

LAW AND PUBLIC POLICY

A Socioeconomic Approach

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Preface

Students are not being exposed in a systematic way to alternative analyses of laws. From a positive perspective, they are aware of efficiency and rent-seeking explanations for the law, but are unaware of explanations that rely on norms, notions of fairness or the limitations of human cognition. Some students still confront professors who ridicule them for being concerned about fairness, with the dogmatic statement that law is not about fairness.

In addition, students are not aware of developments in behavioral psychology. This shortcoming is particularly troubling for the prescriptive analysis of laws. For example, in the criminal area, increasing the penalties and the probabilities of detection suggested by the rational actor deterrence model to discourage crime is not necessarily the most effective means for decreasing crimes flowing from drug addiction. In securities law, regulators need to be aware in mandating disclosures that the consequences of disclosures depend not only on the content of disclosures, but also on the form in which disclosures are made. The same is true for required workplace safety warnings.

In addition, from a normative perspective, students are not taught to identify the normative premises and distributional consequences of the laws they study. In fact, I believe that students are encouraged to leave their ethical and moral beliefs at the door of the law school. They are not encouraged to ask the following questions: What are the “shoulds” or entitlements underlying the rules and legal systems under study? Who benefits? Who loses?

Although students are well versed in free market thinking, this perspective is tempered only by vague moral concerns that students are embarrassed to articulate for fear of sounding nonintellectual. They are not aware of the systematic critique of efficiency concepts as used by neoclassical economists or of the limitations of markets. In fact, they are not aware of the important argument that “free” markets do not and cannot exist because markets require a normative foundation of laws, institutions and norms, which restrict the choices of some as they expand the choices of others. An education should expose students to alternative concepts and modes of analysis, which have the potential for raising the level of discourse and of coming to terms with important public policy issues.

For example, a law and socioeconomic (LSOC) inquiry would prompt students to ask a number of questions in evaluating laws and legal regulations. Consider health care. A LSOC analysis would raise distributional questions: Who is unable to afford health care and why? Norms would suggest important areas of inquiry: How do social norms influence health care choices? Moreover, the empirical findings of behavioral psychologists would take on importance: Do patients truly make informed choices? What forms of disclosures to patients are most effective? From a behavioral perspective, are resources best allocated to the prevention or the treatment of illnesses? How might

the preferences of persons change to alleviate health care problems? The LSOC approach would also be sensitive to the roles of social institutions in influencing individual and group behavior and would explore the roles of institutions, such as hospitals, insurance companies and government, in how health care resources are allocated. In addition, normative issues and the role of government in finding solutions would be explicitly addressed: What kind of health care system do we want? And how might the government assist in providing such a system?

This textbook provides rich course materials that permit students to explore in a variety of contexts the interrelationships between law and economic/social processes. It critiques neoclassical economics and draws on diverse economic approaches and other social sciences, such as psychology, sociology, anthropology and political science, for the tools of public policy analysis. It offers students a values-based approach to public policy that is designed to take into account the power implications and distributional effects of laws, and stresses the importance to effective regulation of attention to historical context, philosophical beliefs, culture, existing institutions, working rules and sources of power. Each chapter of the book contains social science and legal materials that provide the basis for vigorous student inquiry and discussion.

This textbook contains an introductory chapter that compares LSOC and law and neoclassical economics. It then follows with background chapters on law and cognitive psychology, economic fairness and well-being, fairness and legal socialization, culture and norms, and cooperation and trust. The textbook then addresses important public policy areas in which markets are viewed as the nexus of law and economic/social processes. These chapters include chapters on ethics and markets that consider discrimination and the issues surrounding markets for babies and surrogate mothers; a chapter on families and markets that explores the interrelationships between laws and changing norms in the workplace and within families; a chapter on corporations and markets that considers corporate governance and corporate social responsibility issues; a chapter on global markets that suggests a revisionist approach to globalization in its discussion of relevant legal and economic issues; and a chapter on emerging market economies. I have written extensive notes in each chapter that provide information and questions that can serve as the basis for class discussions.

This textbook is intended to be the primary text for law school courses and seminars on law and public policy, law and the social sciences, law and socioeconomics, and law and economics. It is also designed for social science undergraduate and graduate school courses and for pre-law programs.

Numerous sources have been used in this textbook. I have endeavored to note substantive omissions from these sources with ellipses. No notation has been made, however, for the omissions of citations or footnotes. When the excerpted sources contained quotations to other sources, I have sought to footnote those other sources based on the information I found in the excerpted source, and I have renumbered those footnotes. Substantive footnotes that I have added to the text are referred to as editor's notes. Words or sentences added in excerpted material are bracketed.

First and foremost, I would like to thank Daniel B. Rodriguez, dean of the University of San Diego School of Law, who suggested that I teach a course on law and socioeconomics, which provided the occasion for gathering the materials that evolved into this textbook. His inspiration and foresight have been greatly appreciated by me, and I expect it will be appreciated by others who will use this textbook. I would also like to thank Dean Rodriguez and the University of San Diego School of Law for providing re-

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