*Sir David Hughes Parry as Lawyer and Economist**

by R. Gwynedd Parry, LLB

Almost half a century ago, Professor Sir David Hughes Parry, QC, was invested with the medal of the Honourable Society of Cymmrodorion. In a meeting held on 28 May 1958 at the University of London's Senate House, a meeting that would later be recorded in the Cymmrodorion's *Transactions*, both he and Dr Thomas Richards of the University College of North Wales, Bangor, were honoured by the Society.[1] The eminent Oxford historian, Professor J. Goronwy Edwards, presented Hughes Parry to the gathered members, and his presentational address referred to Hughes Parry's distinction as a lawyer and law teacher. As professor of law at the University of London, founding Director of the Institute of Advanced Legal Studies and Queen's Counsel, Hughes Parry had made his mark in the law, and it was his achievement in that field that marked him out for recognition that evening.[2]

Hughes Parry's professional life had been almost entirely spent in the city of London. A 'pilgrim in a barren land', as he confessed in his speech that night, he had arrived in 1924 with the firm conviction that his time in London would be short, before returning to the promised land at Aberystwyth to pursue the remainder of his career.[3] Alas, providence decreed another course, and Hughes Parry's exile was to continue, if not for the remainder of his life, certainly for the greater part of his career. His professional home was to be the London School of Economics and Political Science. Appointed to a lectureship in law in 1924, Hughes Parry found himself working in a dynamic and radical institution with a zealous mission to push forward the boundaries of scholarship and pioneer new approaches towards the study of the social sciences. Indeed, innovation and radicalism were at the origins of its conception. Founded in 1895, the LSE was the creation of a group of Fabians led by Sidney and Beatrice Webb, who believed that the economic advancement of Britain required a dedicated centre that would provide for the systematic study of economics and act as a generator of innovation and a facilitator of social progress. It was conceived not simply to provide another

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* A lecture given to the Society at the British Academy, London, on 25 October 2006, with Professor Prys Morgan, President of the Society, in the Chair.

1 His life is chronicled by Geraint H. Jenkins, *Doc Tom, Thomas Richards*, (Cardiff, University of Wales Press, 1999).

2 *Transactions of the Honourable Society of Cymmrodorion* for 1958, 10.

3 *Ibid*,12.

haven or sanctuary for academic study in solitude, but rather to be a vehicle for practical social reform. With the advantage of a bequest of £20,000 from Henry Hunt Hutchinson in 1894, the vision became reality as the LSE opened its doors in October 1895.[4] From the start, the founding fathers recognised research as being at the heart of its mission, and within the first few years of its existence there had built up a thriving community of researchers. It was the first institution to pioneer the specialist economics degrees of BSc (Econ) and DSc (Econ). During the time of Hughes Parry's appointment in 1924, the London School of Economics was undergoing an important process of physical development and expansion, what would be seen as the second major phase of development in its history. Towards the end of the First World War the School had acquired and developed new premises at Houghton Street. It had effectively taken over most of the Street that would become, to all sense and purpose, the campus of the LSE. The principal instigator of this phase of expansion was the Director, Sir William Henry Beveridge.[5]

Beveridge was appointed Director of the School in 1919, having previously served as a senior civil servant at the Ministry of Food. Beveridge's vision was for the LSE to develop into an international centre of excellence in the study of the social sciences.[6] He recognised that the very name of the institution was somewhat misleading, because it was not simply a school of economics and political science.[7] Rather, it was a school that embraced every aspect of the social sciences, including anthropology, statistics, sociology, and law.[8] Beveridge was subsequently credited as having presided over its

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4 The story is told in Ralf Dahrendorf, *LSE, A history of the London School of Economics and Political Science 1895 -1995*, (Oxford University Press, 1995).

5 *Ibid*, at 268-329.

6 That vision is recounted in Sir William Henry Beveridge, *The London School of Economics and its Problems 1919-1937*, (London, George Allen and Unwin, 1960).

7 *Ibid*, 30-32; His progressive leadership saw the composition of the student population within the school change significantly between 1919 (when Beveridge was appointed to the Directorship), and 1937, (when he retired). Student numbers remained the same during this period, at around 3000 students. However, whereas at the beginning of Beveridge's tenure the vast majority of the students were taking short courses, by the end of his directorship about two thirds of the students were taking full degree courses. The period also saw a significant expansion in the number of students undertaking higher degrees. In 1919, as little as 32 students were undertaking higher degrees at the school. By 1937, this number had increased to 293. The balance between part-time or evening students and day students remained the same, and the school steadfastly remained faithful to the founders' vision of an institution that provided access to higher education that would be impossible in the older institutions with their residence requirements. The period also saw a significant increase in the overseas student population, so that at the end of Beveridge's directorship. Students from over 50 countries studied at the LSE. This development reinforced and strengthened the LSE's international complexion.

8 *Ibid*,. 83-84.

'heroic age', acting as the main catalyst of its subsequent growth and prosperity.[9] As a future Director remarked,

> It is fashionable these days....to play down the role of individuals in history. Yet some institutions would not be as they are – some might even not exist at all – if it were not for the presence of the right person at the right time. Beveridge at the LSE was just that.[10]

Beveridge's first major initiative after his appointment was to strengthen and develop the legal side of the School's activities.[11] This was the beginning of an important period in the development and expansion of legal scholarship, not only in London but also the United Kingdom in general. Although law had been taught at the LSE, from the earliest beginnings,[12] it was in 1920 when Beveridge created a chair of commercial and industrial law that the major breakthrough occurred.[13] In 1923, a chair of English law was also created, and Edward Jenks was appointed to the chair. Jenks had enjoyed a busy career and previously taught at Cambridge, Melbourne, Liverpool, Oxford and the Law Society's College of Law, and he was a civil lawyer and legal historian of some considerable distinction.[14]

Hughes Parry's arrival at the LSE in 1924 coincided with a period when he had been considering the prospect of a career in London. Called to the Bar by

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9 Ralf Dahrendorf, *LSE . A history of the London School of economics and political science 1895 -1995*, 333.

10 *Ibid*, 328.

11 For Beveridge, the students' welfare was also a matter of paramount concern and he initiated measures that insured that students experience at the LSE will be a fulfilling one. Beveridge was also alive to the needs of his teaching staff. His awareness of the financial limitations imposed on staff, balanced with the demands of the school, informed his enlightened policies, and his treatment of the teaching staff. He made concerted efforts to ensure that staff were sufficiently well remunerated to enable them to develop in their time and efforts to the work of the school. And so, for example, the LSE was the first College in London to establish £1000 a year as a minimum salary of full-time professors. The school also took a liberal approach to the matter of lecturers undertaking external paid work. Beveridge wanted to create a climate whereby staff felt valued, challenged and free to fulfil their potential as scholars. Research was therefore to be a central part of the school's mission. The result was that the school became a powerhouse of academic scholarship, as evidenced by the productivity of academic staff. See Beveridge, *The London School of Economics and its Problems 1919-1937*, 30-45.

12 See Richard Rawlings, 'Distinction and Diversity: Law and the LSE' in Richard Rawlings (ed.), *Law Society and Economy: Centenary Essays for the London School of Economics and Political Science 1985-1995* (Oxford, Clarendon, 1997), at 2.

13 H. C. Gutteridge was appointed to the post.

14 See his entry in the *Oxford Dictionary of National Biography* (author, Tony Honore).

the Inner Temple in 1922, he had secured pupillage in the chambers of Sir Benjamin Cherry, shortly to be an instrumental figure in drafting the Law of Property Act of 1925.[15] However, he was diverted from the path of a full-time career at the Bar when he received the invitation from Beveridge to take up a lectureship at the LSE's Law Department. Acting as envoy on behalf of Beveridge was A. D. McNair (later Lord McNair), who was then a member of staff at the School[16] Hughes Parry accepted the invitation, and, with Beveridge's blessing, during the beginning combined his work as a law academic with professional practice.[17]

Hughes Parry's own academic background might explain why he was such an attractive proposition for Beveridge. Hughes Parry had held an assistant lectureship at Aberytwyth since 1920. Indeed, his academic career as a student had began at the University College of Wales, where he had graduated with a first class degree in economics in 1915.[18] This was followed by War service, and thereafter a further period of legal study at Peterhouse, Cambridge. He had degrees in both law and economics, and, in the light of Beveridge's vision of creating a School where the social sciences could be seen as part of a common endeavour, it is not altogether surprising that Hughes Parry was seen as somebody with the right qualifications to contribute to that mission.

Hughes Parry's early career at the LSE was a story of rapid promotion. Appointed to a Readership within the University of London in 1928, this was quickly followed by his appointment as Professor of English Law in 1930, barely six years after his appointment to a lectureship.[19] This was the Chair

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[15] He was elected a Bencher of the Inner Temple in 1952.

[16] Sir David Hughes Parry, *O Bentref Llanaelhaearn i Ddinas Llundain*, (Caernarfon, Y Llyfrfa, 1972), at 102-103.

[17] Indeed, he was encouraged to do so by Beveridge, who at the time of his appointment had written to him stating, '...the appointment here would not preclude you from reading in Chambers, provided suitable arrangements could be made not interfering with your work at the school. Reading in Chambers would, in fact, be regarded as a means of improving your qualifications for the academic work, to which as I understand you look forward as your career'. NLW, DHP Papers: letter 28 May 1924 from Beveridge. This was by no means unusual, and others within the Department also maintained their connections with practice; see Ross Cranston, 'Commercial Law and the LSE' in Richard Rawlings (ed.) *Law Society and Economy: Centenary Essays for the London School of Economics and Political Science 1985-1995*, (Oxford, Clarendon, 1997), at 115.

[18] See Sir David Hughes Parry, *O Bentref Llanaelhaearn i Ddinas Llundain*, 62.

[19] Upon his retirement he was made Professor Emeritus: for details, see *University of London Gazette*, July 1959, 112-113.

that became vacant following Jenks's retirement earlier that year [20] Hitherto, Hughes Parry's scholarly output had been quite sparse, something which he himself would later acknowledge[21] (although it must be said that appointing academics to professorships on the back of modest research productivity was not altogether unusual during this period[22]). However, his appointment now required him to deliver the customary inaugural lecture, and he set about deciding on a subject. His choice of title was to be 'Economic Theories in English Case Law'. Having been at the LSE for more than six years, the lecture reveals a great deal about the influence of that period on his intellectual interests and his development as a scholar. The lecture was presented at the LSE in November 1930, and would later be published as an article in what was regarded as the premier law journal in the United Kingdom, namely the Oxford University based journal, *The Law Quarterly Review*.[23]

Economic Theories in English Case Law

What did Hughes Parry have to say in his inaugural professorial lecture? He begins by declaring that the idea that 'every effect may have an economic cause and every cause its economic effect' was something impressed upon him by his time at the LSE, and so tempted him "to adventure into the borderland between economics and law".[24] At the outset, he proclaims that

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[20] Hughes Parry had made many friendships along the way that stood him in good stead for advancement and promotion. The man who had secured his services for the University of London a few years earlier, Arnold McNair, was one of his loyal backers for the Chair. Indeed, McNair had provided a reference for another candidate, G.W. Keeton, then Reader in the University of Manchester, stating in the letter that, 'I undertook to do this only on the understanding I should be at liberty to state that if Mr D. Hughes Parry should be a candidate for the Chair I consider his claims to be stronger.' *National Library of Wales, David Hughes Parry Papers* (hereinafter referred to as NLW, DHP Papers): Letter from A.D. McNair, 28 March 1930, to the Academic Registrar of University of London. In fact, McNair had sent a copy of the reference to Hughes Parry 'for information'. McNair's long-standing friendship with Hughes Parry is conveyed in a letter sent during the time of the latter's retirement, 'You know how much I admire what you have done for the University of London, for the universities as a body, and for the teaching of the law': NLW, DHP Papers, Letter from Arnold McNair to Hughes Parry, 24 May 1959.

[21] See Sir David Hughes Parry, 'Reminiscences 1920–1924–1930' in J.A. Andrews (ed.), *Welsh Studies in Public Law*, (Cardiff, University of Wales Press, 1970), 147-48.

[22] Professor Harold Cooke Gutteridge had an equivalent profile when he was appointed to the Cassel Chair a few years earlier; see Ross Cranston, 'Commercial Law and the LSE' in Richard Rawlings (ed.) *Law Society and Economy: Centenary Essays for the London School of Economics and Political Science 1985-1995*, (Oxford, Clarendon, 1997), at 115.

[23] David Hughes Parry, "Economic Theories in English Case Law" 47 *Law Quarterly Review* (1931), 183- 202.

[24] *Ibid*, 183.

'law has a closer ally in economics than it has in any of the other social sciences'.[25] His interest in the interplay between law and economics was partly driven by the economic problems of the day – this was the world after the great crash of 1929, and the debilitating depression had began to take its toll.[26] The need to regulate economic forces through legislation was therefore another reason 'to call attention to the interaction of law and economics, and to dwell upon certain aspects of that interaction in so far as modern English case law is concerned'.[27] It was a timely topic.

Setting out his objectives, he stated that he did not intend to 'search for an economic interpretation of English legal history'.[28] He did not see in the canon of English case law any evidence of systematic economic interpretation, and explained that this was the result of the very nature and personality of the common law, in that it is concerned with 'concrete controversies', unlike Roman law, with its tendency 'to foster the logical development of abstract conceptions'.[29] The lecture sought to concentrate on two matters, namely, first of all, the means whereby economic theories and institutions might be in a position to influence English law, and, secondly, the actual influence of economic theories on the courts' decisions.

In his consideration of how economics might be brought to bear on judicial thinking, he identified the education and training of judges as being one principal way of achieving this. Recognising that the main objection to methodological training in economic theory would be that it compromises judicial independence and impartiality, he cited sources which supported the view that judges are, in any event, and at least sub-consciously, influenced by the political, social and economic values of their time.[30] As such, his point was that methodological training would rationalise that which occurs naturally but in a potentially haphazard and whimsical fashion. He then moved on to the education of lawyers. He argued that law as an intellectual discipline belonged to the wider family of social sciences, and that the isolationist trend that had developed in the study of law was to be lamented. He identified the neglect or marginalisation of the teaching of legal philosophy as being one of the consequences of this contrived divorce between law and the other social

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[25] *Ibid.*

[26] See, for example, John Arthur Garraty, *The Great Depression : An Inquiry into the Causes, Course, and Consequences of the Worldwide Depression of the Nineteen-Thirties, as Seen by Contemporaries and in the Light of History*, (San Diego : Harcourt Brace Jovanovich, 1986).

[27] David Hughes Parry, "Economic Theories in English Case Law", *op cit*, 184.

[28] *Ibid.*

[29] *Ibid.*

[30] A subject that would be explored more fully by one of his students, J. A. G. Griffith, some forty years later; see J. A. G. Griffith, *The Politics of the Judiciary*, (Fontana, 1977,1st edn).

sciences, and that this in turn meant that lawyers lacked any proper appreciation of the place of law within wider society and its intellectual relationship with other subjects. This is significant because, he argues, 'legal progress, like trade depressions, appears in cycles and these cycles have more frequently than not been heralded and guided by legal philosophies'.[31] This is an argument for a more theoretical approach to legal study as opposed to a purely pragmatic method that had thitherto been typical of most law schools, with a narrow emphasis on learning positivist legal method and the operation of common law rules of precedent and their everyday application by the courts. He argued that the effect of this narrow approach was to stifle the law's ability to adapt quickly to economic and social development, creating a process whereby the law became fossilised, and lawyers' understanding of society's needs becoming out of date. His proposed remedies to these deficiencies were that works on economics might be relied upon as authority by the judiciary and the legal profession, and that economists might act as expert witnesses in appropriate cases in order to assist the judicial process. These arguments amount to recognition on the part of Hughes Parry that there was a case for looking at the correlation between law and economics from the point of view of legal theory, and with an understanding of law in its wider social context.

Hughes Parry then went on to demonstrate how economic ideas had influenced legal development, notwithstanding the absence of any methodology or theoretical framework underpinning this influence. On the matter of statutory interpretation, where the statute involves the regulation of economic activity, he explained that judges are required to ascertain the purpose and meaning of the term in question in order to give the statute effect. This, he argued, has resulted in some importation of economic principles into the legal vocabulary, particular when the term or expression requiring construction is an economic one. For example, when looking at the courts' interpretation of the economic expression, 'profits', he demonstrated how judges have resorted to authorities on economics in order to ascertain the appropriate definition. He also brought into his argument the role of 'public policy' and the concept of the 'reasonable man' in the judicial decision making process, and he implied that these concepts created a potential for loosening the common-law straightjacket (he implied that the binding force of precedent is often at the root of the law's inflexibility). Indeed, he claimed that the 'reasonable man' was often a more palatable name for the 'economic man' when it came to judicial reasoning in certain contexts, because the 'reasonable man' would often determine the outcome by reference to the fact that a reasonable person would not endorse an outcome that would be uneconomic.

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[31] David Hughes Parry, "Economic Theories in English Case Law", *op cit*, 186.

The implication is that the 'economic man' was an important benchmark by which legal controversies had been determined, even though the expression may have been unfashionable. What he was effectively saying, in so many words, was that one of the tests for reasonableness was whether the outcome made sense on an economic basis. Here we have the germ of an economic theory of legal decision-making.[32]

The latter part of the lecture turned to how economic considerations had actually influenced the development of the common law, and in particular the law of contract and property law.[33] Of particular interest was his reference to the mercantilism of the seventeenth and eighteenth centuries, which promoted unfettered enterprise in the shipping trade in order to increase national wealth and prosperity. This utilitarian approach had some effect on the courts' decision making, as, for example, in its attitude towards monopolies which were deemed to be contrary to the national interest. This was to develop into the more well-known economic and political doctrine of laissez-faire, which he considered as an important influence on the courts' policy towards activities that placed restraints on free economic activity. The courts had been influenced by laissez-faire economics to such an extent, he claimed, that they wholeheartedly adopted economic individualism and behaved in such as way as to limit any action that might amount to economic collectivism. To demonstrate the point, he cited the courts' negative attitude during the nineteenth century towards collective action on the part of trade unions, preferring to enforce only the obligations between individual employers and individual employees. Similarly, as freedom of trade was perceived as a generator of economic prosperity, monopolies were regarded as inhibiting economic enterprise, and therefore as being uneconomic. Accordingly, the courts would tend to rule in such a way as to discourage monopolies. With freedom of trade came liberty of contract, and while the economists argued that wealth and commerce were the fruits of free trade, the courts were also maintaining the importance of unfettered freedom of contract. Freedom of trade was the promoter of economic prosperity, and so legal principles had to be compatible with this economic doctrine.[34] In addition, the property owner's right to dispose of his property in any way he pleases, either during his lifetime or in his will after his death, was seen a further example of the law's respect for individual autonomy.[35] The only recognised restraint on individualism was the Court of Chancery and the equitable remedies it

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[32] *Ibid*, 193.

[33] *Ibid*, 194-97.

[34] This individualism and its emphasis on autonomy and freedom gave birth to many well established legal principles- for example, the principle of *volenti non fit injuria* was argued to be a result of this movement.

[35] David Hughes Parry, "Economic Theories in English Case Law", *op cit*, 200.

developed to override unfair outcomes, even though they might be economic; however, these were exceptions that proved the rule in favour of non-interference and individual autonomy. Some tension was also found between freedom of trade, on the one hand, and liberty of contract on the other, as a result of the development of what Hughes Parry describes as the principle of 'sanctity of contract'. This was seen as a consequence of the courts being willing to uphold agreements which included restrictive provisions that lead to restraint of trade, even though they might be uneconomic, provided they were reasonable, because of the importance of agreements.

The published lecture was a lively blend of legal, economic and historical analysis, a piece which one American scholar described as an 'enlightening article'.[36] It was an article that would attract some interest among scholars on both sides of the Atlantic.[37] When we look carefully at its source references, we discover that one of the influences behind Hughes Parry's lecture was William Alexander Robson. This is unsurprising. Robson had been a member of the staff at the LSE since 1926, having been a student there following his 'discovery' by George Bernard Shaw as a result of publishing a book on aviation in 1916. A Professor of Public Administration at the LSE from 1947, he was something of an intellectual polymath who made his mark as a pioneer in the discipline of administrative law and, for many is regarded as having 'almost single-handedly established public law as a discipline'.[38] Robson seemed to Hughes Parry to have been 'the only other English lawyer who has been bold enough to venture into the borderland between economics and law'.[39] Hughes Parry cited Robson's study of the legal conceptions of the nature of capital and income, and referred to Robson's argument that the existing framework created a risk of incoherence and inconsistency when it came to judicial activity in the economic sphere. Hughes Parry also adopted Robson's practical argument that there should be a procedure introduced whereby an economist would sit as an assessor to assist the judge in formulating his decision in certain types of cases, or that certain types of cases should be determined by a judge trained in economic principles.[40]

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[36] See Thomas P. Hardman, 'Public Utilities', 40 *West Virginia Law Quarterly* (1933) 230, at 231.

[37] See also Percy Winfield, 'Ethics in English Case Law' 45 (1932) *Harvard Law Review* 127 at n. 49; Colin A. Cooke, 'Legal Content of the Profit Concept' 46 (1936) *Yale Law Journal* 436, at n. 7; Arthur Linton Corbin, 'Friedrich Kessler: A Tribute' 64 (1954) *Yale Law Journal* 166, at n. 4; George J. Webber, 'Divorce and a Covenant not to Sue for Maintenance' 9 *New York University Law Quarterly Review* 151, at n. 31.

[38] See his entry in the *Oxford Dictionary of National Biography*, (author, Bernard Crick).

[39] David Hughes Parry, 'Economic Theories in English Case Law', *op cit*, 188.

[40] *Ibid*, 188.

These arguments had been made in an essay written by Robson that had been published in a volume of essays published in honour of Professor Edwin Cannan, the distinguished economist, another academic who was to have a considerable influence on a generation of scholars at the LSE.[41] In his essay, Robson had argued the need for lawyers to have knowledge of economic principles, and vice versa, 'in order that legislators, who seldom possess knowledge of either law or economics, may be saved from the disastrous effects which often result when the doctrines of the economists are expressed in the language of the law and interpreted by the Courts in the light of economic conceptions a century or so out of date'. Robson, through the use of specific examples, had demonstrated how a lack of a systematic and coherent approach to the interpretation and application of economic concepts by the courts resulted in inconsistency and inefficiency.

Another legal scholar at the LSE, Theodore Chorley, had also ventured into the same 'borderland'. He had held the Sir Ernest Cassel Chair of Commercial and Industrial Law at the School. since 1930 (he was H. C. C. Gutteridge's successor), and would leave a lasting legacy as founder of the *Modern Law Review* in 1937, a journal he would edit until 1971.[42] A progressive in the Fabian tradition, his interest in law and economics also stemmed from his belief in law as a social phenomenon. Chorley had presented his inaugural professorial lecture on 20 October 1930, and, like Hughes Parry, published an article based on that lecture in the *Law Quarterly Review* in 1932.[43] The lecture dealt with 'The Conflict of Law and Commerce', and it is a study of the conflict between quickly changing commercial practices and the more slowly evolving common law. Chorley had argued that whereas business and commerce accommodate new ideas and values and incorporate them into everyday usage with little difficulty and delay, the law tends to develop at a slower pace. This creates a lag which then creates a conflict between commercial efficiency and legal certainty. Accordingly, the law, instead of promoting certainty, creates an uncertainty for businessmen in the course of their commercial dealings. Chorley's lecture was, in essence, a critique of the rigidity of the common law, and he used the commercial theme to demonstrate how that rigidity often resulted in unsatisfactory economic outcomes.[44]

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[41] William A. Robson, 'Legal Conceptions of Capital and Income' in T.E. Gregory and H. Dalton (eds.) *London Essays in Economics: In Honour of Edwin Cannan*, (London, Routledge, 1927), 251-279, at 251.

[42] See his entry in *Oxford Dictionary of National Biography* (author, Lord Lloyd of Hampstead)

[43] R.T.S. Chorley, "Conflict of Law and Commerce", 48 *Law Quarterly Review* (1932), 51-72.

[44] *Ibid*, 52.

Hughes Parry, Robson and Chorley's arguments were appeals towards economic efficiency in judicial activity. Their basic point was that judicial decision-making should be compatible with society's economic priorities in promoting wealth maximisation and commercial enterprise, and that for that to happen, judges and lawyers needed to be open to the influences of the economists. Although these were stimulating insights they were nevertheless limited. The approach was primarily positivist, if not descriptive – that is, they demonstrated that economics *had* influenced the decision making processes of the courts, and that the courts *were*, in practice, concerned with the regulation of commercial relationships. Their critique was based on the conviction that the courts, because of the rules of precedent, were unable to respond quickly to adapting times and circumstances, and so became out of touch with the needs of commerce. They focused upon the positive analysis, and the normative content amounted to an appeal to render coherent an incoherent state of affairs. Practical measures were suggested, such as the use of economists in the course of the judicial process. However, none of these scholars went on to provide a fully developed normative theory of law and economics. We are never told *why* the correlation between law and economics is important, and *why* the judiciary should follow economic principles in forming legal principles. We are not clear as to the scope and parameters of economic approaches to legal theory. We are not afforded a vision of how economic principles might be reconciled with ethical considerations and how, if they were in conflict, such a conflict could be resolved. Neither are we provided with a working theoretical framework with which the judiciary could apply economic principles in going about their task.[45]

Nevertheless, the recognition of the existence of a potentially dynamic intercourse between law and economics was an important and valuable insight. What had inspired these scholars to explore the subject? Examining the correlation between law and economics and its possibilities for social progress was something that had engaged scholars, at least on a sporadic basis, for a considerable period of time. Some key insights can be found in the writings of Scottish Enlightenment thinkers, such as Adam Smith and David Hume. It seems that the idea that economic concepts could be used to inform

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[45] As later commentators would note, and referring to Hughes Parry's article, '...the application of economic reasoning to legal instruments and institutions has been limited and tentative. Although it has long been recognised that a marriage of the two disciplines is necessary for the procreation of effective norms in areas where the law clearly governs economic activities, for example, the regulation of trade and income distribution, so far, in this country at least, creative thinking about central legal institutions such as tort, contract, property and crime has remained relatively untouched by such a mode of analysis': see A. I. Ogus and G. M. Richardson, 'Economics and The Environment: A Study of Private Nuisance' 36 (2) *Cambridge Law Journal* (1977) 284, and at n. 2.

legal thinking and the activities of legal institutions, and that the law had a role to play in the regulation of the economy, had enjoyed intermittent interest throughout the nineteenth century and early twentieth century.[46] By looking carefully at the writings of Hughes Parry, Robson and Chorley on the subject we can detect a combination of influences which account not only for their interest in law and economics, but also their methodology and approach towards the subject.

Much of that influence was internal, coming from within the LSE itself. Beveridge's influence, and his support for a view of legal scholarship as a part of a broader social scientific enquiry, was clearly a factor. This was an institution where 'departmental dividing-lines were blurred',[47] one that actively promoted inter-disciplinary studies well before that expression was ever conceived. What these legal scholars were doing was compatible with that institutional mission to break down artificial intellectual boundaries. Indeed, it was not only the lawyers who were disregarding the boundaries. The economist Arnold Plant had been appointed Sir Ernest Cassel Professor of Commerce in 1930, a post he would retain until his retirement in 1965. Plant was a committed free-marketeer who believed in the capability of free competition, private property and market forces to produce equitable and efficient outcomes. He had published articles in the 1930s which examined the economic viability of creating property rights through the legal mechanisms of patent and copyright.[48] Plant distrusted the economic efficiency of legal regulation in these fields. His conviction that the free market could be trusted to bring about efficient and equitable outcomes bore the influence of his tutor, Edwin Cannan, one of the founders of the economics department at the LSE Cannan was the economist to whom the volume in which Robson published his essay was dedicated. Hughes Parry would later recognise the 'deep and inspiring influence' that his contemporaries, such as Cannan, had on him in those early years.[49] There can be no doubt that the LSE was a place where cross-fertilisation of ideas across disciplines was a day-to-day reality. The congenial environment in which these scholars worked goes a very long way

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[46] See Ejan Mackaay, 'History of Law & Economics (2000)', in Boudewijn Bouckaert and Gerrit De Geest (eds.), *Encyclopedia of Law and Economics*, (Edward Elgar Publishers, Cheltenham, 2000), 65-117: See also, Warren Samuels (ed.), *Law and Economics, The Early Journal Literature, Volume 1*, (London, Pickering and Chatto, 1998), at xv – xcii.

[47] See Richard Rawlings, 'Distinction and Diversity: Law and the LSE' in Richard Rawlings (ed.) *Law Society and Economy: Centenary Essays for the London School of Economics and Political Science 1985-1995*, (Oxford, Clarendon, 1997), at 3-4 and 20.

[48] See Arnold Plant, 'The Economic Theory Concerning Patents in Inventions' 1 *Economica* (1934), 30-51; Arnold Plant, 'The Economic Aspects of Copyright in Books' 1 *Economica* (1934), 167-95.

[49] See Sir David Hughes Parry, 'Reminiscences 1920–1924–1930' in J.A. Andrews (ed.), *Welsh Studies in Public Law*, 144.

in explaining the general interest in law and economics within the School.

But the tenor of the writing and the approach adopted by these scholars towards their subject, and the reason why their analysis fails to fully develop into a more comprehensive economic theory of legal analysis, is because their interest was mainly motivated by the American Realist movement that was at its height in the early 1930s.[50] The American Realists were sceptical towards the role of legal rules and principles in judicial reasoning.[51] The realists rejected what Roscoe Pound[52] called a 'mechanical jurisprudence' which had maintained that judicial outcomes were the outcome of the application of legal rules.[53] The focus of their critique was on the role of formalism in the activity of judicial decision-making. For them, judges made their decisions, not by logically and methodically applying abstract legal rules, but by reference to other external social values or goals, or even individual prejudices. The legal rules were seen as being no more than a means whereby the desired outcome could be justified. In other words, judges decided on what they thought was right, or what they wanted to achieve, and then worked out a form of reasoning, using legal rules, that justified that outcome. Because of this, for many of the realists, public policy and the influence of the other social sciences ought to play a more prominent and transparent role in judicial activity.[54]

The influence of the realists is clearly found in Hughes Parry's work. His claim that law is a branch of the social sciences and so should be approached as such, his lament that concentration on substantive legal rules had led to the neglect of the study of legal philosophy, his critique of the inflexibility of precedent, his dissatisfaction at the narrowness of legal training given to the judiciary, are all themes that the American Realists would have recognised and embraced with no difficulty at all. More specifically, his repeated reference to the work of realists such as Roscoe Pound and Oliver Wendell Homes, both doyens of the American realist movement, leaves us in little doubt as to the origin of many of his ideas.[55] Robson had also embraced the realists' contention that the law has much to learn from the other social

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[50] For an overview of the movement and one of its precursors, see William Twining, *Karl Llewellyn and the Realist Movement*, (London, Weidenfeld and Nicolson, 1973).

[51] See, further, Neil Duxbury, *Patterns of American Jurisprudence*, (Oxford, Clarendon Press, 1995), 65-159.

[52] Pound's life and his work is considered by David Widgor, *Roscoe Pound, Philosopher of Law*, (Westport Connecticut, Greenwood Press, 1974).

[53] See Roscoe Pound, 'Mechanical Jurisprudence' 8 *Columbia Law Review* (1908) 605.

[54] For an overview, see M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (London, Sweet & Maxwell, 2001, 7th edn), 799- 853.

[55] David Hughes Parry, 'Economic Theories in English Case Law', *op cit*, 185-86.

sciences and that formal judicial reasoning contained room for discretion, bias and social prejudice.[56]

Perhaps the main inspiration behind these LSE lawyers' interest in the American Legal Realist movement may be summed up in a single word – Laski. Harold Joseph Laski was an omni-presence and influence at the School. was totally unavoidable. An innovative, original thinker and a political theorist who totally disregarded subject boundaries, Laski was the personification of the LSE's independence and sometimes controversial radicalism.[57] Laski had arrived there in 1920 having previously held a post at Harvard University, where he had also acted as the book review editor for the *Harvard Law Review* (although he did not have academic qualifications in law). During his time in America, Laski had befriended Oliver Wendell Holmes, who was to be an important influence on his early career, and who would inject into his constitution a healthy dose of cynicism towards legal formalism. Laski provided an important personal connection between the god-father of American Legal Realism and academics at the LSE, and thus vicariously, through Laski, the common room experienced Holmes's influence.[58]

Accordingly, Hughes Parry and his colleagues were approaching the subject not in order to establish a normative theory of law and economics but in order to engage in a realist critique of judicial reasoning. That explains the comprehensive nature of the critique but the underdeveloped prescription. Their weakness mirrors the weakness of the American Realist approach: eloquence in bringing down the edifice, but few ideas as to what to put in its place. The economists, on the other hand, were inspired by free market adherents' distrust of the inefficient and stifling effect of regulation and a conviction that the market can remedy its own deficiencies. As we shall see, it was the economists' perspective that would have the most enduring legacy.

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[56] See Neil Duxbury, 'English Jurisprudence between Austin and Hart,' 91 *Virginia Law Review* (2005), 2, at 63-64.

[57] The controversies are summarised in Ralf Dahrendorf, *LSE, A History of the London School of Economics and Political Science 1895 -1995*, 278-282.

[58] For an evaluation of his influence on legal thought, see Lord Wedderburn, 'Laski's Law Behind the Law. 1906 to European Labour Law', in in Richard Rawlings (ed.) *Law Society and Economy: Centenary Essays for the London School of Economics and Political Science 1985-1995*, at 25-62.

The failure of the movement

For a brief period before the Second World War, the law department at the LSE was showing signs of a lively scholarly culture whereby the possibilities of economic approaches to legal decision-making might have been explored and developed into a significant intellectual enterprise. However, this embryonic movement failed to evolve into anything substantial or lasting, with hardly anything written on the subject after the War. Why was this so? Again, the answer may be found in a combination of factors, including the way in which the lives and careers of those who had ventured into the area took them away from the subject, the state of legal scholarship at the time, and the War and its effect on rationalist approaches towards legal theory.

David Hughes Parry's essay on law and economics had heralded his appointment to the Chair of English Law. Paradoxically, it also heralded the end of any significant, innovative writing on his part. From then on, he was to take his foot off the accelerator in terms of research and publication, and other than writing a textbook on the law of succession,[59] published very little of real, permanent value until the very end of his career. The reason lies with his growing involvement with university management and bureaucracy. Very soon after his appointment to the Chair of English Law, he would become a central figure in the administration of the LSE, the University of London, and of university administration on a national, and, ultimately, international scale.[60] Only at the very end, with his Hamlyn Lectures of 1959, did he re-discover an appetite, and, just as important, the personal space for scholarship in any meaningful sense.[61] Robson's intellectual development took him deeper into the realm of administrative and local government law, where he was to make his mark. For him, it was a case of other projects to pursue.[62] Chorley's fate was more similar to Hughes Parry, as he would be distracted into the political arena, and become a noted participator in, as opposed to observer of, social reform.[63]

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[59] Sir David Hughes Parry, *The Law of Succession*, (London, Stevens, 1937, 1st edn).

[60] See, further, R. Gwynedd Parry, 'A Master of Practical Law – Sir David Hughes Parry (1893-1973)' in T. G. Watkin (ed.), *Y Cyfraniad Cymreig: Welsh Contributions to Legal Development*, (Bangor, Welsh Legal History Society, 2005), pp.102-159; also R. Gwynedd Parry, 'Federalism and University Governance: Welsh Experiences in New Zealand', *Welsh History Review*, (2006) 23(1), 123-157.

[61] Sir David Hughes Parry, *The Sanctity of Contracts in English Law*, (London, Stevens, 1959).

[62] See *The Times*, 15 May 1980.

[63] See Editorial, 41 *Modern Law Review* (1978), 121-23.

These individuals' career choices may account for their personal disengagement with the subject of law and economics. What of others at the LSE, or even in the other British universities, who might have taken up the initiative and further developed these themes and ideas that had been thrown out by Hughes Parry and his colleagues? Contributing to the story of lost enthusiasm was the general state of legal scholarship in the 1930s and 1940s.[64] Legal scholarship in England, if we are to accept the brutally frank portrait provided by another distinguished LSE law professor, L.C.B. ('Jim') Gower, was in an intellectual depression. This depression manifested itself in a profound melancholy and a deep-seated inferiority complex, which in turn meant that nothing of any real value was being written.[65] The sorry state of the law teacher, and the disdain with which he was regarded by his practitioner counterpart, according to Gower, accounted for much of the lethargy in legal scholarship at the time.[66] On the other, for a man like Hughes Parry with his firsts from Aberystwyth and Cambridge, with his Certificate of Honour, perhaps there was also a belief that there was nothing to prove. However, the new generation of legal scholars that came into prominence after the War, many of whom were based at the leading colleges of the University of London, felt sufficiently dissatisfied with the state of legal scholarship that they decided to do something about it. They were to promote a broader, innovative academic approach to legal scholarship, with an emphasis on a critical understanding of scientific modes of legal reasoning, and an appreciation of law as a social phenomenon.[67] Among this group were the continental Jewish scholars who had found refuge in British academia in the years before the War, and whose contribution to the development of legal scholarship would be enormous.[68] The LSE, who had welcomed many of these exiled scholars, men

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[64] For a general overview of the development of legal studies and legal scholarship, see, William Twining, *Blackstone's Tower: The English Law School*, (Sweet and Maxwell, London, 1994).

[65] See L.C.B. Gower, 'English Legal Training', (1950) 13 *Modern Law Review*, 137.

[66] Sir Robert Megarry conveys the sentiments behind this practitioner cynicism in this extract from his judgement in the case of *Cordell v Second Clanfield Properties [1968] 3 All E.R. 746:* '...the process of authorship is entirely different from that of judicial decision. The author has the benefit of a broad and comprehensive study of his chosen subject. But he is exposed to the perils to yielding to preconceptions, and he lacks the sharpening of focus which the detailed facts of a particular case bring to the judge. Above all, he has to fall his idea without the aid of the purifying ordeal of skilled argument on the specific facts of a contested case. I would therefore give credit to the words of any reputable author as expressing tenable and arguable ideas, as fertilisers of thought, and as conveniently expressing the fruits of research in print. But I would expose those views to the testing and refining process of argument.'

[67] See Cyril Glasser, 'Radicals and Refugees: The Foundation of the Modern Law Review and English Legal Scholarship', 50 *Modern Law Review* (1987), 688-708.

[68] Their story is told in Jack Beatson and Reinhard Zimmermann, *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth Century Britain*, (Oxford University Press, 2004).

such as Khan-Freund and Friedmann, would support a new generation of intellectuals who would invigorate and inject new life into academic law.[69] But that would come about when the memory of these LSE forays into law and economics had been covered by the dust collected on the volumes in which they had been printed.[70]

Can the failure of the development of a substantial and long-term law and economics movement be put down to mere indifference or the intellectual lethargy of the time? There may have been more complex reasons why the venture never took hold. Within a few years the horror of War, and the grotesque human tragedy that was such an inexorable part of its experience, would bring about fundamental changes to every corner of society.[71] The War forced legal scholars to profoundly question and revise their beliefs and ideas, and it would bring about a change of intellectual direction. The realists, whose critique of judicial decision making had enjoyed favour in the inter-war years, became unfashionable. After all, questioning the rule of law, and undermining the role of the judiciary in holding governments to account in a democratic society had also enjoyed the interest of those despotic governments whose activities had led to the subversion of individual rights and acts of oppression towards minority groups in an almost unprecedented scale.[72] The role of law in upholding human rights, and the ethical content of the law, now became the primary concern. Lawyers would also play an important role in establishing a new world order, and in defining the legal element of that process, in order to avert a repetition of the catastrophe from which the world was just recovering.[73] Accordingly, the rational and utilitarian character of economic theory had lost something of its appeal.[74] There had been a distancing from rationalist ideology towards a more humane approach to legal theory.[75]

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[69] Khan-Freund's notable contribution to legal scholarship, and the support that he received from Hughes Parry, is described by Mark Freedland, 'Otto Khan-Freund (1900-1979)' in Jack Beatson and Reinhard Zimmermann, ibid, at 307.

[70] For further insights on the role of the legal academic and the contribution of the law school to legal development, see Anthony Bradney, *Conversations, Choices and Changes: The Liberal Law School in the Twenty-First Century*, (Oxford, Hart, 2003); *Neil Duxbury, Jurists and Judges: An Essay on Influence* (Oxford, Hart, 2001); Fiona Cownie, *Legal Academics: Culture and Identities*, (Oxford, Hart, 2004).

[71] The darkest hour of which is chronicled by Martin Gilbert, *The Holocaust: The Jewish Tragedy*, (London, Fontana, 1987).

[72] See Brian Bix, *Jurisprudence: Theory and Context* (London, Sweet & Maxwell, 2006, 4th edn.) at 186.

[73] See, for example, Robert K. Woetzel, *The Nuremberg Trials in International Law* (London, Stevens, 1960).

[74] Although Legal Realism was in fact an attack on some of the more contrived aspects of legal positivism and an appeal towards greater transparency in legal reasoning; see M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence, op cit*, 812.

[75] See, further, Wayne Morrison, *Jurisprudence: From the Greeks to Post-modernism* (London, Cavendish, 1997), at 299-321.

This change in the intellectual mood can be detected in some of Hughes Parry's post-war lectures and writings. For example, he was invited to present the Haldane Memorial Lecture at Birkbeck College, University of London in 1951. In this lecture, he explores the adaptability of the common law, and seeks to maintain that the common law successfully responds to rapid social change and changing social values, despite the uncertainty brought about with the introduction of a mass of new legislation. Note how a pre-war negativity towards the perceived inflexibility of the common law has now changed into a more constructive, post-war view of its ability to respond to the needs of the age. He concludes the lecture by maintaining that the law has a responsibility to withstand the whims of the times and to operate as the purveyor of fundamental rights and freedoms, therefore ensuring continuity of values within society. He sums up his argument in this way:

> These fundamental ideas, rights and freedoms constitute powerful forces working to secure continuity. They form a central core of principles that has run through the common law for several centuries and that has determined in part sometimes the shape, at other times the content, of much, and often stubborn, new material, and given to the whole a substantial measure of unity.[76]

It seems that the War and its implications had ruined Hughes Parry's appetite for more rational approaches to legal reasoning. The economic approaches favoured in the 1930s had given way to the need to declare legal rules as a means of preserving basic human values and principles. The enthusiasm for the economic approach had been another victim of human experience.

Despite the unfulfilled potential, and the post-war retreat from the subject, the possibilities of an economic approach to legal theory that had flickered at the LSE were not completely consigned to history. The modern law and economics movement is commonly regarded as having begun in Chicago in the 1960s with the publication of Ronald Coase's influential article, 'The Problem of Social Cost' in the *Journal of Law and Economics* in 1960.[77] Coase's argument that significant transaction costs (that is, the costs of bargaining) often prevent the distribution of property rights in the most efficient (economic) way, and that those who are in a position to allocate property rights (such as the government or the judiciary) should 'mimic the market', is regarded as having inspired the more comprehensive normative

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[76] The 18th Haldane Memorial Lecture presented by Sir David Hughes Parry at Birkbeck College, University of London, 1951, (a transcript of which can be found in NLW, DHP papers, Box 15).

[77] Ronald Coase, 'The Problem of Social Cost' 3 (1960) *Journal of Law and Economics*, 1.

theory of law and economics which Richard Posner and others later developed.[78] Coase's ideas on law and economics, which were to mature into fruition in the 1960s, were arguably the culmination of work that he had began as a student at the London School of Economics in the 1930s. Coase had joined the LSE as a student of economics in 1929. In 1937, with the publication of his article on the nature of the firm, he was already demonstrating his keen interest in the interrelationship between economic theory and the nature of legal relationships.[79] That interest was largely inspired by his tutor, the economist Arnold Plant, who was to be an important early influence on Coase, an influence that can be found in Coase's later theories on law and economics.[80]

As Coase later commented, 'at LSE, we were a community of scholars'.[81] That community not only consisted of economists, but also lawyers, living cheek by jowl in what was then a relatively small institution. Accordingly, a cross-fertilisation of ideas inspired the economists, such as Plant,[82] and, as we have seen, the lawyers to explore and examine the frontiers of law and economics, and the potentially beneficial effects to society of understanding the interplay of the two disciplines. However, it would be the economists' endeavours, through the work of Plant's student, Ronald Coase, that would survive and later develop into a significant scholarly movement.

Conclusion

During the period between 1927 and 1939, legal scholars at the LSE, men such as Robson, Chorley and Hughes Parry, published work which, in different ways, explored the significance of economic ideas on judicial activity. That Hughes Parry should have been attracted to the subject might not be so surprising for a man who had degrees in both disciplines. But the work which he published during this period is significant because it also reveals a great deal about the intellectual movements of the time, and the influence of colleagues and surroundings upon his development. His inaugural lecture is a revealing snapshot of the academic culture at the LSE. The mix of

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78 See Richard A. Posner, *Economic Analysis of Law*, (Aspen Publishers, New York, 2003, 6th edn.), at 23-4.

79 Ronald Coase, 'The Nature of the Firm' 4 *Economica* (1937), 386-405.

80 See R. H. Coase, *Essays on Economics and Economists*, (Chicago University Press, 1994), 176.

81 *Ibid*, 214.

82 Another economist who explored the subject was Herbert William Robinson; see 'Law and Economics' 2 (1939) *Modern Law Review*, 257-65.

ideas and theories fluctuating in the LSE's common room in the nineteen-twenties and -thirties also casts light on some of the origins of the law and economics movement, a movement that would develop into a more comprehensive enterprise in Chicago many years later.

Perhaps Hughes Parry and his colleagues had not ventured far enough into the borderland of law and economics, or had retreated too quickly from it. There was a host of reasons why this should have been the case. Their work is therefore significant because it represents unfulfilled potential, a story of lost opportunity. For Hughes Parry, little of what he subsequently wrote had the capacity to stimulate the intellect in the way his inaugural lecture succeeded in doing. Here, he appears to be ahead of the game, pioneering new approaches, beating a new path through a dense thicket; in the future, his writings would perhaps suffer from a lack of that innovative, cutting edge quality that makes for inspirational scholarship. His obituary in *The Times* sums up the point in this way:

> Though an excellent lecturer and an able author and editor in the field of English law, he had preferred the path of academic power, and accordingly had time only on rare occasions...to allow us a glimpse of what he could have done.[83]

We might fairly conclude by recognising that his study of economic theories of English case law, published as an article in 1931, was one of those rare occasions.

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[83] *The Times*, 10 January 1973.