

ANALYTICAL SKILLS FOR SOCIAL ISSUES: REASON OR DELUSION?

ISSUES PAPER NO. 8

Edited by

STUART BIRKS



**CENTRE FOR PUBLIC POLICY EVALUATION
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TABLE OF CONTENTS

	<i>Page Nos</i>
Introduction Reasoning and delusions, Stuart Birks	i
Chapter One: Pure theory and applied economics: Content, problems and the appropriate balance, Derek Pyne	1
Chapter Two: Problems with economic thinking, Stuart Birks	13
Chapter Three: Social policy - the state we're in, Richard Shaw	19
Chapter Four: A critique of psychological thinking, Felicity Goodyear-Smith	35
Chapter Five: Legal Reasoning, Stuart Birks	57
About the authors	78

Introduction

REASONING AND DELUSIONS

By Stuart Birks

This collection of papers is designed to give critical views of several ways of thinking that are important in shaping our treatment of social policy issues. They focus on the areas of economics, social policy, psychology and law, describing the sort of reasoning likely to be observed in the application of those specialisations. While there is much of value to be gained by the use of existing knowledge, it is important to be aware of associated limitations.

By way of background, let us take as a starting point that we are trying to understand certain aspects of our society. We may be doing this for policy purposes, so as to better organise our affairs in the pursuit of our chosen wider objectives. We use formal or informal methods to shape our perceptions and determine our actions. Sometimes these methods are grouped according to academic disciplines, effectively ringfencing a set of perspectives, assumptions, and techniques.

Arnold Toynbee wrote:

"Any account of anything is bound to be selective. The human intellect does not have the capacity for comprehending the sum of things in a single panoramic view. Selection is unavoidable, but it is also inevitably arbitrary; and, the greater the mass of information from which a selection has to be made, the more disputable will be the investigator's choice."¹

Erwin Shrodinger, Austrian physicist and Nobel prizewinner, said:

"It seems plain and self-evident, yet it needs to be said: the isolated knowledge obtained by a group of specialists in a narrow field has in itself no value whatsoever, but only in its synthesis with all the rest of knowledge ..."²

And Daniel Goleman, seeing the process as potentially very harmful and restrictive, wrote:

"Self-deception operates both at the level of the individual mind, and in the collective awareness of the group. To belong to a group of any sort, the tacit price of membership is to agree not to notice one's own

¹ Toynbee, 1976, p.x

² Goleman, 1997, p.6

feelings of unease and misgiving, and certainly not to question anything that challenges the group's way of doing things."³

He goes on to say:

"Perception is selection ... As William James put it, "My experience is what I agree to attend to. Only those items I notice shape my mind.""⁴

"... shared schemas guide group dynamics ... the social construction of reality. Shared schemas are at work in the social realm, creating a consensual reality. This social reality is pocked with zones of tacitly denied information. The ease with which such social blind spots arise is due to the structure of the individual mind. Their social cost is shared illusions."⁵

"A frame is the shared definition of a situation that organises and governs social events and our involvement in them. A frame, for example, is the understanding that we are at play, or that "this is a sales call", or that "we are dating". Each of those definitions of social events determines what is appropriate to the moment and what is not; what is to be noticed and what ignored; what, in short, the going reality involves."⁶

The separation of social analysis into distinct disciplines, each with its own language and assumptions, is one illustration of frames. Avinash Dixit rejected the separation of economics from other disciplines for purposes of analysis when he said:

"... the political process should be viewed as indeed a **process** - taking place in real time, governed and constrained by history ...In this view, the traditional dichotomy of markets versus governments, and the question of which system performs better, largely lose their relevance. Markets and governments are both facts of economic life, and they interact in complex ways. We cannot find feasible improvements by wishing away one of the components."⁷

and:

"My starting points are simple to the point of being trite - one must accept that markets and governments are both imperfect systems; that both are unavoidable features of reality; that the operation of each is powerfully influenced by the existence of the other; and that both are processes unfolding in real time, whose evolution is dependent on history and buffeted by surprises. Most important, I will argue that the political process should be viewed as a game between many

³ Goleman (1997), p.12

⁴ Goleman (1997), p.21

⁵ Goleman (1997), p.23

⁶ Goleman (1997), p.197

⁷ Dixit (1996), p.xv

participants (principals) who try to affect the actions of the immediate policymaker (agent)."⁸

Superimposed on this specification of the complexities of issues and the way that analyses can be misleading is the wider issue of the delusions from which societies can suffer. A century and a half ago Charles Mackay described many of these.⁹ They included such notable economic examples as the South Sea Bubble and Tulipomania. In his introduction to the 1852 edition¹⁰ he says:

"In reading the history of nations, we find that, like individuals, they have their whims and their peculiarities; their seasons of excitement and recklessness, when they care not what they do. We find that whole communities suddenly fix their minds upon one object, and go mad in its pursuit; that millions of people become simultaneously impressed with one delusion, and run after it, till their attention is caught by some new folly more captivating than the first."¹¹

"Popular delusions began so early, spread so widely, and have lasted so long, that instead of two or three volumes, fifty would scarcely suffice to detail their history."¹²

This is no mere historical aberration. We are almost certainly, even without our knowledge, collectively suffering from such delusions now. The historian, Norman Stone, wrote an introduction to the 1995 edition of Mackay's work. There is no doubt in his mind what might be included in contemporary delusions:

"Throughout the world people have tended to focus on individual issues rather than on the good of society as a whole. Thus, we have seen the emergence of minority groups who demand 'rights' on the grounds of past grievances rather than present responsibilities. In the wake of these demands has come the requirement not to be insulted - and the rise of 'political correctness' which reduces languages that have been centuries a'growing to a childish level of primness. Sudden enthusiasms to alter states of affairs that have endured - for good or ill - for centuries have swept through nations and continents. The opponents of child abuse and the advocates of animal rights are examples where evils that have endured through history have suddenly come to the forefront of human notice, though frequently the zeal with which campaigns are conducted damages the causes they are meant to promote."¹³

⁸ Dixit (1996), p.2

⁹ Mackay (1995)

¹⁰ Reprinted in Mackay (1995)

¹¹ Mackay (1995), p.xv

¹² Mackay (1995), p.xvi

¹³ Mackay (1995), p.v

Contemporary writing on "moral panics" describes situations that bear a close resemblance to delusions.¹⁴ This emphasises stereotyping and "media amplification", along with "spurious attribution". In economic terms, economic actors' behaviour is influenced by their perceptions, which depend on the information available and the perspectives used. They may be accidentally or deliberately inappropriate, especially given the operation of the media and the actions of interest and lobby groups (including input from academics).

Labels have been given to phenomena which may assist in this process whereby groups or whole societies develop inappropriate beliefs and perceptions.

Communal reinforcement is the process by which a claim becomes a strong belief through repeated assertion by members of a community.¹⁵ "Sound bites" are particularly useful in this process.

Selective thinking is the process whereby one selects out favorable evidence for remembrance and focus, while ignoring unfavorable evidence for a hypothesis.¹⁶ This might not be entirely independent of the "intuition" that analysts may use, possibly in conjunction with statistical or other information, to select from alternative representations of phenomena.

Confirmation bias refers to a type of selective thinking whereby one tends to notice and to look for what confirms one's beliefs, and to ignore, not look for, or undervalue the relevance of what contradicts one's beliefs.¹⁷ This may also influence the research undertaken and the hypotheses that are tested.

Economics is the first area considered in this Issues Paper. While Derek Pyne's contribution is critical of economics, it is generally positive in tone. So that this is not taken to indicate a bias in favour of economics over other perspectives, I have added a short, more pointed contribution of my own. This is followed by Richard Shaw's view of some serious limitations in social policy. Felicity Goodyear-Smith then presents a case challenging the work of psychologists as it affect policy. I close with an attempt to identify acceptable patterns of reasoning in law, highlighting their failings.

Our society is shaped by the perceptions we have. In turn these are derived according to the perspectives we take, the questions we ask, and the variables we choose to define and measure. It is hoped that this collection stimulates debate and encourages people to look critically at our society and the tools used to analyse that society.

¹⁴ See for example Bartholomew and Dickeson (1998), Fekete (1995) and Cohen (1980)

¹⁵ <http://skepdic.com/comreinf.html>

¹⁶ <http://skepdic.com/selectiv.html>

¹⁷ <http://skepdic.com/confirmbias.html>

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Chapter One

PURE THEORY AND APPLIED ECONOMICS: CONTENT, PROBLEMS AND THE APPROPRIATE BALANCE*

By Derek Pyne

This essay will discuss the advantages and limitations of using economic theory as a tool in the study of human behaviour and practical problems. The first section will deal with pure economic theory. It will discuss what economics is at the level of pure economic theory and potential problems with it. The second section will examine different types of applied economics. It will look at the relationship between applied economics and pure economic theory and potential problems with applied economics both at a theoretical level and at a practical level. The penultimate section will discuss the appropriate balance between purely theoretical economic research and different types of applied economics. The last section briefly concludes the paper.

1. PURE ECONOMIC THEORY

First, it should be clear that by economics this paper is referring to neoclassical economics. Other approaches to economics such as Austrian economics, Marxist economics, institutional economics, etc. are not meant to be included.

Neoclassical economics is the application of rational choice theory to the study of human behaviour¹. It assumes that people behave in a way consistent with the attainment of the feasible outcomes they desire most. This is the main paradigm of modern economics. Many foolish criticisms have been made of this reliance on rationality due to a misunderstanding of what is meant by the term rationality. It does not mean that people never make mistakes², have perfect information, may not have

* This paper benefited from comments by the editor. Any errors remaining are those of the author.

¹ Many elementary textbooks define economics as the study of scarcity. In other words, economics is defined as the study of how individuals/society use scarce resources to meet unlimited needs and wants. This is indeed the subject matter of economics. However, it is also the subject matter of other disciplines. In the view of this author, and others, what makes neoclassical economics unique is not the subject matter but the approach. Indeed, either the stated or unstated goal of most good economic programs is to teach student to “think like economists” rather than learning the specifics of the subject matter.

² This is not to say that current economic theory might not tend to make overly optimistic assumptions on people’s cognitive abilities. However, this writer would argue that this is more the result of the fact that economics is a young science still trying to come to terms with the basics of a complex subject than limitations of the approach itself. Once it has achieved a better understanding of how ‘smart’ economic agents behave, it will undoubtedly move on to more

preferences others see as foolish or even that they are sane! It merely means that people do the best they can in achieving what is the best outcome they think they can achieve given their resources and preferences.

At its core, economics reduces the concept of rationality to three basic axioms. It assumes that individual preferences are complete in the sense that given two alternatives people can state whether they prefer one to another or are indifferent between the two outcomes. It also assumes that people have transitive preferences in the sense that if they think that outcome x is at least as good as outcome y and if they think that outcome y is at least as good as outcome z, then they will also think that outcome x is at least as good as outcome z. The last axiom simply says that they think any outcome is at least as good as itself.

It is the position of neoclassical economics that this framework can be applied to a wide range of human behaviour. It is difficult to think of an area of human endeavour that it has not been applied to. Besides traditional 'economic' markets, this framework has been applied to the study of politics, law, marriage, the family, customs of primitive societies, the agrarian revolution, racial and sexual discrimination, human emotions, the nuclear arms race, military alliances, the formation of nations, history, religion, addiction, population growth, etc., etc. Indeed, if it has not yet been applied to any area of human activity it is only because a PhD student has not had to think hard enough for a dissertation topic to consider the area in question.

At times one hears the claim that some specific aspect or sector of society is different and that economic theory does not apply. Alternative explanations for behaviour in that sector will be offered. Claims like this should be treated with scepticism. If these alternative 'theories' are only applicable to a given sector, they are not really theories of human behaviour. It is inconsistent to assume that human behaviour is different in different situations without some general explanation as to how it can be expected to differ in different situations. A theory of human behaviour that only applies to one specific situation is just an ad hoc rationalization. As discussed below, this does not mean that additional assumptions don't have to be added in more applied applications. However, the additional assumptions should not conflict with the general theory of human behaviour adopted, whether that be rational choice theory or another approach used. Much of science is concerned with explaining why what appear to be exceptions to the general paradigm of a discipline are not really exceptions. When a science is unable to explain an increasing number of these anomalies, it is necessary to consider new possible paradigms.

Rationality itself is not a testable assumption but an axiom. It is likely that almost any observable behaviour could be reconciled with rationality, given the right preferences. Thus, it is more a way of looking at the world rather than a testable assumption itself. In practice, a great deal of structure needs to be added to the basic choice axioms in

realistic models involving less sophisticated economic agents. This issue will be discussed in more detail in part three of this essay.

order to produce useful, tractable results. Some of this structure is purely mathematical. For example, it is necessary to assume that preferences are continuous in order to represent them with mathematical functions³ and assuming that these functions are twice differentiable and quasi-concave allows the tools of calculus to be conveniently employed. Other aspects of this structure are more behavioural. For example, it is common to assume that an individual prefers more of something good to less⁴. As always, the devil is in the detail. At times different assumptions can lead to different conclusions. This is one reason why a goal of economic theory is usually to be as general as possible. Of course, there is a limit on the generality that is possible given the need to actually come up with conclusions that say something.

One potential problem with the fact that almost any observed behaviour can be explained in terms of rationality is that this leads to the danger of the theory becoming ad hoc. By this I mean that models will be made to fit the observations using ad hoc assumptions. The basis of science is the concept of falsification but if ad hoc assumptions can always be created to fit the data, the basis of economics as a science can be brought into question. This is why it is vitally important to understand the implications and limitations of the various assumptions used in economic models to be able to judge whether they are reasonable or heroic. Taken to an extreme case, explanations that can only explain observations by implausible assumptions are not really explanations⁵. As Beth Allen (2000, p. 143) has written: “Good theory starts from a good question and does not cheat by adding enough conditions so as to assume the answer”. Noneconomists often think they are able to make these types of judgements and sometimes they are able to do so. Unfortunately, the ability to make good judgements in this regard often requires a great deal of rigorous training in economics which critics often lack. What may seem like a restrictive assumption to a noneconomist may just be a device used to simplify a model that has no real effect on the conclusions. However, in other cases, what may seem like harmless assumptions can have major effects. Writers such as Allen (2000, p. 145) have complained that a disturbing trend is for researchers to step back from genuine theory resulting in “a cute article that contains some nice ideas pointing out something that’s potentially exciting and important, but the reader has no clue about the possible generality or limits of the analysis because only an example or a highly-specific closed-form parametric model has been presented”. This is clearly something that should be guarded against.

The reader hopefully now has some idea as to what are the defining characteristics of economic theory. However, it should be noted that what is good theory is hopefully no different in economics than other disciplines. In this regard, it is difficult to do better than quote from a recent essay by Allen (2000, p. 143):

³ In most applications, working with binary preference orderings directly would be unrealistic.

⁴ The technical term is that preferences are monotonic.

⁵ In its irregular feature on anomalies, the *Journal of Economic Perspectives* takes this position: “An empirical result qualifies as an anomaly if it is difficult to ‘rationalize’ or if implausible assumptions are necessary to explain it within the paradigm”.

Good theory is derived from sensible long-term research goals and strives to take at least a small step toward some vision. It is a creative endeavour where innovation is desirable, even if the new ideas and methods may cause initial discomfort. Surprising conclusions can be wonderful. Finally, successful theory frequently leads to explanations that validate one's common sense, at least in retrospect. It sometimes leads to a beautiful and elegant model; when this happens, research is very satisfying indeed.

2. APPLIED ECONOMICS

The term 'applied economics' is used in many different ways. Some use it to mean empirical. However, as the other uses of the term 'applied economics' discussed in this paper include empirical economics, this use of the word will not be discussed separately here. This paper will discuss two broad types of applied economics. For lack of better terms, the first will be called high level applied economics and the second will be called practical applied economics. It should be remembered that the different types of applied economics and the pure theory discussed above are not mutually exclusive sets.

2.1 High level applied economics

This involves directly and indirectly taking the results of pure economic theory and applying them to the various subdisciplines of economics⁶. These applications can either be theoretical investigations or empirical investigations that involve economic theory. As an example of the former, consider a game theorist who comes up with a new equilibrium concept to describe the outcome of strategic interactions. An applied economist will take this equilibrium concept and apply it to his/her subdiscipline to expand knowledge in his/her subdiscipline. Indeed, much of economic research in the last few decades has involved the applications of game theory to different areas of economics. Before strategic interactions dominated economics, other aspects of pure economic theory, such as duality theory, would have been the tools developed by the pure theorists that ended up being applied to the different subdisciplines. However, regardless of the examples, the point is that pure economic theory is being applied to various areas of human activity in order to expand our understanding of these areas.

This type of applied economics is the type of research most academic economists engage in. It may not have the 'glory' of pure theory but it does feed back to pure theory. This is because in the process anomalies will be encountered that will either require the pure theory to be revised or force economists to find new ways of applying the theory to understand why what they thought were anomalies are not really anomalies. The later type of activity is what Kuhn (1970) called puzzle solving.⁷

⁶ By 'indirectly' I mean that high level applied theory can take the results of the application of pure economic theory to other subdisciplines and apply the lessons to the subdiscipline in question.

⁷ It should be noted that Kuhn himself limited this analysis of science to the natural sciences. However, others have applied his theories to economics.

Here it is usually necessary to add much more structure to models than at the level of pure economic theory. For example, pure microeconomic theory tells us that it is not possible to predict the effect an increase in interest rates will have on the behaviour of a saver. It may cause him to save more or less⁸. However, this indeterminacy is a problem for macroeconomists studying the effect changes in interest rates may have on the level of GDP or the rate of economic growth. Hence, macroeconomists almost always assume that increasing interest rates will increase the savings rate. Given that the empirical evidence supports this assumption in aggregate, this seems reasonable. However, in general the need to make additional assumptions increases the risk of assuming the conclusion.

This basic problem of having to make additional assumptions is also involved in pure theory but is more pronounced in applied economics. At times, this can lead to major problems that remain unresolved for decades. An example is the seemingly never ending New Classical/New Keynesian debate in macroeconomics. The extent to which economic markets clear can have important implications in understanding how the macro economy works. New classical economists assume that markets are fairly good at clearing while new Keynesians have offered various explanations of why markets may not clear quickly. Generally, reasonable researchers in both groups will agree that there is some truth to the assumptions the other group makes. However, each feels that their own assumptions are closer to the truth. Unfortunately, after several decades the empirical evidence has still not resolved the issue even though the implications of each approach are now much better understood. This problem is much less extreme in other areas of economics where there is much more of a consensus on approaches. However, it still exists.

The need for additional assumptions also raise the risk of adopting ad hoc assumptions in order to fit the situation involved. For example, to get around the never ending debate between new classical and new Keynesian economics that dominated older generations of macroeconomists, many younger macroeconomists feel freer to move between the different approaches as different models seem to fit different situations better. For example, when studying economic growth it is standard to assume that in the very long run, market clearing is a reasonable assumption. However, in shorter time frames, this may be less appropriate. This does seem like a more pragmatic approach. However, if care is not taken, it does run the risk of becoming ad hoc.

2.2 Practical applied economics

The traditional subject matter of economics has always been the study of scarcity. Scarcity is something that societies and individuals have always struggled with. Given that much of economics involves studying various trade-offs that must be made

⁸ To elaborate for the noneconomist reader this is basically because what economists call income and substitution effects are working in opposite directions. The fact that the returns to saving are higher may induce people to increase savings. However, because a saver's lifetime income is also higher, he may decide to spend more now and save less for the future. For example, if an individual is trying to save a fixed amount for retirement, an increase in interest rates means that he has to put less aside now in order to have the same fixed amount when he retires.

due to scarcity, one would think that economic findings could be applied to help society deal with the problems created by scarcity. Possible examples are endless and range from broad questions like the design of tax systems and trade policies to much narrower questions such as the whether a new road should be built or how government departments and other institutions should be organized. For the purposes of this essay, the defining feature is that the goal is not to expand economic knowledge but to apply existing knowledge. An analogy could be made that the relationship between what this essay calls practical applied economics and other areas of economics is similar to the relationship between the natural sciences and engineering. However, as the teaching specialist is also not primarily involved with the expansion of economic knowledge, he will also be considered a 'practical applied economist' for the purposes of this essay. This section will first deal with the first type of practical applied economists and then the teaching specialist.

Often the term 'applied economics' is used to mean the development of public policy. This leads to the first major question. Is it possible for economists to have any real influence on policy? For a long period of time, economists working in areas such as public economics implicitly assumed this and developed models of what optimal policies would be from the point of view of some sort of social welfare criteria that a benevolent despot might use. However, public policy is not decided by benevolent despots but by the political system whether it is a democratic political system or not. For over 200 years economists have recognized the benefits of even unilateral free trade policies. However, with the exception of 19th century Britain, no major country has ever adopted unilateral free trade. This (and other paradoxes) forced economists to rethink the usefulness of the benevolent despot approach. Now, economists generally recognize that it is inconsistent to assume that people behave differently in the political sphere and the traditional economic sphere. Thus, economists now tend to assume that voters, politicians, special interest groups and others try to maximize their utility in the political sphere just as they do in the economic sphere⁹. This implies that public policy is endogenously determined and not influenced to any great extent by what economists recommend. Indeed, after 200 years, the free trade example above seems to support this conclusion.

If public policy is endogenous, what role do economists have when it comes to these practical applied questions? This paper will take the position that they do have some role. Even if the direction of policy is endogenously determined, there are still many details allowing economists to have some influence on at the margin. If an interest group can influence the political system to transfer resources to it, it is likely to be more successful if it can do this at a lower cost to society as this will reduce the opposition to the transfer. Therefore, one would think that economists do have a role to play when it comes to making transfers more efficient and less costly to society as a whole.

⁹ For two good surveys of this area see Dennis C. Mueller (1997, 1989).

It should be noted that the necessity of having to make additional (perhaps ad hoc) assumptions is going to be even greater in this type of applied work. In addition, many of the sources of information used in making these additional assumptions are going to be from those with a vested interest in the area.

The practical area of applied economics is often looked down on by academic economists. However, in its defence, it should be noted that those involved in these practical questions have problems that academic economists don't have to deal with. For example, if an academic economist cannot come to a firm conclusion on a problem, he knows that it is unlikely to be published and he can ignore it. He just moves on to another problem. However, the governor of a central bank cannot pick and choose the problems he wants to work on. If the economic situation changes, he may have to decide whether to change interest rates or not. If he does decide to change interest rates he must decide by how much he should change interest rates. Even if he cannot come to any firm conclusions as to how the economy will react he must decide on a course of action that may turn out to be incorrect. Thus, what may appear to be lower quality results is undoubtedly due in part to a publication bias.

In addition, it has to be remembered that economists doing this level of applied work have to rely on the theory academic economists have developed. Given the incredibly complex nature of the economy it is not surprising that academic economists have only made limited headway in understanding how it works. Indeed, in a sense this makes it easier for academic economists to expand knowledge. They are starting from a low base. Richard B. Freeman (1999) has even offered the lower level of accumulated knowledge in economics as an explanation of why economists tend to be paid more than their counterparts in the physical sciences:

Because our base of confirmed knowledge is less than in the physical sciences, we are higher up the marginal product curve for basic research than many of them. After all, what determines demand for research is not the problems that a science has solved, but the new things it can learn and the values that new learning can bring to society (Freeman, 1999, p. 144).

However, this limited knowledge base is going to limit the ability of those involved with more practical questions who cannot necessarily pick the problems they want to address. Thus, to an extent, this practical side of economics involves the necessity of making judgements (as opposed to deductions) that would be frowned on in academic journals.

One criticism of this type of applied economist is that they are often advocates for a given position rather than dispassionate advisors. Any good first-year economics course will point out to students that economics should be a positive science. This does not mean that economics cannot deal with the implications of different normative values. Indeed, a whole subdiscipline of economics called social choice theory deals with the implications and consistency of different normative values.

However, while economists can study the implications and consistency of different normative views, they have no more expertise than anyone else when it comes to actually determining whether the normative views in question are ‘good’ or ‘bad’. By becoming advocates they may be inferring to lay people that their economic training gives them an expertise in normative issues which it does not do. Moreover, it may very well colour their economic judgement and therefore reduce the value of their advice.

It should be noted that remaining dispassionate on policy issues is not as easy as it may sound. Economists like most people have their personal views on what a just society is. One danger in applied work is that the passion will cause a loss of objectivity when one gets caught up in public debates,. This can even happen to leading theorists. George Stigler (1982) has reported that Jacob Viner related his experience of testifying for the American government in an early collusion case. Although he considered himself a detached scholar, after some hours of cross-examination he “found that he had become an aggressive supporter of the government’s position” (Stigler, 1982, p. 50).

Another criticism of this type of applied economist is that they have often not keep up to date with advances in the discipline since they left graduate school. This is likely because they are often dealing with noneconomists who know less about recent advances than they do. Thus, they are not under as much pressure to keep up to date. However, this problem is not limited to non-academic economists. If one considers the teaching specialist to be a type of practical applied economist, this problem of becoming out of date can have serious implications as the next generation of economics undergraduates are not properly prepared for graduate study¹⁰. This is becoming a major problem in the United States where there is a much sharper distinction between research institutions and teaching schools¹¹. There, the top graduate programs are the world leaders in economics while liberal arts schools are generations behind. Clearly, being the products of weak high school systems, many of the students at American liberal arts colleges and teaching oriented universities are not prepared to study economics at a much more advanced level anyway. However, the fact that many of their instructors are generations out of date exacerbates the problem. Undoubtedly this is an important factor in the increasing proportions of nonAmerican students dominating the top graduate programs in the United States¹².

The problem of out-of-date instructors does not seem to be nearly as bad in New Zealand. The statutory requirement of ‘research led teaching’ undoubtedly helps as it

¹⁰ An academic economist who spends all his research time doing practical applied work may also suffer from this problem. However, only the case of the teaching specialist will be dealt with here as it is more clear cut.

¹¹ For a discussion of this issue that is more favourable to the position of the teaching specialist, see William J. Barber (1997).

¹² For an overview of the increasing internationalization of graduate economic programs in the United States, see Nahid Aslanbeigui and Verónica Montecinos (1998).

means that most academics are engaged in some sort of research. Even if every individual is not engaged in leading edge research, it undoubtedly helps them keep abreast of at least some developments in economics. However, even in New Zealand one gets the impression that the same problem exists even if not to the same degree. Indeed, one reason it likely does not exist to the same degree as in the United States is not only that the undergraduate teachers are more research oriented but that the graduate programs seem to be less rigorous and extensive in general.¹³ In addition, PhD programs are limited to the research only variety and lack the more extensive training that the course work and comprehensive examinations that the upper tier of the North American programs involve¹⁴. However, even if the top is lower, the greater emphasis on research by those teaching undergraduate courses clearly raises the bottom relative to the more teaching oriented of the American post-secondary institutions.

3. WHAT IS THE CORRECT BALANCE BETWEEN PURE THEORY AND VARIOUS TYPES OF APPLIED ECONOMICS?

This section will attempt to ask what the correct balance should be between pure economic theory and more applied research. To an extent, this is a typical applied economic question. How should scarce resources be used?

At one level this is a normative question. The more work that is done at the level of pure theory today, the more productive will be the higher level applied work of tomorrow and the more useful will be the practical applied work the day after. The cost is that with fewer economists working on practical applied problems today, the result is poorer economic performance today¹⁵. Thus, to an extent, this is a question of trade-offs between the welfare of current and future generations. As any good first-year economics student knows, there are no right and wrong answers to normative questions. Reasonable people may have different opinions.

At another level this is a positive question. It is necessary for reasonable people to have some idea as to what the actual quantitative trade-offs are in order to decide what is the appropriate balance. It is difficult to imagine a way of determining this with any degree of certainty and for now one must simply make a judgement (the work of practical applied economists?). It seems to this writer that the real world is incredibly complex. Economics is only beginning to understand it. This has meant that it has often been necessary to create very simplistic models in order to understand what future specialists in the study of the history of economic thought will

¹³ The author's experience with New Zealand graduate programs is limited and he is willing to admit that there are very likely exceptions to this statement. Indeed, the author gets the impression that there is at least one important exception to this rule.

¹⁴ For evidence that research only PhDs lead to lower levels of research productivity by future academics, see Kevin J. Fox and Ross Milbourne (1999).

¹⁵ In the extreme, it could be the case that as the effects of this poorer economic performance today compound, future generations will be worse off even despite the better economic knowledge that they will be able to apply. This case is not addressed here as the writer has no evidence to support it and as an academic economist he can pick and choose the questions he wants to address.

undoubtedly see as very basic relationships. These simplistic assumptions include making the representative economic agent very sophisticated. In discussing the development of modern economics, Richard H. Thaler (2000, p. 134) has stated: “The IQ of Homo Economicus became bounded only by the IQ of the smartest economic theorist”. If leading microeconomic theorists such as David M. Kreps (1997) are correct in arguing that economics is on the verge of a “revolution” in being able to deal with more realistic agents, the benefits from future theoretical research are tremendous¹⁶. Thus, in the judgement of this economist, the potential future payoffs from furthering this knowledge are great.

An additional point should be mentioned in passing. There is no reason why increasing mankind’s knowledge of human interactions at a purely theoretical level does not have value as an end in its self. I doubt if astronomers ever ask if understanding more about some far away galaxy will ever have practical implications for mankind. Thus, one must wonder why economists feel they have to justify their work with practical applications.

4. CONCLUSION

This essay has discussed the advantages and limitations of using economic theory as a tool in the study of human behaviour and practical problems. It has tried to do this both at the level of pure theory and applied economics. It has also tried to ask what the appropriate balance between different levels of economics should be. It has tried to present the argument that economics is still in its infancy as a science and therefore the benefits of a concentration of research efforts on pure and upper level applied research are great.

¹⁶ If we are indeed on the verge of a “revolution”, it will be interesting seeing what happens to undergraduate economic education and even graduate programs at some institutions. As mentioned above, many of the courses are currently taught by individuals who have concentrated on the teaching aspects of their careers and have not kept up with developments in economic theory even to the point of being able to incorporate the ‘strategic revolution’ in economics into their teaching. If there is a further revolution in economics, there will undoubtedly be students who are trained in material two revolutions out of date.

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Chapter Two

PROBLEMS WITH ECONOMIC THINKING

By Stuart Birks

One of the strengths of economics is its formalised structures for modeling which lend themselves to precise specification of hypotheses and relationships, rigorous analysis and testing, and, frequently, quantified results. The tools that economists use are not without their weaknesses, however. As with any discipline, its proponents can become overly focused on the accepted structures without recognizing when those structures may be inappropriate. Here I describe several potential problems.

Perceptions

Economic agents act not according to what is happening, but according to their perceptions of what is happening. These may not be the same. This is important not simply in terms of imperfect information, but also in the context of the way people respond to policy announcements or anticipated events, described by Shaw as announcement effects.¹

Structures and information from analysis can shape perceptions, so that research may not be an active influence, rather than merely neutral.

Homogeneity

Homogeneity is a common assumption in markets and in relation to factors of production. Even with identical inputs or outputs, the next three points below can make the assumption questionable. Aggregation problems can arise if the components of an aggregate are not homogeneous. It is not only in macroeconomics that aggregation occurs.

Time dimension

Static and comparative static analyses do not consider adjustment paths and behaviour in disequilibrium situations. Economies are continuously going through the process of adjusting to change. Unless we consider adjustment paths, it is not possible to determine the feasibility of attainment of a new equilibrium. Even with dynamic models, there are issues of consideration of continuous activities in terms of discrete time intervals. This affects lag structures and even the chance of identifying relationships between variables. While continuous time models can be considered in theory, for estimation purposes we commonly use discrete data.

¹ Shaw, 1977, pp.19-20

Spatial dimension

Models which ignore the spatial dimension are overlooking location factors, consideration travel/transport times and costs, and issues of accessibility and the geographical boundaries of markets. Even within a market, distances may have an impact on levels of demand and prices that people are prepared to pay. It is common to use geopolitical boundaries to define areas, if only because they provide the areas for which data are available. Such boundaries do not necessarily coincide with the boundaries of economically meaningful areas (an aggregation issue). Where data are grouped by geographical area, once again discrete groupings are made. To illustrate the problem, consider a worker and a suitable job. If within a region, the worker would be considered frictionally unemployed even if they are at opposite boundaries. If in two adjoining regions, then it would be a case of structural unemployment even if they are within metres of each other across the boundary dividing the regions.

Level of aggregation

An analyst can sometimes exercise discretion as to the level of aggregation, but the choice can affect results. This applies in numerous areas. How broadly the product is defined can affect the determination of the market structure. Time intervals can affect observed relationships and lag structures. Aggregation over groups within society can conceal advantage or disadvantage for sub-groups.

Substitutability/differentiability

The linear programming approach to production allows for consideration of a limited set of fixed factor proportions production options. Given the limited number of options with production machinery and the relatively fixed number of workers that can work with each machine, this may be more realistic than the approach which assumes continuous substitution of capital and labour and differentiable isoquants.

Utility/welfare assumptions

Utility theory commonly assumes that satisfaction/utility is obtained from goods and services, with preferences being exogenous. This is very limiting and disregards the possibility of relative requirements in relation to others or in relation to (endogenous) expectations, or the operation of influences shaping preferences. Why not consider the possibility that people can become more efficient at obtaining utility by developing cheaper tastes? Might a benefit of education be that people can more easily get enjoyment from low cost activities such as reading or discussing a freely obtainable library book? Perhaps experiences also influence future preferences and satisfaction in other ways. Traumatic events such as a serious car accident or the loss of a child can have long-term effects, as may numerous minor events in lesser ways.

Decision making in organisations

It is inappropriate to assume single-minded pursuit of specified objectives when there are several decision-makers or beneficiaries involved. Note that alternative approaches have been considered in both the public and the private sector, if only in a

simple way, in the economics of bureaucracy² and X-inefficiency.³ We should possibly ask who is making what decisions to meet what objectives and under what incentives/constraints.

Institutional constraints

The organisational structure of society, the beliefs, customs, and laws, the professional bodies and their behaviour, as well as the political system and the media have a significant influence on the activities and preferences which shape a society. Economic analysis commonly pays little regard to these, while inevitably implicitly assuming an underlying structure. Even where structures are well established and commonly used, they may be subject to economic scrutiny only rarely. The legal system is central to the implementation of many government policies, but has received little attention to date.⁴

Learning and repeat games

Behaviour changes over time as people learn from past experience. This results in more complex and dynamic structural relationships and strategies. As an added dimension, people's current behaviour may be shaped by past experiences and cultural traditions. An interesting literary illustration of this is the story "A Bar of Shadow", by Laurens van der Post.⁵

Statics and dynamics

Much economic theory is set in a static context, where there is no time dimension. The focus is then on the equilibrium point or the optimal point. The equilibrium is where the system would eventually come to rest and from where, once attained, it would not move unless something changes. In reality, systems are likely to be continually in states of disequilibrium, adjusting to various shocks, possibly moving towards ever changing equilibria. The dynamics of such adjustment can therefore be very important. How long will it take for adjustment to take place? What adjustment path will be followed? How long will it take for a policy to have an impact, and are there costs associated with the movement?

Econometric limitations

These are more severe than econometricians would generally admit, even ignoring the accuracy of and perceptions of the data.

For example, the basis of a theoretical approach is to simplify. This includes the omission of relevant but less important variables. Ramanathan describes the effects of omitting a relevant variable as: likely bias of estimated coefficients; biased constant

² Niskanen (1971)

³ Leibenstein (1966)

⁴ One paper on this topic is Birks and Buurman (1997).

⁵ The first story in the three story compilation, *The Seed and the Sower*, by Lawrence van der Post, which formed the basis for the film, "Merry Christmas, Mr Lawrence".

and forecasts; and invalid hypothesis tests.⁶ Is this an econometric equivalent of the Theory of Second Best?⁷

Econometric models include a variable in a specified functional relationship, commonly requiring additive separability either of the variable or of some transformation of the variable or relationship. The relationship between variables can be complex, especially with time series data which require consideration of possible lag structures. We can conceptualise the relationship between two time series variables as an input wave from one variable going into a "black box" and generating an output wave in the other variable. In econometrics we make specific and restrictive assumptions about the form of the output wave and its relationship to the input wave. This is particularly apparent when we consider qualitative exogenous variables⁸, or lagged relationships estimated in discrete time.

Single equation estimation assumes the existence of exogenous variables, but the complexity of economic systems suggests endogeneity is more likely, if only indirectly through the relationships with other variables. Ignoring simultaneity can lead to biased and inconsistent estimates and forecasts, with invalid hypothesis tests on parameters.⁹

Conclusion

Care must be taken when using economics and interpreting the results of economic analysis. As with any other body of knowledge and methods of analysis, it has weaknesses. These should not be overlooked.

⁶ Ramanathan (1995), p.187

⁷ See, for example, Lipsey and Lancaster (1956).

⁸ Variables which take values 1 or 0. These can be used to represent a price freeze, for example, taking the value 1 during the freeze and 0 otherwise.

⁹ Ramanathan (1995), p.661

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Chapter Three

SOCIAL POLICY - THE STATE WE'RE IN

By Richard Shaw

In the beginning there was the Plan
And then came the Assumptions
And the Assumptions were without form, and the Plan was without substance
And darkness was upon the face of the Workers (*anon.*)

1. INTRODUCTION

The publication of Harold Lasswell's seminal works some fifty or so years ago triggered an explosion in what Lasswell termed the 'policy sciences'. In the immediate post-war period policy-focused research had been conducted in disciplines as diverse as sociology, psychology, management, political science, and social administration, but in the 1950s a more unified approach to the nature of policy-making, and to the search for information with which to inform that process, began to emerge (Parsons, 1995). In the years since the pioneering work of Lasswell (1948, 1951), Lindblom (1959), Simon (1957) and others, the policy sciences have bifurcated into two major approaches: policy analysis, which is largely concerned with the generation of knowledge for use *within* the policy process, and studies *of* the policy process itself, which explore the manner in which policy is formulated, implemented and evaluated (see Easton, 1965; Hill, 1997; Hogwood and Gunn, 1984; Simon, 1957).

This paper sits most comfortably within the second of those traditions, inasmuch as it has little to do with the content of governments' social policies, and rather more to do with the manner in which external interests explore and comment on those policies. Clearly, no single paper can adequately cover the myriad of different conceptions of, and approaches to social policy. Accordingly, I have opted to focus on academic commentaries in the social policy literature, rather than on the policy analysis and information with which decision-makers inform policy decisions. In a sense, my intention here is to reflect upon what might broadly be termed the social policy method. If the paper errs on the side of highlighting flaws in that tradition, that is no reflection on its intrinsic merits. On the contrary: the social policy literature has a very great deal to offer, particularly concerning the implementation effects of governments' policies upon groups which traditionally struggle to make much of an impact in policy processes. But as with all intellectual endeavour, the social policy literature has its own particular blindspots and predispositions, the ramifications of which are worthy of discussion. To that end, this piece begins with a generic

discussion of the nature of social policy, and of the policy process, following which it explores the subjective nature of policy, debates over language, and the relationship between social policy and economics.

2. THE SUBSTANTIVE AND PROCEDURAL ASPECTS OF SOCIAL POLICY

At the risk of over-simplification, the term ‘social policy’ generally connotes a disposition to policy matters in which considerations of collective or societal well-being take priority over ‘sectional or private interests’ (Wilkes and Shirley, 1984, pp. 7 - 8). While there is considerable debate within the domestic and international literature on its precise meaning, most authors would be reasonably comfortable with the definition offered by Cheyne *et al* (1997, pp. 2 -3), for whom social policy refers to those ‘actions which affect the well-being of members of a society through shaping the distribution of and access to goods and resources in that society’ (Cheyne *et al*, 1997, pp. 2 - 3). Social policy most commonly refers to policy activity, and, in particular, to service delivery, in the domains of health, welfare, education and justice. It takes many different forms; typically, social policy is ‘found’ in actual programme delivery, but it also exists in briefing papers to Ministers, formal publications, and agency reports. Moreover, it is generated by a variety of different policy actors, including departmental officials, academics, private consultants, interest groups, and independent think tanks.

The political and theoretical etymology of social policy lies in the philanthropic pragmatism of Fabian socialism, and in the British tradition of social administration (Stephens, 1998, p. 139). And while it has long been a focus of international scholarship, the growth in the New Zealand literature has been a relatively recent phenomenon. It may be no coincidence that the growing interest in social policy in this country has coincided with the raft of economic, structural and constitutional reforms implemented in the domestic context during the last decade and a half. Certainly, much of the published material focuses on the impact which the implementation of those policies has had upon particular groups in society (see Boston *et al*, 1992, 1999; Cheyne *et al*, 1997; Kelsey, 1995; Shannon, 1991; Sharp, 1994). These accounts conceive of policy as the sorts of things which decision-makers (principally in government, but also in product markets and voluntary associations) choose either to do, or not to do: the decisions taken, the resource commitments entered into, and the services which agencies fund and/or provide. In addition to the ‘what’ of policy delivery, however, the study of social policy also encompasses the ‘how’ of policy-making (although in New Zealand this approach receives less attention in the social policy literature than it does in the related field of public policy). In its procedural sense, policy is often conceived as a cycle comprising a series of inter-related activities, which include:

- the identification of policy issues which require government attention;
- the consideration of a range of policy options, or responses, to these issues;
- decisions about the course of action to be followed, if any;
- the design of a policy programme;
- the implementation of that programme; and
- an evaluation of the impact of policy delivery.

3. WHY THE SOURCE OF POLICY INFORMATION MATTERS

For those who are relatively unfamiliar with the social policy method, it is important to establish from the outset that no single instance of social policy can claim to represent the last (or, indeed, the only) word on any given policy issue. The generation of policy commentary does not occur in a theoretical vacuum: much social policy is descriptive, but all of it is built upon certain assumptions, and most of it contains a clear normative orientation. In short, the point made by Parsons (1995, p. 550; cited in Boston, 2000, p. 2), which is that policy evaluation is ‘knee-deep in values, beliefs ... and ideology’, neatly describes the academic study of social policy.

That social science research takes place within certain ‘frames’, which are shaped by the personal histories, political preferences, and academic training of researchers is more or less axiomatic (Cheyne *et al*, 1997; Denzin, 1989; Rein, 1983; Stephens, 1998). Those engaging with social policy, in other words, employ intellectual paradigms which mediate the relationship between the researcher and the researched. The particular heuristic device used has significant implications for both the content and process of policy research, and will have a bearing on the types of issues researched, the data collected (and that which is overlooked or discarded), the conclusions drawn, and so on. In short, the social policy literature is seldom (and seldom aspires to be) value-free. Herbert Simon’s notion of ‘bounded rationality’ has considerable utility in this regard. Simon applies standard notions of imperfect knowledge to policy matters, and contends that individuals generate policy within environments which are bounded by certain constraints. As a consequence of the influence of variables such as the incomplete nature of knowledge and organisational culture, ‘it is impossible for the behaviour of a single individual to reach high degrees of rationality, [such that] individual choice takes place in an environment of ‘givens’ ‘ (1957, p. 79).

The bounded nature of rational thought lends to social policy accounts an inevitable degree of subjectivity. While that need not be an inherently bad thing, particularly if it is explicitly acknowledged, it does mean that the substance of contributions to the literature says something about ‘which values matter [to the author] and how they should be ranked’ (Boston *et al*, 1998, p. 71). Policy issues are invariably multifaceted, and policy professionals and academics (intuitively or consciously) employ intellectual constructs to assist them to sift and arrange the myriad data required to make sense of, and perhaps act upon such complex problems (Shaw, 1999a, p. 47). The term ‘policy frame’ is frequently used to describe the different ways ‘of selecting, organising, interpreting and making sense of a complex reality to provide guideposts for knowing, analysing, persuading and acting’ (Rein and Schon, 1994, p. 146). The important point to register is that an individual’s choice of ‘policy frame’, or interpretive framework, will inevitably promote a particular understanding of and disposition to a given issue, and accommodate certain policy options to the exclusion of others. A small example may help demonstrate the point. The *Fiscal Responsibility Act* 1994 has attracted very different normative responses: what for one author is regarded as ‘a useful contribution to ... policy making and ... some comfort for those concerned [with] a return to deficits and increasing debt’ (Scott, 1995, p. 15) is for

another a legislative innovation promoted by government ‘technopols ... intent on locking in their policy of fiscal restraint’ (Kelsey, 1995, p. 232).

Hall (1993, p. 279; cited in Halligan, 1996, p. 73) makes the point that policy-makers ‘customarily work within a framework of ideas and standards that specifies not only the goals of policy and the kind of instruments that can be used to attain them, but also the very nature of the problems they are meant to be addressing’. His observations suggests that, to a certain point, social policy research and publishing is also influenced by the particular institutional environment within which it is undertaken. That is perhaps less an issue in universities, in which principles of academic freedom grant a certain degree of editorial autonomy to authors (although a report recently commissioned by the Association of University Staff identifies a number of challenges to academic freedom in the current tertiary policy environment), but can certainly influence the content of policy advice generated in the core departmental sector. The question of the degree to which policy content is shaped by institutional context is addressed by a branch of political theory called ‘new institutionalism’, the driver of which is the realisation that ‘human activity and thought is fundamentally bound by the institutions within which they are located’ (Parsons, 1995, p. 224). New institutionalists such as March and Olsen (1984, 1989) stress the primacy of institutions in framing individuals’ understandings of policy issues, and their access to and understanding of policy information.

The New Zealand Treasury is often cited as an exemplar in this regard. During the latter part of the twentieth century an organisational culture evolved within that agency which was characterised by the promotion of a ‘consistent and focussed (if uni-dimensional) model of economic reform’, and a relative intolerance of alternative policy analyses and prescriptions (Bollard and Mayes, 1993). Arguably, in recent years the Treasury has demonstrated a greater preparedness to entertain policy analyses which would not have been accommodated in the 1980s and 1990s. In the post-election briefing papers to the incoming Labour/Alliance government, for instance, the agency explicitly acknowledged the need to have at least one eye on the social wellbeing impacts of particular fiscal choices. The Treasury remains a risk-averse and fiscally conservative institution, but does seem increasingly willing to accept that the government's ownership interest in public institutions must be balanced against its purchase interest (i.e. to acknowledge that there is a point beyond which tight fiscal policy settings create long run effectiveness difficulties in the public sector).

The argument that certain ‘rules of the game’ (Lowndes, 1996, p. 183) develop within institutions, which have the effect of wrapping philosophical parameters around the nature of the knowledge created within those agencies, is certainly not restricted to the Treasury, nor to government departments generally. As with the subjective nature of an individual’s orientation to policy issues, however, the point is that the social policy produced within complex organisations reflects, to a certain extent, influences which are specific to those agencies.

4. THE POLITICS OF LANGUAGE

The suggestion thus far is that social policy is in many respects a function of personal and institutional characteristics. That point is manifest in the approach taken in some of the social policy literature to the language which is commonly used to describe policy developments. More specifically, a feature of a number of commentaries is a hostility to the terminology associated with key aspects of the reformed public sector. Some clearly find that the language of reform offends against certain deeply held values, such that the very use of constructs such as 'inputs', 'outputs' and 'outcomes' is seen as an uncritical acceptance of a fundamentally undesirable reform agenda. The imprecation to 'resist market speak, [to] maintain control of the language, [to] challenge its capture and [to] refuse to convert your discourse to theirs' (Kelsey, 1997, p. 396) is at one level an example of an aversion to the 'latest managerial unspeakability to be visited on academics' (Matheson, 1996, p. 3).

Kelsey raises an important issue: social scientists and anthropologists have long known that the battle over the meaning of words is an important one, inasmuch as those who control language can, to a considerable extent, also control meaning. In some instances, however, a preoccupation with linguistic form injects into social policy commentaries a disposition which militates against reasoned debate regarding the merits and flaws of reform. In part, this has something to do with the fact that the language of the reformers (principally senior officials in the central agencies) carried with it the 'political baggage of the minimalist government debates' which had raged in the United Kingdom and United States in the early to mid 1980s (Matheson, 1996, p. 3). The reactions of some policy commentators to that 'baggage' reflects the conflict and confusion over terminology which characterises certain cross-disciplinary debates. Moreover, while critics might rail against the 'economic-speak' of officials and certain politicians, that should not obscure the fact that the economics discipline itself is characterised by robust debates over language, perspectives and policy directions.

That notwithstanding, separating the political etymology of the language of reform from the uses made of those terms in the New Zealand context has proved a challenging exercise for some in social policy. Indeed, on occasion it has precluded any acknowledgment whatsoever that the reform process has delivered positive outcomes. Few but the most unreconstructed reformist would dispute that the public sector changes have been won at some cost. For instance, one of the effects of reducing the size of the core public service workforce from around 80,000 in 1984 to fewer than 30,000 in mid 1999 has been some reduction in the capacity of the public service to perform the various tasks asked of it by the political executive (see Upton, 1999; SSC, 1999b). Furthermore, there are significant transaction costs attached to processes of organisational change and a reliance on contractualist models of governance, both of which are key features of the contemporary public service (see Boston, 1995; Shaw, 1999b; Upton, 1999).¹

¹ The figures cited here refer to all staff (including full-time, part-time and temporary) employed in core public service departments as of June 1999 (SSC, 1999a). When the numbers employed in the wider state sector, including the defence sector, are added in, full-time employment as of

But equally, an account of those changes which failed to acknowledge the gains which have been made would be deficient. In a review of one New Zealand social policy text, for instance, James (1997, p. 200) makes the point that those who dismiss the institutional separation of the funder/purchaser/provider roles in the health sector as mere 'new right liberal philosophy' miss the point that that particular change, which has certainly not been unproblematic, has been welcomed by groups (such as Maori) who have grasped the opportunity to enter the market for service provision. Moreover, it is difficult to deny that the introduction of stringent financial reporting requirements has greatly enhanced the quality and timeliness of information regarding the performance of the public sector, to which extent those reforms have underlined the importance of the principle that 'the people's servants are subservient to the people's representatives when spending the people's money' (Matheson, 1996, p. 2). In any case, discomfort with the language of reform does not make the policy instruments and institutions which those terms apply to go away, and an unwillingness to accept the centrality of the new institutional architecture (if not the words used to describe it) to policy development may simply reduce the currency and relevance of policy commentary.

Similarly, an acceptance of and preparedness to use the contemporary language of public management need not connote an uncritical acceptance on the part of the user of all that has happened in the era of reform. In this sense the concern with terminology in some corners of the literature can take the form of what a former State Services Commission official describes as 'bundling', which is 'the tendency to confuse the technology of public administration with the public policies themselves' (Matheson, 1996, p. 3). The point Matheson makes is that the vehicles of public management (contracts, output classes, organisational restructuring and so on) can, and should be distinguished from the normative and substantive elements of the policy decisions to which they give effect. That distinction is not always evident in the social policy literature, however, and from time to time it is possible to detect hints of an Orwellian 'two legs good - four legs bad' approach to critical policy issues.

Debate about the use of the term 'managerialism' and the practice of contracting out publicly funded service delivery represent two cases in point. Regarding the first, there is no doubt that in the recent New Zealand context, managerialism has come to be equated with an approach to public management which emphasises cost-cutting and down-sizing (Boston *et al*, 1996). But the policy of shrinking public institutions exists independently of the art of management itself, and as the comparative data shows (see Castles *et al*, 1996), public sector managerialism New Zealand-style looks quite different to the approaches adopted in other jurisdictions. And as far as the greater use of non-departmental service providers is concerned, Stephens (1998) observes that the model is extensively used in a number of European jurisdictions governed by social democratic governments. His point is that the search for greater efficiency and responsiveness from service providers cannot be considered synonymous with the sorts of political philosophies and fiscal policy preferences

December 1998 totalled 55,600, with a further 6,900 employed on a part-time basis (PCInfos, 1999).

which have characterised government in New Zealand since the mid 1980s. In short, in much the same way as a distinction can be drawn between governance and management, so the technology of policy implementation can be delineated from the partisan content of particular policies.

Finally, an over-fascination with nomenclature can significantly deflect the focus of academic inquiry, and amplify the risk that it is rendered less relevant than it might be. Again, Matheson (1996) demonstrates the point by suggesting that, although Ministers 'purchase' various outputs from departments (and other providers), the use of that particular term masks a purchasing relationship which is fundamentally different to those which commonly apply between consumers and producers in product markets. Purchase agreements (which codify a Minister's purchase requirements of a departmental provider) are an administrative innovation designed to inject some rigour and clarity into the appropriations process. Their advent did not greatly alter what had previously gone on; rather, the change in language represented a new way of thinking about relationships between the political and administrative wings of the executive branch of government. However, that fact tends to be lost in some social policy accounts which heavily criticise the use of the language of 'purchase', 'ownership interest', 'contracts' and 'accountability'. An overly literal interpretation of terminology, however, risks missing the wood for the trees. In this respect the language (which tends to evolve over time in the normal course of events) is of less significance than the fundamental relationships described by particular terms, which are invariably much more nuanced and complex than is suggested by a cursory concern with the nouns attached to them.

5. THE ECONOMICS OF SOCIAL POLICY

The language of economics, and the economics discipline more generally, has come in for particularly trenchant criticism by some social policy commentators. Kelsey (1995, p. 394) does not shy away from economic issues, but does enjoin against 'economic fundamentalism', while Shirley is concerned that social policy has been subsumed to economic goals (1990, pp. 145 - 146). Both points of view are broadly typical of the approach to economics adopted by many in the New Zealand social policy tradition. While there are obviously exceptions (see Boston *et al*, 1999), much academic social policy is characterised by a suspicion of economics (and economists). Matheson (1996, p. 3) partially explains that suspicion on the grounds that 'to non-economists the confusion of economic concepts (e.g. the self-interested individual) with common language (e.g. selfishness) heighten[s] the sense of conflict' between economists and non-economists. That may be so, but the antipathy to economics which is evident in parts of the literature, and the occasional bi-furcation of economic and social policy (although see Hill, 1996, for an exception), is perplexing for a number of reasons.

The most obvious is that the implementation of social policy, particularly in the fields of health, social welfare and education, makes considerable demands on the nation's scarce resources, and dominates the Budget process. In the year to June 1999, for instance, 72.4% of total public expenditure was accounted for by spending in those

three domains; that figure amounted to a fraction under 25% of gross domestic product (GDP) (Statistics New Zealand, 1999; SSC, 1998, p. 15). Moreover, while it is a less significant measure of the fiscal impact of social policy delivery, it is worth noting that this expenditure is administered by departments which dominate the institutional topography of the core public service. In mid 1999, four of the seven agencies which employed more than 1,000 officials were social policy-focused, and some 49% of the 29,463 public service employees worked in social policy advisory or delivery agencies.² Aggregate data of that nature masks specific expenditure patterns, such as changes in expenditure on benefits relative to direct service delivery, but they do suggest that, in order that it remain relevant to political debates about the direction of fiscal policy, the academic social policy tradition can ill afford to ignore the economics of policy.

Moreover, the tendency to employ the generic term 'economics' has the effect of masking the diversity of opinion and method which characterises the economics discipline, and of reducing to a uniform, undifferentiated approach what is in reality a vastly more complex and contested arena. In so doing, it also diminishes the stock of intellectual capital from which social policy can draw, and therefore potentially detracts from the rigour and sophistication of policy analysis. There are some very sound analyses of social policy implementation which are underwritten by a robust assessment of the core economic issues; in Boston *et al* (1999, pp. 60 - 75), for instance, the macro-economic constraints which were wrapped around the social policy programmes of the National governments of the 1990s are set out in considerable detail. Other policy texts (see Cheyne *et al*, 1997), however, pay relatively little attention, if any at all, to the fundamental concern with the allocation of scarce resources which is central to the economics discipline (and, for that matter, to the theory and practise of politics itself).

It may be that what on occasion resembles anti-economism (Kelsey (1995, p. 394), for instance, warns that 'leaving economics to economists is fatal') is a function of the strong influence which neo-classical economic principles have had on fiscal policy directions in recent years. Yet one of the signal features of the economics literature, both internationally and domestically, is the contestation that takes place within and between different traditions. For instance, the neo-Keynesian orientation has things to say about fiscal policy settings, and the relationship between the state and economy more generally, which are markedly different to those which are promoted within the neo-classical tradition. In New Zealand, the work of economists such as St. John, Chatterjee, Easton, Harris, Dalziel, Philpott and others is testament to that:

² The four departments were Corrections, Courts, Social Welfare and Work and Income (shortly thereafter, the Department of Social Welfare was reconstituted as the Ministry of Social Policy and the Department of Child, Youth and Family Services). The second calculation is based on the State Services Commission's 1999 Annual Employment Survey (SSC, 1999a), and includes public servants in the departments of Corrections, Courts, Education, Health, Housing, Social Welfare, Work and Income (WINZ); in the Ministries of Maori Development (Te Puni Kokiri), Pacific Island Affairs, Women's Affairs and Youth Affairs; and in the Education Review Office. It does not include those employed in wider state sector, and the non-state sector, who are engaged in publicly-funded social policy delivery.

unfortunately, however, the diversity of analysis and prescription within economics is not always reflected in the social policy literature.

The final problem which arises in some sections of the social policy scholarship is a tendency to confuse a government's fiscal policy preferences with the analytical tools and constructs used by economists, and, more significantly, with the policy instruments used to give effect to governments' preferences. In what is a specific instance of the phenomenon which Matheson calls 'bundling', Cockburn (1994, pp. 94 - 95) appears to hold the output reporting requirements designed into the *Public Finance Act 1989* responsible for the under-resourcing of the implementation of the *Children, Young Persons and Their Families Act 1989*. The current model of public finance management has certainly not been unproblematic. The incentive to focus on allocative efficiency in the production of outputs has detracted from the achievement of substantive policy outcomes, or results, and there has been a tendency for the executive to focus on the Crown's purchase interests at the expense of long-run ownership considerations (Shaw, 1999b). Neither phenomenon is especially positive, but the 1989 legislation cannot be described as a charter for small government (and neither can its companion, the *Fiscal Responsibility Act 1994*): it contains no statutory public debt:GDP ratio, and neither does it prescribe particular levels of public expenditure. In fact, in the absence in New Zealand of entrenched constitutional constraints on governments' budgetary activities (see Buchanan, 1990; Schick, 1997), the resourcing of policy implementation is, in the first instance, a function of fiscal policy decisions taken by the political executive. Those decisions are administered within particular legislative contexts, but are not necessarily anticipated by them.

The understating in some social policy scholarship of the significance of economic issues is a flaw in the tradition, and suggests a need for a greater degree of sensitivity to the benefits of inter-disciplinarity. The case for a tighter interface between social policy and economics is well made by Scott (1997, p. 249), who observes that the value of the latter lies in its capacity to 'provide insights into the targeting of resources and the making of choices about their alternative uses'. It may well be that some economists could benefit from a greater appreciation of the real-world impacts of the models they promote, but it is certainly the case that a number of social policy accounts would be much more rigorous and persuasive were they to complement their analyses with a clearer sense of the economic considerations which underlie all political and policy decisions.

6. CONCLUSION - SOCIAL POLICY INTO THE FUTURE

The New Zealand Treasury once famously commented that 'social policy is simply that list of activities that are normally deemed to be social policy' (1987, p. 5). One of the signal contributions of the growing body of social policy research in this country has been its capacity to drag the level of public understanding and debate past that rather glib observation, and to highlight the theoretical antecedents and the actual impacts of governments' policies on citizens. In this respect, social policy has contributed mightily to recasting people as subjects in policy development, rather than as the objects of social policy delivery.

That said, there is scope for enhancing the value of social policy as a distinct approach to the study of politics and policy. Several areas in which progress might be made have already been flagged, and in what remains of this piece, I wish to offer a handful of concluding comments concerning various ways in which, to follow Lasswell's seminal distinction, social policy can make an even greater contribution to knowledge *within*, in addition to knowledge *of* the policy process.

The first would require a willingness amongst some scholars to entertain a greater degree of methodological pluralism. While it would be incorrect to suggest that social policy lacks a quantitative methods base (see Boston *et al*, 1999; Kelsey, 1995; and Stephens *et al*, 1995, for recent accounts of policy implementation which draw upon quantitative data), much of the scholarship relies heavily upon qualitative methodologies. This has certain ramifications for the utility of social policy research in applied policy contexts. Tools such as life histories, structured interviews, and small group case studies certainly have a great deal to offer the policy researcher. They permit the generation of data about events, ideas, opinions and circumstances which cannot easily be directly observed, and which are difficult to capture through quantitative approaches (Patton, 1987). In short, their principal merit is that they enable researchers to 'glimpse the categories and logic by which [research participants] see the world' (McCracken, 1988, p. 9).

As is the case with all methodologies, however, qualitative methods are not without their shortcomings. At best, in a social policy context they can provide important insights into the motivations and experiences of those who design, deliver or are affected by policy; at worst, poorly designed and/or executed qualitative research produces large and unbounded bodies of data which are difficult to organise, work with and analyse in any coherent or systematic fashion. Moreover, the generalisability of some such data, and the extent to which it has any end-use in policy design and implementation, can be constrained by the fact that 'qualitative research does not survey the terrain, it mines it' (McCracken, 1988, p. 16). As a consequence, data thrown up by qualitative methods can be of limited relevance beyond those from whom it is gathered, and therefore of questionable utility to the development of policies which apply at the national level. In the future, then, social policy researchers might well look to an integration of both qualitative and quantitative technologies as the best means of reducing the incidence of methodological myopia, and of maximising the explanatory value of their research (McCracken, 1988; Frankenberg, 1982).

Studies of social policy would also benefit from a preparedness to draw on empirical findings from a much wider range of disciplines, and, in fact, to demonstrate a greater degree of interdisciplinarity more generally. I tend to concur with Hill (1996, p. xiv), who has called for a much closer alignment of social policy studies with the disciplines of sociology, political science and economics. In New Zealand, while there are specific instances in which other disciplines have been woven into social policy accounts, those sorts of alignments have been hampered by a tendency to link social policy and social work, at least within tertiary institutions. While all social work

activity occurs within both an organisational and government policy context, the conflation of social policy and social work limits the scope of the former by channelling it towards 'a strong emphasis on social pathology and on policies directly oriented to the social welfare of the deprived' (Hill, 1996, p. xiii). Both of those are laudable projects in their own right, but the study of policy necessarily expands past those foci, and stands to gain a great deal by accommodating theoretical and empirical insights from other related social sciences.

Even in a market for social policy research which is as small as that which exists here in New Zealand, where publishers are increasingly demanding generic social policy texts for use in undergraduate courses, the literature found in the core texts and journals is surprisingly diverse. No single extract from that scholarship would possess each of the traits mentioned here; indeed, there are a number to which few, in any, of these observations could safely be said to apply. Having taught, researched and published within the social policy tradition for the better part of a decade, however, it seems to me that there is remains room for improvement. Important synergies, particularly between social policy and economics, remain under-explored. The unwillingness to disentangle the normative dimension of governments' policy from the institutional arrangements within which that policy is delivered continues to close off fruitful avenues of research, and an overstated concern with terminological issues can detract from rigorous inquiry. Research into the substantive and procedural features of social policy has come a considerable distance in New Zealand, but it will need to demonstrate a willingness to think well outside of its current disciplinary square if it is to continue to flourish, and to possess currency and relevance into the new millennium.

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Chapter Four

A CRITIQUE OF PSYCHOLOGICAL THINKING

By Felicity Goodyear-Smith

1. INTRODUCTION

I have been asked to conduct a critique regarding reasoning in psychological thinking and how this impacts on policies affecting our society. First, a caveat: I am not a psychologist. I am a medical practitioner with special interest and expertise on issues pertaining to the interface between General Practice and psychology. I hold a Masters in General Practice with my thesis on issues pertaining to recovered memories, conducted under supervision from the Department of Psychiatry and Behavioural Science, University of Auckland. My reading of the psychological literature is extensive and I have conducted in-depth literature reviews on a number of topics, such as child abuse and neglect; domestic violence; memory including the recovered memory debate; and issues relating to men and to fathering, including divorce and custody. I also have an appreciation of the scientific underpinnings of clinical practice and the need for interventions to be evidence-based. However it needs to be appreciated that I make my comments on psychology from a position outside that profession. The psychological literature base is vast, and time and space restraints mean that I am not able to focus on specific topics in depth. This paper therefore concentrates on areas where I believe that psychology is failing to operate from a place of reason, because these have serious social implications. There are many areas where psychology serves us well which I am unable to cover except perhaps in passing.

Reasoning is the ability to draw logical conclusions from premises, and hence is the foundation of scientific thinking. The basis of science is a focused inquiry using observation, experimentation and induction. Research is the critical investigation of a subject using these scientific principles, an empirical approach to data. Basic tenets of research are that the findings should be reproducible (under similar conditions) and that potential biases should be recognised and allowed for. Qualitative research is subjective and tends to generate hypotheses, whereas quantitative research is aimed at objectivity and seeks to test hypotheses. The convention in science is to start with the null hypothesis: the assumption that there is no statistical difference between the effects, factors or groups being looked at. If, for example, the difference between the samples is shown to be too great to have occurred from chance alone, then the null hypothesis is rejected, and is replaced by an alternative hypothesis. The scientific approach continues to look for the best fit of data to a theory, but not an exact match.

As such, it is a valid tool for processing information, but not the total answer to the nature of reality. When a new discovery is made, scientists tend to work backwards to construct hypotheses consistent with that discovery, and then go on to deduce other consequences of those hypotheses that can in turn be experimentally tested. If any one of these predictions turns out to be false, the theory has to be modified or abandoned. The emphasis is thus on falsification not verification. A powerful theory is one that is vulnerable to falsification and so can be tested in many detailed and specific ways. If the theory passes those tests, our confidence in it is reinforced. Good researchers will define the conditions under which they believe their conclusions can be generalised.

Hence there is no such thing as 100% proof in science, only probability and levels of confidence. When testing a hypothesis, it is possible to make errors in two different directions. Differences between two samples may result merely from chance. Accepting a difference as significant when it is not, and hence wrongly rejecting the null hypothesis, is a type I error, or false positive. Conversely, disbelieving that there are real differences between samples and accepting the null hypothesis when it is false, is a type II error or false negative. The more we reduce the risk of making a type I error, the more we increase the risk of making a type II error. However the emphasis always must be always on avoiding type I errors. Depending on the circumstances and what is contingent on it, scientists may demand a significance level of 5%, 1%, 0.1% or even 0.01%.

There is a clear parallel with the use of evidence in a court of law. As with science, the principles of justice demand the starting place as the null hypothesis – innocent until proven guilty. If we are prepared to accept relatively weak evidence of a person's guilt, then we risk convicting many innocent people (type I errors). When strong evidence is required (beyond reasonable doubt) clearly some guilty people will go free (type II errors). This is the price we pay for justice, expressed so articulately by Increase Mather in 1692 at the conclusion of the Salem witch trials when he said "It were better that a hundred witches go free than one innocent person be condemned". This principle was clearly not understood by an Auckland court psychologist who said in 1989 "I would rather see ten fathers wrongly accused than one child sent back into what could be an abusive situation".

Over the past few decades, 'psychological thinking' has infiltrated deep into our collective psyche. Psychological thinking is a major contributor to policy in many realms of modern society – education, health, law enforcement, the courts, social welfare and accident compensation. Psychology makes some grandiose claims. It may ascribe causes to current conditions; offer treatment based on reliving or reworking the past; recommend interventions in circumstances where previously no professional assistance has been considered necessary; and claim ability to predict future behaviours. The primary question therefore, is what are the rationale for such claims – is psychology grounded in scientific enquiry, and are its dictates rigorously evidence-based?

The field of psychology has made huge advances over the past century, and thousands of scientifically conducted studies have contributed to our knowledge, especially in areas such as physiology, perception, judgement, behavioural control, and social beliefs, attitudes and interactions.¹ A number of valid and reliable psychometric tools have been developed, such as IQ tests. There are some valid and effective psychological interventions, which are outlined later.

2. ADVOCACY RESEARCH

In the past 50 years there has been an increasing split between academic research-based psychologists and clinical psychologists.² Many of the latter do not read the academic scientific literature. Some argue that experiments and observations under controlled or laboratory conditions are not applicable to the real-life experience of trauma.³ Practitioner theories and practices are largely shaped by data from clinical observations and by beliefs about the cause of social ills and the ideal solutions.

In the past two decades psychotherapy, especially principles and practices in the sexual abuse field, has been predominantly developed along 'feminist and scientist-practitioner perspectives'.⁴ At the extreme end of feminism there is distrust of traditional methods of professional education on the grounds that it has been developed by men in a patriarchal system and is therefore tainted by the corrupt, male-dominated world of rationalism.⁵ Feminist analysis claims that the patriarchal basis of our society means women lack equality and are relatively powerless, a situation condoned by major social institutions.⁶ Physical and sexual violence are defined within the parameters of male abuse of power and control. Because of this power imbalance, men are to be held responsible for their actions, but women have diminished responsibility (or are never to blame) because of their victim status.⁷

Intellectual fudging and misuse of questionable statistics is frequently considered justified to achieve political or other ends. Much provocative but inaccurate information is disseminated on the grounds that ends justify means.⁸⁻¹⁰ For example, the prevailing brand of feminism claims that women live in an oppressive male hegemony, and its members constantly seek evidence that women are victims of male brutality. This can lead to the use of grossly inflated statistics to gain support, vindication and ammunition.

The principles of advocacy research, which combine unbiased measurements of social parameters with a committed expression of concern, have eroded since the 1960s. The estimates of social scientists are of increasingly questionable accuracy, with a growing tendency to greatly magnify needs while asserting the scientific validity of these large numbers, a phenomenon at least partly fuelled by competition for funding.⁸

For example, data from the Christchurch Child Health and Development longitudinal cohort study indicates that about one parent in 500 sexually abuses their biological child.¹¹ However it has been widely promoted that one in eight fathers sexually abuse their daughters. Just before the 1988 Telethon (which raised \$5.5 million to work with

'families at risk from violence and sexual assault') the New Zealand Mental Health Foundation released a publication claiming that 'one in four girls and one in 10 boys will be sexually abused by the age of 18. Half the reported cases of incest are by the child's own father' and 'In one in seven families, women live in daily fear of violent assault by their husband /mate'. These figures were widely quoted by professional bodies¹² and featured in emotional and frightening full-page advertisements in national newspapers. These 'facts' were based on statistics from a book on sexual abuse by psychologist Miriam Saphira,¹³ and while the assistant director of the Foundation admitted after the Telethon that the figures were misleading, it has been uncritically accepted that incest occurs this frequently. A decade later, a survey of Australian professionals (social workers, psychologists, community nurses) found that a third of them believe that a quarter of fathers sexually abuse their children.¹⁴

Similarly, inflation of domestic violence statistics is commonplace. By broadening the definition of violence to include yelling, slamming doors, verbal insults, criticising a partner or not allowing free access to credit cards, the incidence of heterosexual partner violence has been grossly expanded. Furthermore, despite the numerous epidemiological studies demonstrating that men and women hit each other about equally (although men may inflict greater injury), domestic violence is often defined as the psychological and physical abuse of women by male partners.¹⁵ For example, this is the definition used in New Zealand by the Hamilton Abuse Intervention Pilot Project (HAIPP) which co-ordinates the responses to domestic violence by the Police, Criminal and Family Courts, women's refuges, Community Corrections and treatment programmes, and by the New Zealand Justice Department 'Hitting Home' investigation of 2000 men, which reported a prevalence rate of 21% of men being violent towards their female partners, but did not examine women's behaviours towards men.¹⁶

An increasing number of commentators are now expressing their concerns about what they see as the dangerous direction social science and therapy has taken.¹⁷⁻²¹ These writers claim that the price of feminist political activism and ideology is loss of academic scholarship, integrity and intellectual freedom. They also stress that promoting women as victims of male oppression who require long-term psychotherapy to deal with their traumatic pasts, is counter-productive to the goal of women claiming their status as autonomous responsible adults equal to their male counterparts. There currently is no evidence that interventions based on this theory leads to improved mental health, as will be further discussed below.

3. ASSESSMENT OF CAUSES OF PSYCHOLOGICAL PROBLEMS

It is part of human nature to try and understand why things happen, and establishing the causes of undesirable conditions is likely to assist in both treatment and prevention. However psychology has a poor track record of assuming causality, when at best, all that has been demonstrated is an apparent association between two factors. When research is used to link factors that may cause a subsequent condition, this association must not only have a high correlation but it must be statistically direct, exclusive, and have a certain inevitability.

For example, in the 18th century it was believed that a variety of physical and mental conditions, including fatigue, consumption, blindness, insanity and dementia, were caused by masturbation.²² By the 19th century extensive lists of behaviours in children (such as nightmares, trouble with school work, over-eating, bedwetting, shyness, fearfulness or excessive boldness) were believed to be indicators of masturbation.²³

In the 1980s, identical lists resurfaced as indicators of childhood sexual abuse.²⁴ Sexual abuse in childhood was believed to cause a wide variety of mental health problems in adulthood, including eating disorders, relationship problems, personality disorders and schizophrenia.

Extensive research, however, has failed to demonstrate a ‘causal link’ between childhood sexual abuse (CSA) and subsequent psychological and social problems and psychiatric disorders.²⁵⁻²⁷ CSA has no inevitable adverse outcomes and typically, reactions to CSA are neither intense nor pervasive. It is consistently found that only a small percentage of those children who have been sexually abused suffer either short-term or long-term harm.²⁶⁻³¹ Most people are resilient while a few are vulnerable and develop a wide range of problems. In those who do develop problems, the effects are idiosyncratic and unpredictable. When considering sexual activities of adults with children, clear distinction needs to be made between issues of morality, legality and harmfulness. Sexual abuse may be illegal and morally repugnant but not necessarily harmful. This observation in no way condones such activities. It does however have important implications with respect to treatment and with respect to determining the ‘cause’ of adult psychological and social problems.³²

An American review of studies of both clinical and non-clinical populations found that between 60 to 80% of abused children manifested no psychological disturbance, and when studied as adults, less than 20% had serious psychopathology.³³ Another comprehensive review of 45 empirical studies on the impact of CSA showed that only 10-15% of victims developed problems over a 2 year period following victimisation.³⁴ A recent meta-analysis of 59 college-based studies in the United States found that only a small minority of students with a history of CSA demonstrated lasting psychological harm, and the authors concluded that ‘the claim that CSA inevitably or usually produces harm is not justified’.²⁶

New Zealand studies have similar findings. An epidemiological study conducted in Christchurch found that women who had experienced depression, substance abuse or eating disorders had a slightly increased chance of giving a history of intrafamilial generalised childhood abuse, although this only reached statistical significance for depression, and the researchers could not determine whether these findings were caused by sexual abuse itself or the characteristics of families in which such abuse occurred.³⁵ Data from the longitudinal Christchurch Health and Development Study found that those 18 year olds reporting CSA had an increased rate of depression, anxiety, substance abuse, disturbed behaviour or attempted suicide than those not reporting sexual abuse, and when confounding factors such as family dysfunction

were adjusted for, that 10 to 20% of the risk of psychiatric disorder in young adults might be accounted for by exposure to CSA.^{11, 36} Similarly, the Otago Women's Health Survey Child Sexual Abuse study found that women reporting CSA had a higher rate of psychiatric disorders, especially depression, as adults (20%) compared to a non-abused population (6.3%).^{37, 38} The researchers warn against 'overestimating the contribution of childhood abuse in general, and sexual abuse in particular, to explaining mental health and interpersonal difficulties in our community', and concluded that the contribution of any form of childhood abuse to the variables they studied (psychopathology, sexual difficulties, decreased self-esteem or interpersonal problems) was extremely modest, only 1 to 5% of the cases. Most subjects reporting CSA who had developed problems had concomitant histories of family violence or emotional neglect, and in many cases the apparent association between CSA and adult problems 'was accounted for by this matrix of childhood disadvantage from which abuse so often emerged'.³⁹

Both New Zealand and international studies have found that in the majority of cases, the negative effects of CSA can be explained by the family and social context from which it emerged. Family dysfunction correlates with both CSA and later problems as an adult. CSA is rarely found in isolation, but usually occurs along with other forms of child abuse, including physical and emotional abuse and, most importantly, neglect. In a meta-analysis of nearly 3000 people who had specific adult maladjustment symptoms, the family environment in which they had grown up was a nine-fold more important predictor of adult maladjustment than CSA.²⁶ An American study of the effects of various forms of child maltreatment found that physical neglect, physical abuse and verbal abuse was the worst combination for adult distress. Emotional neglect predicted later psychiatric illness better than any of the other forms of childhood maltreatment. Sexual abuse was one of the weakest predictive factors in this context.⁴⁰ The effect of CSA does however appear to be dose-dependant –risk of long-term sequelae increases with very severe forms of molestation and sexual assault. The Otago study found that in the small minority where there had been particularly serious abuse, especially that involving vaginal penetration and force, there was an increased risk of psychopathology even in those who have come from advantaged backgrounds.^{37, 41}

When ascribing causality, the association between the causal experience and the putative results must be obvious and large. It appears that just as a history of CSA is not necessary for the development of any particular psychiatric or adjustment disorder as an adult, only a small minority of people exposed to CSA develop any problems. In general, CSA in isolation cannot be said to 'cause' psychiatric problems in adulthood.

It follows that there are no specific behavioural indicators or mental health problems indicative of CSA. While statistically there is a slightly increased risk of a problematic adulthood in those who have suffered CSA, currently there is no way to identify which children subjected to CSA will develop problems. Psychopathology appears to be significantly more a consequence of being raised in a dysfunctional family environment rather than the result of any specific form of maltreatment.

It is therefore not possible for a psychologist to establish retrospectively whether or not psychological or social problems in adulthood have been caused by CSA. This has clear implications with respect to both diagnosis and treatment of alleged sexual abuse.

EFFECTIVENESS OF PSYCHOLOGICAL TREATMENTS

A number of psychological interventions have been demonstrated to be both safe and effective. In general these are ones that facilitate change aimed at goal achievement, therapies based upon cognitive, behavioural or interpersonal theories. These include treatments for anxiety,⁴² depression,⁴³ panic disorder,⁴⁴ behaviour modification for enuresis and encopresis,⁴⁵ for headache and for irritable bowel syndrome,⁴⁶ marital therapy,^{47, 48} treatment of social phobia,⁴⁹ treatment of bulimia,⁵⁰ family education programmes for schizophrenia,^{51, 52} and treatment of posttraumatic stress disorder in rape victims.⁵³

In general, these therapies are short-term and focus on helping people change the way they think or react, the way they behave or the way they relate to others, in a direction designed to help them achieve their goals. This form of treatment is endorsed by the American Agency for Health Care Policy and Research (AHCPR). In their 1993 Specific Psychotherapy Practice Guidelines outlining the established standard of care, they recommend psychotherapy that is active, time- limited (brief), focused on current problems and aimed at symptom resolution.

With the exception of specific cognitive behavioural and inter-personal therapies, outcome studies have failed to show that specific counselling or psychotherapy techniques are effective beyond the expected placebo effect mediated by the client-therapist relationship.⁵⁴ These non-specific placebo factors include the attention and the structured world view offered by the therapist, the hope and faith in the therapy by the client, the expectation of both that the client's life will improve, and the client's increase in self-confidence and self-mastery.

An increasing number of professionals are questioning the usefulness in general of psychotherapy, “the talking cure”, especially that which delves into the past to try and redress the future.^{1, 55-58} Terence Campbell found that there is scarce evidence that psychotherapy has demonstrated to be successful treatment and concludes it is often little more than a “Rent-a-Friend” business.⁵⁵ Campbell argues that it is unethical and harmful for a psychotherapist to replace family, friends, lovers and colleagues as the most important person in a client’s life.

Emphasis on clients’ histories in explaining their problems is an inefficient, and hence expensive, form of treatment.⁵⁹ Evidence is mounting that many psychotherapies are completely ineffective, and some are iatrogenic (cause harm).⁶⁰ Three factors which might contribute to the harmful effects of therapy are encouraged dependency, false optimism and externalised responsibility. These typically relate to treatments which claim that clients have to face and re-experience past adverse effects before they are healed. Such therapies tend to involve regular ongoing sessions with the therapist,

who sometimes even encourage clients to break contact with their family of origin because they are declared dysfunctional. This increases the reliance on the therapist, who may present an unrealistic expectation of future happiness post-therapy. A client's behaviour may also be exonerated because she is seen as a victim of traumatic events as a child and therefore cannot be held responsible for her actions.

One of the most alarming forms of psychotherapy was that of 'recovered memory therapy' which was extremely popular in the early to mid 1990s. Based on the unproven theory⁶¹⁻⁶³ that memories of childhood trauma (especially incest) could be repressed or 'blocked out', but accurately recalled under the guidance of a therapist offering a safe environment to relive the memory.⁶⁴ Therapists used a variety of techniques (including age regression, guided imagery, dream analysis) which were hypnosis-like and hence enhanced the possibility of the generation of sincerely believed-in false memories in susceptible patients.⁶⁵ A number of academics have expressed grave concerns that 'recovered memory therapy' has been very damaging to large numbers of people and their families.⁶⁶ For example, a preliminary study of 30 randomly selected claims made to the Washington State Crime Victims Compensation Program found that all but one were women alleging incest, and for 26 of them, their first memory of sexual abuse surfaced during psychotherapy.⁶⁷ All were still receiving psychotherapy 3 years after the 1st memory, and 18 were still in therapy 5 years after the 1st memory surfaced. The incidence of suicidal ideation, self-mutilation, hospitalisation, alcohol and drug problems, unemployment, divorce and loss of custody of their children sky-rocketed after starting therapy. All has become estranged from their extended family. What was even more startling was that 29 of the 30 claimed a history of satanic ritual abuse (SRA) at the hands of their parents and families, and had recovered memories of physical torture and mutilation (medical examination corroborated none of these). The average age of claim when SRA memories begin was 7 months. Most remembered birth & infant cannibalism and one third claimed they had been tortured with spiders. Collectively, the complainants claimed to have witnessed over 150 murders. Not one of these allegations resulted in a police investigation. While this study cannot prove that recovered memory therapy made these patients worse, it is certainly compelling evidence that they did not get better from this therapy, and raises alarm about treatment outcome.

Both belief in being victims of SRA as a child and the condition dissociative identity disorder (previously called multiple personality disorder) are closely connected with recovered memory therapy. The latter is now believed by many to be a therapeutic artefact created by the use of hypnosis and 'memory recovery' techniques.^{68, 69}

Many other contemporary treatments are not based on empirical evidence. An extensive review of a number of meta-analyses of interventions which are effective in reducing violent reoffending was conducted in 1992.⁷⁰ Here also, meta-analyses conclude that a cognitive behavioural approach is the most effective intervention, a finding supported by large numbers of studies.⁷¹ The most effective interventions utilise behavioural and social learning principles of interpersonal influence, skill

enhancement and cognitive change. Specifically, techniques shown to be effective include modelling, graduated practice, rehearsal, role-playing and reinforcement. Strategies which focus on past events or award blame (such as psychodynamic and nondirective client-centred therapy; unstructured, peer-orientated group counselling; and interventions based on a deterrence mode) are unlikely to be effective.⁷² Despite considerable evidence to the contrary, domestic violence offender treatment programmes in New Zealand claim that family violence is a power and control issue,¹⁵ and make wide use of the unscientifically validated ‘Duluth Wheel’, often experienced by men as a ‘shame and blame’ model.

5. MAKING VICTIMS

What previously may have been considered part of the normal ups and downs of human experience is increasingly categorised as sick or damaged and requiring treatment. In circumstances where previously no professional assistance was seen to be required, psychological intervention is increasingly deemed necessary. This is particularly the case when adverse circumstances befall an individual.

For example, there has been a growing use of Critical Incident Stress Management (CISM), a service designed to help workers ‘debrief’ after exposure to a traumatic event. Despite the fact that research suggests that CISM does not result in stress reduction,^{73, 74} it is being used in a variety of settings, from emergency workers such as police, firemen and ambulance personnel, through to members of the public exposed to tragedy (for example, local people in Nova Scotia who helped search for bodies from the Swissair plane crash on their coast).⁷⁵ In New Zealand, CISM was introduced in 1998 by the Children and Young Person’s Service to ‘debrief’ social workers exposed to cases of child abuse.⁷⁶

There appears to have been little or no scientific evaluation of many of the forms of counselling and therapy in this area. A review of the periodical literature on loss, death, bereavement, and grieving reported that the lack of empirical studies on psychotherapy and counselling was striking.⁷⁷

As psychologist Tana Dineen points out, the term ‘victim’, once reserved for those who suffered from a calamity of nature or violent crime, has become psychologised and applied to anyone who has knowingly or unknowingly ‘been exposed to or experienced stress, distress or trauma’.⁶⁰ Furthermore, the idea is promoted that professional assistance is necessary for ‘healing’ to occur and enable the move from ‘victim’ to ‘survivor’.

To a greater degree, psychologists, psychotherapists and counsellors have taken over the role of priests or other religious leaders and that of extended family and friends, in helping people through the inevitable ‘down’ times in their lives when they encounter hardship or loss. Psychological researcher Robyn Dawes views the rush to provide psychological assistance whenever there is a tragedy in a school, an earthquake or terrorist attack, as paternalistic and demeaning.¹ Paradoxically, the secondary gains

associated with ‘victimhood’ (such as attention, financial support, or absolving of responsibility for one’s actions) may be detrimental to one’s health.⁵⁷

6. ‘SYNDROMES’

In line with the medicalisation of normal human conditions, the concept of a particular response or behaviour fitting into a designated ‘syndrome’ has gained considerable ground in psychology over the past couple of decades, with increasing use of ‘syndrome’ evidence in courts of law.

In medical terminology a ‘syndrome’ is a set of symptoms that occur together and characterise a particular condition or disease, often congenital in nature. Mostly originating in the United States, psychologists have invented a number of “syndromes” to explain why or why not a person has responded in a certain manner. Some of the best known examples are Child Sexual abuse Accommodation Syndrome; Rape Trauma Syndrome; the Battered Woman Syndrome (BWS); Premenstrual Tension Syndrome; Repressed Memory Syndrome; False Memory Syndrome and Parental Alienation Syndrome. Syndrome evidence is largely based on clinical impressions gained from the study of people who have undergone certain experiences, and not from research using rigorous scientific methodology.

Syndrome evidence is justified on the grounds that it may help a jury understand why someone has done something that appears to be counter-intuitive. For example, the defence might use the Battered Woman or PMT syndrome to explain why a woman might murder her partner in cold blood but still argue that she is not responsible for his death; or use Rape Trauma Syndrome to explain why she told no-one about an alleged sexual attack until 30 years after it happened, but then tries to pursue a conviction.⁷⁸

Battered Woman Syndrome

The use of such evidence is however problematic for both scientific and ethical reasons. For example, BSW has no medical legitimacy and is not included in the Diagnostic & Statistical Manual of Mental Disorders (DSM-IV). The concept of ‘BWS’ was invented by Lenore Walker in 1979. Walker hypothesised that women living in violent relationships suffer a cycle of violence and experience ‘learned helplessness’ which prevents them from leaving the relationship.⁷⁹ Learned helplessness is a phenomenon originally observed in animals. Experimenters placed dogs in an environment where they received electrical shocks from which they could not escape, no matter what they did. When the dogs were subsequently placed in a position from which they could escape the shocks, they failed to do so.⁸⁰ Walker has extrapolated this concept and applied it to human females in the complex circumstances of living in abusive and /or violent relationships with male partners. Subsequent research has not found any empirical basis for this claim.⁸¹ Thus ‘BWS’ is a poorly substantiated hypothesis not corroborated by serious rigorous scientific testing. It does not meet the four criteria for scientific reliability (the Daubert test) required by United States law courts.⁷⁸ In particular, BWS has not undergone adequate scientific testing; criteria have not been established to determine which

women who suffer a violent relationship will not develop the syndrome; research validating BWS has not been published in peer-review journals; and while clinical psychologists who work in the field of domestic violence may use the diagnosis, it has not received general acceptance from experimental psychologists.

Walker claims that the syndrome is not a form of insanity, but a normal response of women in violent relationships.⁸² A woman is said to be suffering from the syndrome if she undergoes at least two cycles in her relationship of being repeatedly subjected to any forceful physical or psychological behaviour by a man in order to coerce her do something he wants her to do. Hence a woman can be considered battered even if there is no physical violence. This introduces an ethical problem by assuming women are weak, helpless and needing special privileges and protection, and hence denying them status as autonomous adults who are responsible for their actions.

Child Sexual Abuse Accommodation Syndrome

One of the most alarming syndromes has been the Child Sexual Abuse Accommodation Syndrome (CSAAS), invented by Dr Roland Summit in 1993.⁸³ Summit claimed that sexually abused children typically exhibited this syndrome. It required the pre-conditions of helplessness and secrecy about the abuse, and he claimed that the characteristic sequelae are children who accommodate to the abuse; make delayed, conflicting and unconvincing disclosures and later retract these. Summit claimed that most children will never tell about abuse or seek help.²³ He advocated that CSAAS should provide credibility and advocacy for the child in the courts.⁸³

This led to the situation where a child's reluctance to disclose abuse to an adult who believed it must have happened, was seen as a hallmark of the syndrome, and therefore denial and recanting of allegations was considered as evidence of abuse.⁸⁴ This unscientific 'heads I win, tails you lose' approach meant that whatever the response of a child suspected of having been abused (often because of behavioural 'indicators' such as bed-wetting or tantrums) – whether they admitted or denied the abuse – was considered proof that the abuse had occurred.

In 1992 Summit admitted that CSAAS was based solely on his clinical impressions and was not empirically research-based. He said that it should not be used in diagnosis, and that it was not a syndrome but rather a pattern he had observed, and that although it might be useful therapeutically it should not be transported into a forensic setting. There is no unique pattern of the effects of sexual abuse, and behaviours cannot be easily referable to the occurrence or non-occurrence of past abuse.⁸⁵ Despite this caveat, CSAAS was frequently used in the courts to explain why children believed to have been abused were denying it. After enjoying a number of years of popularity in the courts, CSAAS was ruled inadmissible as evidence in Florida, USA in 1997. These days courts both in North America and Australasia are far more cautious about admitting CSAAS evidence.⁸⁶

Memory syndromes

Repressed or recovered memory syndrome has been mentioned above, and refers to the retrieval of previously-unavailable memories of childhood abuse, usually mediated by psychotherapy. The term false memory syndrome has been coined to describe growing body of adult allegations of recovered memory of childhood sexual victimisation thought to be falsely generated, usually in a therapeutic context.

Neither of these terms may represent medically recognised entities although they do serve to describe the processes involved in eliciting a particular phenomenon.^{87, 88} The courts have become increasingly cautious about allowing repressed memory syndrome evidence.

Parental Alienation Syndrome

Over the last two decades there has been a growing body of literature documenting the phenomenon of post-separation conflict and hostility between parents where one or both parties uses their children to meet their own emotional needs, as vehicles to express or carry their anger, or as pawns to manipulate in order to extract revenge from the other parent.⁸⁹ This is sometimes called the parental alienation syndrome (PAS).⁹⁰ In its severe form, one parent (usually the custodial one) denigrates the other to the point where the child comes to express hatred and reject that previously loved parent.⁹¹⁻⁹³ Frequently this has involved the alienating mother making false allegations against the father, sometimes referred to as the SAID syndrome (sexual abuse allegations in divorce),⁹⁴ and is particularly likely to occur when one member of the divorced couple gets a new partner. When one parent forms a new relationship, escalation of parental disputes over a child and one parent alienating the child against the other have been documented.⁹⁵ Parental alienation is a gradual process related to the time spent alienating. The process is accelerated if the child is denied all access to the accused parent, and slow judgements by the courts can exacerbate this problem.⁹⁶

Certainly, one angry parent turning a child against the other parent is a situation that is being described with some frequency. However, as with the other psychological syndromes, there is a danger in pathologising human responses into a 'syndrome' or disorder. Describing a case of parental alienation may be helpful in the court and other forums, but this does not require elevating these behaviours into a medical condition.

There has been increasing caution by the courts in the use of psychological syndrome evidence, and in 1997 a discussion paper prepared by the New Zealand Law Commission spelled out some of these limitations.⁸⁶

7. ABILITY TO MAKE FUTURE PREDICTIONS

Psychology does have some ability to predict the future. At times social scientists can make very accurate predictions about the likelihood of future events occurring within the population of their interest. For example, well-conducted opinion polls can accurately reflect public attitudes. Aptitude tests can predict future performance. Past overt behaviour is the best evidence on which to base predictions. It must be noted,

however, that this is on a statistical not a certain basis. This is quite different from making clinical predictions about individuals. Individuals can and do change, and may fail to respond in the way we have come to expect.

Medical decision-making relies on two types of methods - actuarial (statistical) and clinical.⁹⁷ The actuarial method uses conclusions based solely on empirically established relations between data and the condition of interest. No human judgement is required. For example, insurance agents compare patient details with data in a chart to calculate life expectancy, or the intravenous mineral and fluid requirements for an intensive care patient are decided using standard tables and patients' laboratory investigation estimations.

In the clinical method, decision-makers combine or process information about patients and conditions of interest in their heads.⁹⁸ Most medical decisions involve clinical rather than actuarial judgements. Clinical decision-making in psychology is clearly problematic. The more a patient's problem falls in the realm of psychological or interpersonal discord, rather than a more precisely defined pathological disease entity, the greater the potential for decisions to be made in the absence of "hard" empirical data of measurable findings, and made solely on the basis of "clinical judgement".

Research shows that clinicians often obtain little feedback about the accuracy of their diagnoses and predictions. Outcome predictions lead to decisions which bias or influence what happens, and make the prediction more likely to occur - become a "self-fulfilling prophecy". A review of available studies shows there is no demonstrated relationship between years of clinical experience and accuracy of judgement.^{99, 100} In study after study it has been shown that clinical experience does not increase the ability to predict outcomes.¹⁰¹ In the absence of critical review of their performance, clinicians are unable to learn from their mistakes, and hence repeat one years' experience over and over again.¹⁰²

One of the areas where this has serious social consequences is in the prediction of violence. Numerous studies have shown that predictions of violent behaviours are very inaccurate.^{103, 104} This is particularly the case when the prediction is made on the basis of interview and the clinician's intuition about the individual's risk of future crime. A follow-up study of over 800 parolees found that predictions of future risk based on diagnostic judgements were virtually unrelated to known post-release outcomes.¹⁰⁵

While someone with a previous conviction for violence may be more likely to commit a violent offence than an average member of the public, it should be noted that the best prediction in general is that neither violence nor criminal behaviour will be repeated, no matter what.¹⁰⁶

8. IMPLICATIONS

There is no doubt that advances in psychological science have benefited our society in many ways. However there have also been a number of unscientific concepts widely promoted by the psychology movement and adopted uncritically by society. These have grave implications with respect to policies and practices affecting our population in many different spheres, from education to health to social services through to policing and justice.

Gross inflation of the incidence of a particular condition or behaviour means that a relatively rare phenomenon is considered common-place, and inevitably leads to over-reporting and over-diagnosis. This has grave implications, both to those erroneously considered to be a victim, for example of sexual abuse, and to those wrongly accused of being a perpetrator. In the latter case, for example, men may be wrongly imprisoned or children may lose access to a loving parent who has never harmed them. Organisations which persistently promote misinformation should be held accountable, especially when they are publicly funded.

In the past couple of decades some influential organisations have attempted to suppress public debate on controversial issues (for example, recovered memories) by pressuring editors of journals, educational institutions and other organisations to exclude critics of their beliefs from publication and from lecturing.¹⁰⁷ A common tactic in this regard is attempting to discredit the challenge by personal attacks on the ‘messenger’. Organisations indulging in such academic intolerance and censorship of all but the ‘correct’ knowledge and attitudes should be disciplined and held up to public scrutiny.

Attributing a condition to a particular cause, and then proceeding to treat this assumed cause, is clearly an inappropriate response in situations where this may not have been the cause; where there is insufficient evidence to establish the cause; or where, as in many human conditions, the cause is multi-factorial and the result of the interplay of various inherited and environmental aspects.

Introducing psychological interventions based on clinical intuition but not supported by empirical data means that at best, resources are wasted on treatments that appear to be a ‘good idea’ but are in fact ineffective. At worst, interventions might be adopted which are harmful to some of the recipients.

Defining human responses to loss, death, and other calamities as abnormal and requiring treatment undermines people’s resilience to adversity, and gives people an unrealistic expectation of continual health and happiness. While professional support may be necessary in specific circumstances, most people can deal with hardship and grief using their network of family and friends. Designating someone as a victim has a cost. Secondary gains that may be associated with victim status may reduce individuals’ ability to take full responsibility for their lives. Policies which focus on children’s rights to absolute safety¹⁰⁸ may fail to teach how to assess risk, handle uncertainty and meet challenges.¹⁰⁹ Pathologising human responses into a ‘syndrome’

or disorder further defines significant numbers of our population as being in need of psychological services.

While accurate predictions may be possible in specific circumstances, particularly with respect to populations of people, clinical decisions about individual's behaviours, for example whether someone is likely to re-offend, are extremely unreliable. Generalising from one situation (for example, an episode of a husband shouting at or hitting his wife during their separation) to predict likely violence in different circumstances in the future (that his children are therefore at danger from his violence and he should not have access to them) is a misuse of science at its worst, and results in a series of unjust and adverse consequences for the entire family.

Public funding should only be invested in interventions that can be shown to be safe and effective by scientific evaluation. A degree of conservatism in introducing new programmes should prevail, with greater use of pilots, proper outcomes studies and genuine debate encouraged in peer-reviewed publications. Treatments which do not meet these criteria need not be banned should members of the public chose to use and pay for them, but practitioners have an ethical responsibility to inform their clients that such interventions are experimental and do not meet these established criteria.

While this paper addresses serious concerns about some of the activities occurring within psychology, counselling, psychotherapy and social work, this is not meant as an attack on those working within these professions. In general, those employed in the helping professions have the intention to assist individuals and to improve society. It is vital that their practices and policies undergo ongoing rigorous scientific scrutiny to ensure firstly that they are useful and effectual, and secondly that they do no harm.

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Chapter Five

LEGAL REASONING¹

By Stuart Birks

1. INTRODUCTION

This paper arose from a growing awareness that reasoning that I observed in law did not meet criteria that I had come to expect from my training in economics. Loosely expressed, this training offered a familiarity with various problems. Much economic thinking, with all its faults, is directed at methods of formulating and addressing issues to find the appropriate outcome or best decision. This may therefore serve as a useful perspective to ask the question whether legal reasoning is such that it can be expected to give "the appropriate outcome or best decision". Problem-solving approaches in economics provide structures from which several lessons can be learned. Policies may have to be selected in situations where there are conflicting objectives, requiring trade-offs between them. Cost-benefit analyses involve the weighing up diverse relevant factors, to decide if, overall, there is a net gain or loss from an action. Consideration of equilibria includes the possibility of multiple solutions, in which case the identification of one solution provides only an incomplete answer to the problem. The application of economics to an area necessitates not only a knowledge of economics, but also a knowledge of the area of application.

It appeared to me that in several instances of legal reasoning equivalent requirements were not met. There are difficulties in identifying decision-making rules in law because details of court cases are not always made public, and legal decisions do not include a comprehensive statement of the information put forward.² There are clues to the working of the legal mind that can be found in writing about lawyers, reports on cases, publications to assist and inform lawyers, and public pronouncements, conference papers and submissions by those associated with the law. If lines of reasoning by prominent people with a legal training are observed in legal circles or more publicly, it might be assumed that such approaches are considered acceptable at least by those presenting the reasoning. It might also be presumed, in the absence of criticism and rebuttal, that acceptance is more widespread.

¹ An earlier version of this paper was presented at the New Zealand Association of Economists Conference, Wellington, 12-14 July 2000. Thanks are due to discussants John Savage and Nathan Strong for helpful comments.

² As discussed in 2.2 and 2.3 below and elsewhere, I suggest that an adversarial approach can result in reliance on "plausible stories", and decisions may be based more on selection from a "menu of principles" than a weighing up of conflicting objectives.

Section 2 of this paper attempts to describe what might be considered as “legal reasoning” based on various clues gleaned from a variety of sources. Section 3 gives two examples of legal thinking, one from a radio interview and one from a paper presented at a Law Society Conference. Section 4 takes the concept of equity, which has received much attention from economists, as a context for considering two laws which have, among their objectives, equity and just outcomes.

Lawyers may well respond to this paper with the point that they are operating within an adversarial system according to established rules, that “ideal” solutions may not be possible, that they are working with laws that are vague and ambiguous, and that it would be too expensive and time-consuming to have complex systems to perfectly address every situation. If so, they would be correct. It may be that improvements can be made. However in the meantime it is appropriate that we be aware of the costs and limitations of the law and the effects of legal systems on behaviour. If any lawyers do choose to respond, I would be happy to offer a forum for publication.

2. GENERAL CONTEXT

The first problem to overcome is that of specifying what might be meant by "legal reasoning". This is somewhat elusive, but there are numerous clues. Some of these are discussed below.

2.1 Misinformation or activism

A 13th Century document suggests that, at that time, legal reasoning may have had its shortcomings:

Since these laws and customs are often misapplied by the unwise and unlearned who ascend the judgment seat before they have learned the laws and stand amid doubts and the confusion of opinions, and frequently subverted by the greater [judges] who decide cases according to their own will rather than by the authority of the laws, I, Henry de Bracton, to instruct the lesser judges, if no one else, have turned my mind to the ancient judgments of just men, examining diligently, not without working long into the night watches, their decisions, consilia and responsa, and have collected whatever I found therein worthy of note into a summa, putting it in the form of titles and paragraphs, without prejudice to any better system, by the aid of writing to be preserved to posterity forever.³

Judges' ignorance of laws may not apply only in the distant past. It is not clear how, given s 20(a) of the Guardianship Act 1968, otherwise to explain the statement in relation to obstructed enforcement of an access order that, "Judge Boshier found that there was clear contempt, but doubted whether there was power to punish for such contempt"⁴.

³ *Bracton on the Laws and Customs of England* (attributed to Henry of Bratton, c. 1210-1268) <http://bracton.law.cornell.edu/bracton/Common/index.html>, this extract is at: <http://supct.law.cornell.edu/bracton/Unframed/English/v2/19.htm>

⁴ Butterworths (1995). S 20(a) of the Guardianship Act specifies penalties for hindering or obstructing access. See section 6.3 of Birks (1998a)

Are there also judges who "decide cases according to their own will rather than by the authority of the laws"? In the third reading of the Protected Disclosures Bill on 29 March 2000, Stephen Franks MP, said:

"As a lawyer, I can tell members that there is more than ample obscurity in this bill. There is more than ample confusion about what was really expected or intended for any judge to pare back the protection as he or she feels fit. There is also more than ample opportunity for anyone who wants to misuse these procedures to take advantage of them, and we could well find that we have the opposite of our intentions."⁵

To some extent, it is through legal processes that the specific nature of a law is determined. Cases are heard and decided, decisions may be appealed, and over time a body of case law develops which influences subsequent decisions. On this point, Richardson made an interesting claim. "I think it helped to have the same bench of judges hear all the early appeals [on the Matrimonial Property Act]".⁶ Can this be likened to saying it is good to avoid political disagreements by having a dictatorship?⁷

Elsewhere I have addressed the question of judicial activism in some detail with particular reference to a paper by Judge Boshier.⁸ The Judge has also been vocal specifically on this issue.⁹ To quote:

"Expect Judges to be much more vocal in the development of family law.

The former Chief Justice, Sir Thomas Eichelbaum, has signaled in successive reports on the New Zealand judiciary that the public could expect Judges to be more visible in addressing issues of concern and participating in discussion on some of those issues." (p.51)

"...I see nothing wrong with Judges commenting on bad laws and/or areas where administration of the law is failing because of outdated statutes or failure on the part of the State to deliver as required by statute.

As long as there is a legislative presumption that Family Court cases may not be published, I think it inevitable and desirable that Judges incline to be more active in bringing matters of concern to public attention." (p.52)

The former Chief Justice called for participation in discussion, a two way process. Judge Boshier's suggestion is for a one way process.

⁵ *Hansard* (2000)

⁶ Para.2.11 of Richardson (1999)

⁷ Something similar was lampooned in *The Mikado*: "*KoKo: ... so I consulted the Attorney-General, the Lord Chief Justice, the Master of the Rolls, the Judge Ordinary, and the Lord Chancellor. They're all of the same opinion. Never knew such unanimity on a point of law in my life.*" (From Act 2 of *The Mikado*, by W.S.Gilbert. All these posts were filled by one person, Pooh-Bah.)

⁸ See sections 2.8-2.10 of Birks (1998b), discussing Boshier P (1998)

⁹ Boshier P F (1999)

A common criticism of judicial activism, where Judges are proactive in the development of the law, is that Judges do not have a mandate for this, nor are they accountable. It could also be argued, that they are not appropriately informed either. In particular, they are involved in and focus on individual cases, thus taking a "micro" rather than a "macro" perspective.¹⁰ This is significant not only because a large number of individual cases may have a wider social impact, but also because individual cases can have an impact on many situations which do not involve court appearances. These situations involve operating "in the shadow of the law", and can be influenced by possibility of legal intervention.¹¹ Possible ignorance of this by lawyers is demonstrated by a New Zealand Law Society Family Law Section news release on the Shared Parenting Bill, which states:

"...the Bill seems to ignore the fact that the vast majority of parents seem to be able to find sensible and pragmatic solutions to the problems posed by family separation without resort either to lawyers or the courts. The Section is concerned that substantive law changes are being promoted as a response to a relatively small number of difficult cases."¹²

While Judges and others prominent in law are more active in promoting their own views, they have been reluctant to participate in debate. Principal Family Court Judge Patrick Mahony declined an offer to respond to a publication criticising the Family Court on the grounds that, "It is not normal for a Court to contribute to publications on policy issues".¹³ However Teletext of 18 October 1999 reported, "Judge Patrick Mahony says in some cases it may be fairer to give one person more than half of the property or a portion of the future earnings of their former partner." This was nothing new for him. He was reported eight years earlier, in the *Dominion Sunday Times* of 27 October 1991 (p.2), calling for women to get more than half the assets in a marriage breakup. The same issue reported that, "he would like the court's work to be put more before the public" (p.11).

Similarly President of the Law Commission, Honourable Justice Baragwanath, has not even responded to private and public invitations to comment on published criticisms of the work of the Law Commission.¹⁴

Reluctance to debate may be an engrained characteristic of judges. To quote Hugo Young:

"The possibility that the system has erred is the lifeblood of any barrister who finds himself in front of the Court of Appeal. Yet when that barrister becomes a judge, the same proposition inexplicably

¹⁰ See section 2.10 of Birks (1998b)

¹¹ See <http://www.massey.ac.nz/~KBirks/gender/econ/shadow.htm>, and section 3 of Birks (1999a)

¹² The Family Law Section of the New Zealand Law Society (2000)

¹³ Personal correspondence, 30th September 1999.

¹⁴ See, for example, Birks (1999b)

seems to tend towards one which he feels obliged to repudiate unto his final breath."¹⁵

2.2 "Plausible stories", Persuasion or Proof?

Further insights into legal reasoning can be gleaned from quotes on lawyers. To quote Colin Brooks:

"It is on his skill in leading a jury to take his view of fact and facts ... that earns for a barrister the reputation of being ... good with juries."¹⁶

Brooks is suggesting that such a barrister chooses one of possibly many interpretations of the facts. This is not a general weighing up of information. Rather, a selection may be made from the available information, this then being woven into a "plausible story". Juries are then presented with opposing stories, being faced with the choice of accepting one and rejecting the other.¹⁷

Others have espoused the view that the law is a matter of misinformation and trickery:

They have no lawyers among them [in Utopia] for they consider them as the sort of people whose profession it is to disguise matters." Thomas More, *Utopia*¹⁸ "There is no better way of exercising the imagination than the study of law. No poet ever interpreted nature as freely as a lawyer interprets the truth." Jean Giradoux, *Tiger at the Gates*¹⁹

This would suggest that legal reasoning is such that lawyers don't have to **prove**, they have to **persuade**. Although the terms "beyond reasonable doubt", and "balance of probabilities" are used, the doubts and probabilities are subjective.

If so, it may be that parallels could be drawn with the sophists of classical Greece:

"Protagoras was reputedly the first person to write a treatise on techniques of argument, and was notorious for his claim to make 'the weaker argument the stronger'."²⁰

"[Sophists] emphasis upon worldly success as well as their advocacy of the idea...that the ability to plead a case and win depends on a skill that can be taught rather than on having a just cause...were factors in promoting the skepticism and moral relativism that were associated with their name."²¹

¹⁵ Pp.164-165 of Young (1991)

¹⁶ Brooks (1952), pp.74-75 Brooks C (1952) *More Tavern Talk*, London: James Barrie

¹⁷ For more on "plausible stories", see section 4.2 of Birks (1998a)

¹⁸ Rawson and Miner (1986) p.145, alternatively <http://www.d-holliday.com/tmore/utopia008.htm>

¹⁹ Ibid p.144

²⁰ Hornblower and Spawforth (1996), p.1422

²¹ Howatson (1997), p.531

Lawyers' techniques have also been described by the Honourable Justice Robertson:

"The hallmark of most litigation was *stealth and surprise*. You kept both hands in your pocket, every rabbit still in the hat, and you hoped, by avoiding any forewarning, to be able to steal a march and win your client's case. That is not the law as I observe it today... At least from the perspective of the outsider it is a situation where the prime driving force frequently appears to be a fees budget which has to be met to maintain a predetermined standard of living and lifestyle."²²

Contrary to Justice Robertson's opinion, the suggestion of money as a driving force is not new. Dickens observed that, "The one great principle of the English law is to make business for itself"²³.

2.3 Menu of Principles

Persuasion is a matter not only of "plausible stories", but also of the criteria that are applied. These influence the weight given to the various pieces of information. It would be desirable to have consistent application of principles, just as economic assessments would require consistent values. Sometimes there may be several principles, in which case there can be conflicts. With a lexicographic approach, the aim would be to proceed as far as possible to meet the first principle. If there are several options which are equally successful in this aim, then selection would be made according to their success with the second principle, and so on. It is more likely that we would be concerned about trade-offs between principles. How much simplicity would we be prepared to give up to achieve more equity, for example? Economists might attempt to weigh up competing objectives in this way. In law, however, we are more likely to see judges drawing from a "menu of principles". I have discussed this elsewhere²⁴, and there are further examples in 3.1 and 4.2 below.

The "menu" concept means that there is no set pattern for the application of principles. Rather, there are several principles available and it is merely necessary for a decision to be presented in such a way that it is clearly consistent with the chosen principle or principles. It may well be that the decision is inconsistent with other principles that have not been mentioned. The decision making process then involves not only the decision as presented, but also the choice of principles. This latter may be neither transparent nor explained. This introduces an element of uncertainty and scope for arbitrary and inconsistent rulings.

2.4 Are Results "Process-dependent"?

"The art of cross-examination is not the art of examining crossly. It's the art of leading the witness through a line of propositions he agrees to until he's forced to agree to the **one fatal question**." Clifford Mortimer²⁵

²² Robertson (1999)

²³ Dickens' Works Page

²⁴ See Section 4.2 of Birks (1998a); section 2.8 of Birks S (1998b); section 3.4 of Birks (1999a)

²⁵ From Mortimer (1982)

We see this process described by Robertson and Busch:

"...the questions we ask to a large extent determine the outcomes we derive. It is one thing to ask, 'Did you hit her?' but if the next question is 'Why did you hit her?' the focus may immediately shift from the violence to the alleged failings of the victim...To posit that there may be circumstances in which violence is justified is to give the abuser the right to define, control and mete out punishment in respect of his partner's behaviour."²⁶

Robertson and Busch object to the application, being dissatisfied with the resultant outcome, but they do not necessarily reject the method. It is a problem with any research that the approach taken may determine the outcome. In law this may be the deliberate intent. The lawyer's role is one of advocate for one of the parties. The lawyer is paid to present information so as to influence the outcome in the client's favour.

An alternative violence paradigm that Robertson and Busch might prefer is that there is no excuse for male domestic violence, that any violence or abuse shown by a male of the types described in the Duluth Wheel is evidence of a patriarchal power and control relationship, and that the male is then a "batterer" and the female and any children in the family are "victims".²⁷

This is not to deny the possible suitability of either of these paradigms for some cases, but rather to illustrate that a paradigm might be adopted as a result of a strategy by an advocate for one side, rather than deliberate consideration and the elimination of other possibilities.

There has been some recognition that terminology may be important. Judge von Dadelszen has suggested that "parental responsibility" be used in place of "custody" and "access".²⁸ Similarly Judge Blaikie has suggested the use of the term "contact". Hubin suggests that a more radical change might be needed to shift current perceptions:

"The phrase "award of custody" constitutes a strange twisting of reality in the context of divorce, dissolution and most other conflicts over custody between natural and adoptive parents. Such parents typically appear before the court at the outset each with full parental rights. Noone is awarded rights; one parent is deprived of rights."²⁹

The representation of an issue can be crucial to people's perceptions and to the outcome.

²⁶ Robertson and Busch (1998), p.55

²⁷ This paradigm would be familiar to many and is described at: http://www.justice.govt.nz/pubs/reports/1999/family_conference/author_20.html, and at: <http://actag.canberra.edu.au/actag/Reports/CLRC/r9/dov7.html>.

²⁸ Dadelszen (1995)

²⁹ P.136 of Hubin (1999)

2.5 Expertise and Experts

Some would contend that similar behaviour in the form of "advocacy research" is also adopted by some areas of academia. This raises additional questions about the quality of "expert" testimony:

"Over the last three decades ideological doctrines have infiltrated the curricula of many of the larger universities. Spurious academic subjects such as 'black studies' and more recently 'women's studies', putatively designed to 'raise consciousness' and strengthen commitment to credos of 'emancipation', manifestly fail to meet the stringent requirements of scholarship: certainly the doctrines of these ideologically inspired 'studies' are not regarded by their proponents as provisional and refutable hypotheses. Clearly arrangements being made for their systematic propagation in these circumstances do not comport well with the idea of a university as a forum for open-minded enquiry and impartial scholarship."³⁰

Given these problems and motivations, how much faith should we place in the ability of lawyers to understand, present and weigh up information? Particular difficulties can arise if the information is outside the bounds of their legal training. Socrates, describing good artisans, said, "because they were good workmen they thought that they also knew all sorts of high matters, and this defect in them overshadowed their wisdom"³¹

Lawyers are trained in the law, but not in the specific issues to which the law is applied. Hence they are not experts on economics, or family relations, or medicine or the environment. This is illustrated in answers to Questions for Written Answer Nos. 10024 and 10025, lodged in the House on 30 May 2000:

10024. Dr MURIEL NEWMAN to the Minister of Revenue: What training is given to child support review officers to enable them to critically assess claimed income and expenditure levels?

Hon Dr MICHAEL CULLEN (Minister of Revenue) replied: The Commissioner for Inland Revenue has informed me that review officers do not receive specialized training to enable them to critically assess claimed income and expenditure levels.

If a review officer is unsure of any income or expenditure details, then experienced staff (including accountants) are made available to work through the issues with them and enable them to make reasoned and appropriate decisions.

10025. Dr MURIEL NEWMAN to the Minister of Revenue: Are child support review officers required to be familiar with benefit entitlements, such as family assistance?

Hon Dr MICHAEL CULLEN (Minister of Revenue) replied: The Commissioner for Inland Revenue has informed me that it is not a requirement for child support review officers to be familiar with

³⁰ Mishan (1993), p.202

³¹ Socrates Apology by Plato, from: Gibbons (1995), p.10

benefit entitlements as these type of enquiries would be redirected to the Department of Work and Income.

Child Support officers, as staff of Inland Revenue, will have knowledge on the concepts of benefits administered by Inland Revenue such as Family Assistance and Parental Tax Credit."

Hence child support review officers, most of whom have a law degree, do not have training so as to assess the accuracy of parties' claims of income and expenditure and the resultant circumstances under which they are living. Reviews are based on the evidence presented. If review officers do not have the appropriate background knowledge, they will not know what information to challenge. Even if they do question some of the information, they are unlikely to get informed advice while with the parties and will not be able to challenge the information later.

There are serious questions to raise about the way in which "expert" information might be included in legal deliberations, and how contrary expert opinions may be handled. To rely on someone trained only in law to resolve such matters could be likened to someone with no knowledge of French being used to select the winner of a French oratory contest.

Hence the legal mind is not informed on the wider issues, and legal reasoning appears not designed to give balanced evaluation of the information, rather it is one of selective use of information to present a story, and selective use of criteria to support the client's interests.

3. EXAMPLES OF LEGAL THINKING

Mention has already been made of judges who are unhappy with current laws. This dissatisfaction is likely to influence their decisions where they have some discretion. This can occur without public debate, and possibly even without public awareness. Occasionally we do get a more public glimpse into the workings of legal minds. Here are some examples.

3.1 Honourable Justice Baragwanath on affirmative action

David Baragwanath, President of the Law Commission, was interviewed by Brian Edwards in early 1998³², said the following about the appointment of women to academic positions:

DB - "... the consequences of it include, the messages sent out, let's say to the potential women students that may go to that faculty if this woman is appointed, and they choose not to if she isn't. It's oversimple to say that the man has a right to the job. He has not."

BE - "Well, you and I are going to have to disagree on that. You've got to ask yourself how you're going to feel. So I swan in there with a first class honours degree in political science and there's a woman who's come in with a third class honours degree in political science and she gets the job purely because she's a woman."

³² "Top of the Morning", on National Radio, possibly broadcast 10th January 1998.

DB - " Oh no. In that case of course you would appoint the man. I am referring to two people who are of equal potential, and if they are of equal potential, even though the male is a distinguished person of your age and the female is a youngster, if she's got it, if she has the capacity to perform equally to him, she may well have the capacity to perform better, you build that in. But ultimately it's to be remembered whose interests you are looking at. It is not his interests, it's not hers, it's the interests of the students and of the wider community whose taxes are paying for the appointment."

The approach involves the definition of an unmeasured variable ("potential"), which then allows someone to attach a desired value to it. In this instance it allows measured differences to be disregarded. The added assumption that women academics are needed to attract women students then supports preferential treatment over and above that afforded by the use of the newly defined criterion. This can support any decision, even if based on prejudice. In fact there have been more female than male tertiary students since 1986.³³ To illustrate a possible weakness in the reasoning, let's follow the same theme further.

If the objective is to increase the number of women academics, criteria could be selected from a "menu of principles" to support this position in a range of scenarios. Consider the following possibilities:

- there are few women students - more women academics are needed to encourage women into the area.
- there are about the same number of women and men students - for balance, there should therefore be about the same number of women and men academics.
- Women students are in the majority - it is a woman-focused area and students would be uncomfortable with men academics, so most of the academics should be women.

In other words, this approach is not a reasoned and comprehensive assessment of the situation. It can be used to apparently support a whole range of positions and cannot be considered as sufficient on its own. In terms of decision making or policy advice, it is seriously deficient.

The approach involves reliance on a criterion, plus assumptions or information to support a conclusion based on that criterion. The choice of criterion, including the decision to reject other possible criteria, is not explained. There is no consideration of a simultaneous consideration and weighing up of several criteria. There may be problems with the relevance of underlying assumptions or accuracy of information used.

The approach can result in over-simplification of issues and inconsistency in approaches. If women are less than proportionately represented in one area, they must be more than proportionately represented in another. They are interconnected. If

³³ For detailed discussion of this and related issues, see Summers and Birks (2000)

representation in one is defined as a problem, then so also is representation in the other. A solution could be directed at one, or the other, or both, but one cannot be changed without changing the other.

From an academic point of view, a requirement that might be specified for appropriate policy advice is that a range of alternatives be considered on the basis of consistently selected and justified criteria, with suitable weighing up of conflicting objectives and accurate underlying information. It should also be open to critical evaluation and peer review.

If such reasoning is displayed in public, what is happening behind close doors? It is to be hoped that it is not representative of approaches where legal minds are expected to consider factors other than simple points of law.

3.2 Annis Sommerville on superannuation

Annis Sommerville is a Dunedin barrister and solicitor. In 1998 she became chairperson of the [Family Law Section of the New Zealand Law Society](#). The following is an extract from her paper at the 1995 New Zealand Law Society Family Law Conference. It is relevant because it indicates a willingness to take a position while showing a lack of understanding of the issues. This could be taken to indicate a need for lawyers to debate the issues outside their own circles so as to incorporate other relevant and available information and analysis.

Sommerville compares the option of realising an interest in an ex-husband's superannuation in an immediate lump sum payment against an agreement whereby she would get a share of payments when they are made to the husband:

"Superannuation

If the earner has a superannuation fund, then the wife should consider negotiating payment in a lump sum at the time of settlement rather than a [Matrimonial Property Act 1976] s.31 agreement. Agreements pursuant to s.31 have to be worded carefully if the wife is to be protected. The Deed should bind the husband to be paid out by way of a lump sum rather than by pension. If the husband has elected to be paid out of his Fund by pension when he retires, the wife should ensure that she is entitled in her own name to that pension. Her Legal adviser should ensure that her entitlement is not contingent on her husband's survival or a spousal benefit (which is not applicable once she is divorced). If the husband dies soon after retirement and she does not have any right in her own name, she will miss out. Settlement agreements often trade off the husband's share or part share in the house for his retaining the Superannuation Fund. The woman keeping the house ends up without a retirement fund but she has to weigh up the reality of a house or a retirement fund. There are not a lot of choices when she is the custodial parent."³⁴

³⁴ P.56 of Sommerville (1995)

If Superannuation is correctly valued, there should be no difference between its value as a lump sum and its value as a possible future income stream. Nevertheless, Sommerville voices a preference for a lump sum payout at the time of settlement. This indicates that she considers the valuation for lump sum payment to overstate the true value of the superannuation. She then concludes by suggesting the woman loses out by not having a retirement fund later. She seems unwilling to accept that there are advantages and disadvantages to either option. She ignores the equity from the lump sum payout as a basis for a retirement fund, and she even suggests that s.31 splits should be taken as a lump sum payments rather than as ongoing payments.

There are other aspects about which she appears ill-informed.

She shows ignorance of the Government Superannuation Fund. The Fund only allows for a portion of the entitlement to be taken in lump sum on retirement, and it does not allow entitlements to be put into someone else's name such that payments are not contingent on the contributing party's survival.

If the husband dies soon after retirement, she is not the only one to lose out. He will also lose out. If she gets a lump sum on settlement and dies before he retires, then she is getting more than she would have had they stayed married.

The valuation of superannuation for matrimonial property settlement purposes should take account of the benefit of lump sum payouts giving cash in hand at the time of settlement to the non-contributing party. The contributor cannot obtain the funds before retirement without bearing a possibly substantial penalty.

S.31 involves a sharing of the uncertainty about the final sum paid out. Valuations for lump sum payments at settlement should be lower because they are offering a certain sum in exchange for an uncertain income stream. It is wrong then for Sommerville to suggest that s.31 penalises the woman because of such uncertainty.

If any contributions are made during a marriage, the Matrimonial Property Act considers superannuation entitlements as a result of contributions before marriage also to be matrimonial property, although they are clearly not a result of the marriage partnership.

If there is means-tested state superannuation, then the income from a contributory scheme may reduce the superannuation an individual receives from the state. This would arise even if the recipient has made a lump sum payment to an ex-spouse based on receipt of that superannuation. The recipient of a lump sum payment would face no such reduction in entitlement as a result of the lump sum received. The contributing party is therefore disadvantaged

Superannuation received by someone who chooses to reside overseas may be subject to tax in the country of residence, but superannuation is valued on the basis of tax-free payments. The superannuitant therefore faces a significant restriction that does not apply to the recipient of a lump-sum payout on separation, especially as the tax would

be payable on all superannuation, including that portion in exchange for which the spouse received a lump sum payment.

4. EQUITY AND LAW - TWO APPLICATIONS³⁵

4.1 Equity

Outcomes are more likely to be acceptable if they are considered equitable. The Child Support Act 1991 refers to equity, and the Matrimonial Property Act 1976 refers to "just division". What might this mean?

Economists refer to horizontal and vertical equity. Horizontal equity relates to like circumstances, under which equitable outcomes require like treatment. Vertical equity refers to differing circumstances, for which an "appropriate difference" in treatment is required.

"Like circumstances" depend on the degree of detail considered - should one look at current income, or lifetime income, or how the income is earned, should one also consider the number of dependants, their ages and specific needs? If there are problems with the concept of horizontal equity, there are even greater problems with vertical equity. "Appropriate differences" in treatment depend on the variables used and the values placed on them. Should time with children be considered? How should it be measured - hours, days, nights? What costs should be included? What effect would specific differences have on treatment?

Discussion of disadvantage and discrimination hinge on the same points - what variables are selected to draw comparisons, what are "appropriate differences" and what values are assigned in terms of specifying the significance of a difference and whether it is considered beneficial or detrimental to a particular group. Policy debate frequently revolves around differences in choice of and interpretation of variables. For example, current proposals for unequal splitting of matrimonial property are based on the monocular consideration of caregivers' assumed sacrifice of earning capacity, disregarding numerous other dimensions. Resulting policy, often specified in legislation, can be confused and inappropriate.

4.2 Child Support

Section 4 of the Child Support Act 1991 lists its objects. It is stated on the IRD Child Support web page that: "Child Support is governed by the objectives set out in the Child Support Act 1991".³⁶

Child support is paid by a liable parent to a custodial parent. Both parties are assessed in a shared parenting situation, with a net payment going from one to the other. I shall only consider the formula under sole custody. Key aspects of the basic child support formula in a sole custody situation are as follows:

³⁵ A version of this section of the paper was published in the *New Zealand Law Journal*. See Birks (2000).

³⁶ <http://www.ird.govt.nz/childsupport/csa.htm#legislation>

- Child support income is equal to taxable income up to a maximum level, now \$68,436.00.
- A living allowance is deducted from this as follows:

Description	Living Allowance
Single with no dependent children	\$11,446.00
Married or defacto with no dependent children	\$15,501.00
Single, married or defacto with one child living with the paying parent	\$20,001.00
Single, married or defacto with two children living with the paying parent	\$24,445.00
Single, married or defacto with three children living with the paying parent	\$26,889.00
Single, married or defacto with four or more children living with the paying parent	\$29,333.00

Child support is equal to the balance times a percentage rate, 18 percent for one child, 24 for two, 27 for three and 30 for four or more children.

The custodial parent's income is not considered.

- The liable parent's time with the children is not considered unless it includes at least 40% of nights.
- There is some scope to deviate from the formula through an administrative review or hearing, but most applications by liable parents are declined.
- If a custodial parent is on the DBP, child support payments go first to offset that payment. Any additional child support is passed on to the custodial parent.

When the objects of the Act are compared with the formula, several inconsistencies can be observed. Neither the custodial parent's income nor the liable parent's time with the children are taken into account. Vertical equity cannot generally be achieved. If the formula assessment is correct for one level of custodial parent's income, then it is incorrect for others, and similarly for time with children. There are also problems with payments not being linked to expenditure on children, and with both parents potentially being caregivers for some of the time. To consider specific objects in the Act:

- Object (a) is *To affirm the right of children to be maintained by their parents*, but the act does not ensure that payments are made by both parents, nor does it ensure that payments actually benefit the child(ren).
- Object (b) is *To affirm the obligation of parents to maintain their children*, but the act focuses only on "liable parents".
- Object (c) is *To affirm the right of caregivers of children to receive financial support in respect of those children from non-custodial parents of the children*,

but non-custodial parents could be the caregivers for up to 40 percent of nights with no effect on child support obligations.

- Object (d) is *To provide that the level of financial support to be provided by parents for their children is to be determined according to their capacity to provide financial support*, but only liable parents are required to provide, and the other parent's circumstances are generally not considered.
- Object (e) is *To ensure that parents with a like capacity to provide financial support for their children should provide like amounts of financial support*, but under the formula this only applies for comparisons between liable parents. The other parents' circumstances are generally ignored.
- Similarly, object (f), *To provide legislatively fixed standards in accordance with which the level of financial support to be provided by parents for their children should be determined*, refers to parents, but the formula only refers to payments by liable parents of money received by the state or by custodial parents.
- Object (h) is *To ensure that equity exists between custodial and non-custodial parents, in respect of the costs of supporting children*, and is commonly not met because only the circumstances of the liable parent are considered.
- Object (j) is *To ensure that the costs to the State of providing an adequate level of financial support for children and their custodians are offset by the collection of a fair contribution from non-custodial parents*, but can it be a "fair" contribution when there is no change in contribution as the liable parent's time with the children rises from 0 percent to 40 percent of nights?

In other words, the specifics of the law are inconsistent with its objectives.

The law commenced on 18 December 1991. There has since been a review headed by Judge Peter Trapski.³⁷ Not only was there no mention of these inconsistencies, but the Act also appears designed to achieve other unspecified labour market objectives. On consideration of the custodial parent's income the *Consultative Document* states: "a strong disincentive to workforce participation could result if every dollar earned by the custodian over a given threshold resulted in a decrease in child support. As 84% of lone parents are women, structural gender based inequities in the labour market could be worsened." (p.24)

The use of nights as a measure is also problematic. It is explained in *Butterworths Family Law in New Zealand* as follows:

The choice of 40 per cent of nights might at first appear curious but it is probably explained by the fact that most children spend a great part of the day time in school and most of the parental care is later in the day and in the early morning with sleep in between.³⁸

Young children are not at school, but for those who are there can be a big difference between custodial and non-custodial parents' time with them. Non-custodial parents

³⁷ See Child Support Act Working Party (1994) and Trapski (1994)

³⁸ Butterworths (1995), p.294

would generally care for children at weekends and school holidays, when contact time and associated expenses can be much greater.

It could be suggested that anomalies can be allowed for through the review process. However review officers are lawyers and may be equally unaware of the problems. In fact some aspects, such as the “costs of enjoyment of access” for the liable parent, are expressly ignored. S 105(2)(b)(i) of the Act refers specifically to the costs of "enabling access" only.

Rather than ignorance, disregard for the inconsistencies may be tacitly accepted because the status quo is considered desirable. Benson describes how, in *Commissioner of Inland Revenue v Aspinall* [1999] 3 NZLR 87, certain objects were considered and others ignored.³⁹ Benson is concerned about the decision in the case. In fact he highlights a more serious problem, namely the judiciary's adoption of a flawed line of reasoning. I refer in section 2.3 above to judges selecting, as convenient, from a “menu of principles” to support of their preferred outcome. Benson describes this process also. The result is a *post hoc* rationalization for what may simply be the whim of the judge in question. Judge Boshier has actively encouraged lawyers to "push these boundaries".⁴⁰ This covert form of judicial activism can be very harmful given the judiciary's limited information and understanding of the wider social implications of their actions. We see this in operation elsewhere in family law.

4.3 Matrimonial Property

According to its title, the Matrimonial Property Act 1976 is: “to recognise the equal contribution of husband and wife to the marriage partnership; to provide for a just division of the matrimonial property between the spouses when their marriage ends by separation or divorce”.

There are two key aspects to this, equal contribution, and just division. There is a rebuttable presumption of equal contribution. The decision as to whether contributions were equal or unequal would depend on the aspects considered (choice of variables), and the values assigned to each of these components. Hence, under the presumption, a greater paid work contribution by one party is considered to be balanced by a greater unpaid work contribution by the other. This places an implicit value on unpaid work which can be determined by the explicit value of income earned from paid work or other financial contributions. The difference in financial contribution is considered equal in value to the difference in unpaid work contribution. Taken as a firm rule, this can lead to ludicrous valuations.⁴¹

³⁹ Benson (2000)

⁴⁰ Boshier (1998)

⁴¹ See Birks (1994)

Some of the sections of the legislation, such as those relating to the matrimonial home and chattels and to superannuation, can serve to give extreme results. Unfortunately the Court is in a poor position to assess an alternative value.

Another weakness in legal thinking is apparent where possibly tortuous reasoning may give inappropriate results. Consider, for example, *Lewis v Lewis* [1993] 1 NZLR 569, which relates to the Matrimonial Property Act. Section 8(c) states that all jointly owned property is matrimonial property. Section 10 states that property acquired by succession or by survivorship or as a beneficiary under a trust or by a gift is separate property except under specific circumstances such as via intermingling or by use for a matrimonial home. There is therefore a conflict when the conditions for both sections are met. Which should be considered dominant? P.574 L54 to P.545 L2 of *Lewis v Lewis* read:

“It can be said that if Parliament had intended s 8(c) also to yield to s 10, a subordinating “subject to” would have been provided. Since Parliament did not do this there is no sufficient reason for the Court to read in such a qualification.”

The decision is based on the presumed intent of Parliament. Pp.4108-4111 of *Hansard* of 23 November 1976 (Vol.408) contains Mr McLay’s speech presenting the report of the committee on the Matrimonial Property Bill. On p.4109 he defines matrimonial property, including the terms of section 10 without qualification by section 8(c). He is even clearer introducing the second reading in his speech of 9 December 1976 (pp.4721-4722):

“The other suggestion made, which is, in my opinion, an irresponsible suggestion, is that the Bill in some way represents a “confiscation of property”...The purpose of the legislation, in my view, is to enable possession to be given, or a just and proper apportionment to be made, of those capital family assets which Lord Denning has referred to as the things intended to be a continuing provision for the parties during their joint lives, the working capital of the marriage partnership that may be generically described – and I underline the words ‘marriage partnership’, in contrast, for example, with formal gifts or investments brought to the marriage by one party or the other, or achieved by incomes ranging well outside the normal family needs.”

As if that was not clear enough, he then reiterated the significance of the term ‘marriage partnership’. The closing comment in the quote may also be of interest for those following *Z v Z* [1997] NZFLR 241.

The concepts of horizontal and vertical equity are useful for identifying the real interpretation of equal contribution under the Act. Consider two couples, identical except that in one couple someone entered with ten years of prior superannuation contributions. The presumption of "equal contributions" would mean that all the other contributions made by that person are found to be worth less by the value of the prior superannuation. How can this be justified? To add another dimension, should the

consideration of this be different if that person had already made a lump sum payment to a previous spouse because of that superannuation?

As another example, consider someone who received an inheritance. If it is kept separate, there is no change to the perceived value of contributions to the marriage partnership. If it is put into the family home, then the other contributions by that person are considered to be worth less by the amount of the inheritance. And for another dimension, if one person's inheritance is included in matrimonial property, should consideration be made of an anticipated inheritance by the ex-partner?

For yet another example, someone could consider marrying one of two people, then contributing by keeping house. The tasks performed in either marriage would be identical, but one potential partner has an annual income of \$100,000, the other \$25,000. If the partner does nothing besides earn, then keeping house is valued at four times more in one marriage than in the other.

Paradoxically, while the Matrimonial Property Act considers unpaid work in the home to be a significant and valued contribution, the Child Support Act does not. Equal sharing under the Matrimonial Property Act implies an intra-family sharing of income, but a homemaker who is a liable parent under the Child Support Act would be assessed as having no income, and an income earning liable parent will receive minimal consideration for the presence of a homemaker partner.

We could ask why marriage has a special significance, especially given proposals to apply the legislation to other relationships. A “just division” is called for if a marriage lasts for three years or more. Someone’s grown-up child could live in the same home for three years and have no claims on the family assets when leaving, but an adult can enter the family for the same time and leave with a claim on half the assets. While the Act's title refers to “taking account of the interests of any children of the marriage”, it makes no reference to other children from a previous marriage.

Under the legislation, assets are transferred rapidly from one adult to another when one brings more wealth or earning power to the relationship than the other. The more someone brings to a relationship in terms of assets and earning power, the lower the Court values him/her as a person. What will the long-term social implications be in terms of people’s willingness to earn and save, to plan for the future, to acknowledge the contribution of others, and even to form stable relationships?

It is in this context that lawyers and the judiciary are intervening in people’s lives and applying policies in their own way, possibly quite at odds with the original intention of the policymakers. They do this with limited supervision and accountability and with a marked reluctance to publicly debate and justify their actions.

5. CONCLUSION

Viewed from an economics perspective on the requirements for determining an optimal solution to a problem, legal reasoning appears to have several weaknesses. It

may be that, in an ideal legal system, laws are correctly specified, lawyers then apply the laws as intended, and there is appropriate expert input in areas where the lawyers' expertise is inadequate. In practice it appears that lawyers are operating in areas where they are poorly informed, they do not always know when they need outside expert assistance, and they are working with laws that have shortcomings, in an atmosphere whereby the judiciary may be keen to modify laws at their own pace without external supervision. In addition, the approach taken in advocating for a client may affect the style and content of information presented.

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LIST OF ISSUES PAPERS

- No.1 S. Birks and G. Buurman, *“Is the Legal System an Efficient Regulatory and Dispute Resolution Device”*, October 1997.
- No.2 S. Birks, *Gender Analysis and the Women’s Access to Justice Project*, March 1998.
- No.3 S. Birks, *The Family Court: A View From The Outside*, October 1998.
- No.4 S. Birks and P. Callister (eds.), *Perspectives on Fathering*, April 1999.
- No.5 J. E. Alvey (ed.), *Perspectives on The International Sale of Tertiary Education Services*, September 1999.
- No.6 S. Birks and P. Callister (eds.), *Perspectives on Fathering II*, October 1999.
- No.7 S. Birks and Gary Buurman, *Research for Policy: Informing or Misleading*, August 2000.
- No.8 S. Birks (ed.), *Analytical Skills for Social Issues: Reason for Delusion?* October 2000.