if one concentrated on, say, the law of torts or antitrust.

In 1972, I naively thought that the answer was NO—law does not function independently from economics. In a contracts casebook published in that year (the same year, by coincidence, that Richard Posner published his first edition),[2] I included material on law and economics on the assumption that it had become an essential ingredient in learning about contract law. Six years later, in 1978, I learned that I was wrong. The answer was YES—law functions independently from economics. In that year, I presented the chapter on remedies of the Restatement

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1. MOLIÈRE, LE BOURGEOIS GENTILEHOMME, act 2, sc. 4 (1670) (*"Par moi foi! il y a plus de quarante ans que je dis de la prose sans que j'en susse rien . . . ."*).

2. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1972).

(Second) of Contracts to the Council of the American Law Institute. An introductory comment called attention to the fact that the important role that the institution of contract plays in the economy has drawn the attention of economists to the law of contract remedies. It went on to discuss whether a party should be compelled to perform its contracts and concluded that economic theory tends to confirm the traditional responses of common law judges in dealing with that question. Although it admitted that this analysis is not without shortcomings, the comment concluded that the main thrust of this analysis and its support of traditional contract doctrine in this area is clear.

Right or wrong, this did not strike me as subversive. But the hostility of my audience was unmistakable: Take it out! Such subversive thoughts—in particular the notion of "efficient" breach—were not to find their way into the Restatement. There was a silver lining, however, for I was permitted to put what I had proposed into the smaller print of the Reporter's Note, for which the Institute does not take responsibility, and you will find even the dread "E" word if you look there.[3]

Things may have changed over the course of two decades, and the Council of the Institute might have a different reaction today. So I revisited the question, still in the optic of contract law, from three different perspectives: that of the professor, that of the judge, and that of the lawyer.

I began with professors. From the front page of the *Wall Street Journal* I learned that, as far as professors were concerned, number one on the list of all-time-greatest hits—the platinum journal article, as it were—was Ronald Coase's noted piece on Social Cost,[4] with a total of 1,741 citations in scholarly journals.[5] Calabresi and Melamed on the View of the Cathedral[6] almost made the top ten, coming in eleventh with a total of 542 citations.

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3. RESTATEMENT (SECOND) OF CONTRACTS ch. 16, reporter's note on introductory note (1981) (discussing how breach of a contract may result in "economic efficiency").

4. Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

5. Paul M. Barrett, *"Citology," the Study of Footnotes, Sweeps the Law Schools*, WALL STREET J., Jan. 22, 1997, at 1, col. 4. The *Journal*'s story was based on SYMPOSIUM ON TRENDS IN LEGAL CITATIONS AND SCHOLARSHIP, 71 CHI.-KENT L. REV. 743 (1996).

6. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

Those of us who frequent academe are acutely aware that no one there can ignore law and economics, and that goes for even those who abhor the dread "E" word. Thus my recent local mail included an announcement of a "Feminism and Legal Theory" workshop devoted to economic modeling, the "general idea" of which was "to explore ways in which economic concepts and language are being used to prevent or dismantle progressive social policies."[7] Surely at least in "elite" academe, law does not function independently of economics. What about judges?

Judges, I found, are a very different lot from professors. A careful study by Professor Jeffrey Harrison done in 1988, a decade after my encounter with the American Law Institute Council, concluded that the influence of law and economics, judged from the frequency of citations by *courts*, was "modest."[8] My own study, while not as careful (and limited to the last two decades), confirmed this.[9] First, I found Coase's "best loved article" cited in only 33 cases, 14 of those with opinions by Easterbrook, Posner, and district court judges within the Seventh Circuit. I turned up citations to Calabresi and Melamed in only eleven cases, once roughly every two years.[10] To put this in perspective, a leading article on covenants not to compete that did not appear on the all-time-greatest hits list, was cited 77 times.[11]

What to make of this? Judges, unlike professors, may not cite everything that they have read in reaching their opinions. Chief Judge Judith Kaye once confessed, "I read many more articles than I cite in my opinions. I don't feel compelled to cite everything that I've read."[12] Lawyers may be remiss in arguing their cases. In 1988, Justice Pollock of the Supreme Court of New Jersey said that in his nine years on the bench, he had

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7. For anyone who might have missed the point, a follow-up e-mail contrasted "economics *rhetoric*" with "feminist *method*" (emphasis added).

8. Jeffrey L. Harrison, *Trends and Traces: A Preliminary Evaluation of Economic Analysis in Contract Law*, 1988 ANN. SURVEY AM. L. 73.

9. This was done at the end of 1996 in preparation for the Symposium at Duke and has not been updated.

10. Lest this pattern seem limited to law and economics, consider a leading article from the discipline that might be called law and sociology, Stuart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. (1963), which was fifteenth on the all-time-greatest hits list, came up only twice in two decades, once by Judge Easterbrook.

11. Harlan Blake, *Employee Covenants Not to Compete*, 73 HARV. L. REV. 625 (1960).

12. Judith S. Kaye during a transcribed discussion in 1988 ANN. SURVEY AM. L. at 270.

never seen a lawyer present a law-and-economics argument.[13] It may take time for academic writing on law and economics to filter down (or is it up?) to the courts. Law clerks, influenced by professors, may in turn influence judges. (It would certainly help matters if more professors were appointed to the bench![14]) But whatever the reasons, the influence of law and economics is vastly different in the courts from what it is in academe.

Finally, I turned to lawyers. Judge Harry Edwards of the District of Columbia Circuit lamented in his article on "the growing disjunction" between law schools and law practice, that while "the schools are moving toward pure theory, the firms are moving toward pure commerce."[15] He began the article with a quotation from Justice Frankfurter: "In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them."[16] But despite the pervasive influence of law and economics among academics, its influence on lawyers seems negligible. Admittedly, many lawyers toss around terms learned in law school such as "superior risk bearer," "risk averse," and various forms of the dread "E" word. But I think that Justice Pollock's observation is telling. The law schools have not succeeded in turning out lawyers attuned to serious argument rooted in law and economics.

So there seems a paradox. If lawyers are what the law schools make them, why is the influence of law and economics, so evident in the schools, so hard to find among lawyers (at least New Jersey lawyers)? How to explain it?

Let me begin some "trash talk" with a moral tone. Jesus said to his disciples, "Go ye therefore, and teach all nations . . . ."[17] I put it to you that the explanation of the paradox is that, when it comes to teaching "all nations" beyond the boundaries of the law schools, too many of the disciples of the law-and-economics movement (none represented in this Symposium, to be sure)

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13. Stewart G. Pollock during a transcribed discussion in 1988 ANN. SURVEY AM. L. at 126. In an informal conversation with me, one of Justice Pollock's colleagues recently expressed doubt that the report would be very different today.

14. Two other Coase-citers, in addition to Judges Easterbrook and Posner, were Douglas Ginsburg of the D.C. Circuit and Richard Neely of the Supreme Court of West Virginia, both ex-professors.

15. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992).

16. *See id.*

17. *Matthew* 28:19.

are still in their ivory towers—unintelligible, uninterested, and uncooperative.

How unintelligible? Professor Avery Katz observed in a recent law review article that "[m]ost lawyers do not read the interdisciplinary literature in law and economics, . . . let alone the economic literature."[18] Why don't they read it? John Cassidy, in a recent piece in *The New Yorker*, bearing the ominous title "The Decline of Economics," quoted Paul Samuelson as observing that "[t]he number of people in the profession who can communicate effectively is very small."[19] It would not be difficult to find examples from the literature of law and economics to support this assertion. In a Symposium growing out of a program for law students, it may not be inappropriate to ask what effort student-edited journals make to ensure that articles on law and economics are accessible to practicing lawyers.

How uninterested? Rare is the law graduate that enters the profession with more than a single course in law and economics, with irregular reenforcement in substantive courses. The graduate then crams for a bar examination that ignores law and economics. After, say, five years, the graduate then appears before an appellate court for an argument. How likely is it that this lawyer is going to get nourishment from instruction that has gone stale for more than five years without refreshment?

Every day my junk mail includes flyers inviting me to refresh my learning with up-to-date continuing legal education (CLE) programs of every imaginable sort. Well, *almost* every imaginable sort, for I do not recall ever being asked to attend one on "Law and Economics Without Tears" or "How to Make a Million by Efficient Breach." In the thought that I might not be on the right mailing lists, I telephoned three leading purveyors of such CLE programs,[20] at none of which could my informants recall a program devoted to law and economics. To be sure, just as professors weave law and economics into substantive courses, panelists may weave law and economics into their substantive

18. Avery W. Katz, *Positivism and the Separation of Law and Economics*, 94 MICH. L. REV. 2229, 2233 (1996).

19. John Cassidy, *The Decline of Economics*, NEW YORKER, Dec. 2, 1996, at 50, 59.

20. I telephoned the ALI-ABA (joint programs of the American Law Institute and the American Bar Association), the Practicing Law Institute, and the Association of the Bar of the City of New York (running programs for one and a half years).

presentations. But my impression is that even the cardinals of the law-and-economics movement are uninterested in carrying their message to the bar. Given the impressive group of contributors to this Symposium, one might wonder how many have participated in law-and-economics programs for the practicing bar.

How uncooperative? If law and economics is to play a normative role, it need not be before judges. In the field of commercial law, there is a seemingly unending flurry of text revision—notably by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. Even the criticism and defense of the process seems to have become a cottage industry.[21] Yet, to the best of my knowledge, those involved in the law-and-economics movement remain largely aloof from such practical efforts at law reform. How many of the distinguished contributors to this Symposium, one might ask, have been actively involved in those efforts?

Enough of this "trash talk." I believe that if one asks whether law *does* function independently from economics, the answer is sometimes YES and sometimes NO. If one had asked the question whether law *should* function independently from economics, I would adhere to my original view of 1972 and answer NO. Finally, I offer apologies to any who may have taken offense at these remarks. It may have been impolitic to have deprecated the citation of law-and-economics articles by the likes (should there be any) of Judges Easterbrook and Posner, but the conversion of a cardinal does not count for much. Nor should preaching to the choir, which suggests a quick end for this homily.

21. For examples of criticism, see Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995). For an example of defense, see Peter A. Alces & David Frisch, *On the UCC Revision Process: A Reply to Dean Scott*, 37 WM. & MARY L. REV. 1217 (1996).