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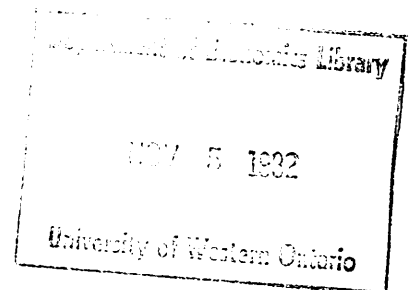
THE FUTURE OF ECONOMICS IN  
LEGAL EDUCATION

by Warren F. Schwartz\*

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## The Future of Economics in Legal Education

Warren F. Schwartz\*

This paper consists of two parts. In the first I assume that the two objectives of legal education are to improve our understanding of how governments function and how they ought to function. The inquiry is a purely intellectual one in which I attempt to design a law school curriculum to accomplish these two posited goals.

In the second part of the paper I analyze the forces which will actually determine the supply of and demand for economics in legal education. Since economics is one input in the production process called legal education the analysis must, of course, extend both to a consideration of the demand for the various types of training offered by law schools and the use of economics in satisfying that demand.

The two parts of the paper are related. The intellectual contribution of economics to understanding and evaluating the legal system will, to some extent and least, determine the use made of it by legal institutions and consequently the derived demand for its inclusion in the legal curriculum. The willingness to provide public and private support will similarly be affected by the intellectual value of the work being done. And to the extent that learning is a consumption good for teachers and students more is likely to be demanded as the quality of the product improves.

Thus the intellectual inquiry in the first part provides a necessary foundation for the practical analysis in the second. But, as shall be discussed in detail below, many factors other than the intellectual contribution of economics to the understanding of law will determine the extent to which economics is included in the law school curriculum and the research conducted by faculty and students.

### The Proposed Law School Curriculum

#### Introduction

The reason why economics plays an essential role in the thinking of many legal scholars is that it provides an extremely useful means of ordering the analysis of the two basic issues about law which are of intense concern to them: (1) How can the coercive power of the state be employed to maximize the total social product by contributing to the process of taking into account interdependencies in human actions, individual differences in preferences for good and services and variations in productive capacity among people and material resources? (2) How can the coercive power of the state be employed to contribute to the process of achieving a just distribution of the social product among individuals? -

The curriculum I propose is designed to be directly responsive to these two questions. It is organized functionally, rather than doctrinally, in the belief that the theoretical elements necessary to answer them are the same in all areas of law. In every case legal intervention impinges on the process of private adaptation and either increases or decreases the total

social product. In very case some people are made poorer and others richer. A focus on these two questions in all legal contexts renders the inquiry coherent and reveals the essential similarities in the issues confronted in all types of legal regulation. And the differences in actual or proposed solutions are also better understood if the comparison is between the allocative and distributional consequences of the proposals under consideration rather than their doctrinal content.

An example may help to illustrate the functional approach I am advocating. One general issue in law is how to provide appropriate incentives for self protection by persons who may be harmed by the acts of others. Contributory negligence, comparative negligence, assumption of risk, public enforcement of the law so that victims do not receive the money taken from violators, the limitations of damage for breach of contract to "reasonably foreseeable" consequences, the obligation to mitigate damages resulting from breach of contract, the requirement that a potential victim act reasonably in the exercise of his right of self defense and many other examples which could be cited represent legal means of providing incentives for self protection by potential victims. A theoretical understanding of the issue permits a coherent approach to all of these legal doctrines and a basis for choosing the rule which best serves the underlying social objective in the particular circumstances. If, on the other hand, each of these doctrines is considered only in its own special context, and no common theoretical framework applied, none of them can be understood and an intelligent choice of a

legal rule cannot be made.

The basic plan of my proposed curriculum is to develop the requisite analytic framework in the first year of study in a series of courses which examine the fundamental questions which are relevant to understanding and evaluating the legal system. The content of each course is dictated by theoretical considerations, with doctrinal examples selected from the complete range of legal regulation on the basis of their contribution to an understanding of the underlying issues. In subsequent years this analytic framework can be applied intensively to whatever legal subjects are of interest to the student. I do not think that as an intellectual matter it makes any difference in what areas the student decides to concentrate. All legal subjects provide sufficient variety in factual and regulatory context to enable the student to strengthen his command of the underlying theoretical analysis. Beyond this the only consideration is one of individual preference. If the student finds airplanes interesting or is concerned about the quality of the air or is committed to assuring a just distribution of wealth or has any other conceivable preference to study any particular area of law I see no intellectual reason to prevent him from indulging these preferences. He cannot escape the difficult, recurring issues which are encountered in all legal regulation and one context is as good as another for testing and refining the normative and positive theory explicitly developed in the first year.

The essential curricular issue then is the design of the

first year of study. In doing this I have tried to structure a group of subjects which address what I perceive as five sets of fundamental issues relevant to understanding and evaluating the allocative and distributional consequences of legal intervention. As shall be developed in detail below, these courses will have much economic content. They will, however, not be confined to economic analysis. It is clear, for example, that other sources must be found for ultimate value judgments. But with respect to positive issues as well, other disciplines, such as sociology, history, anthropology, biology, psychology and political science may also have much to offer.

I have structured the first year curriculum so as to pose, rather than resolve, the question of the appropriate role to be played by the various social sciences. I am reasonably clear about the contribution of economics. I am also able to identify certain respects in which economic analysis must be substantially supplemented by theory drawn from other disciplines. But I am uncertain both about the full range of questions as to which substantial reliance must be placed on disciplines other than economics and the appropriate sources for the theory which is needed. These issues can be addressed in determining the content of the five first year subjects I propose as constituting the first year curriculum.

The courses in the proposed curriculum are: Government Coercion and the Allocation of Resources, Government Coercion and the Just Distribution of the Social Product, Government Processes, Empirical Methodology and Law and Culture. I consider

these in turn.

Government Coercion and the Allocation of Resources

This course embraces what has been the mainstream analysis by economists of the legal system as a means of providing an incentive structure which will serve to maximize the value of the social product by ensuring that all relevant costs and benefits are taken into account either by some private decision maker or by the government as proxy for private actors when transactions among individuals which do take account of all relevant values cannot be concluded. The phenomenon upon which this approach focuses is variously characterized as one of market failures or externalities. The essential idea seems to me, in principle, unassailable. If opportunities to increase the aggregate wealth of the society exist which are not being realized under the existing institutional structure but could be under an alternative institutional arrangement there is good reason to change the law so that these opportunities are realized. Whether this reason proves to be sufficient depends, of course, not on the existence of a theoretical possibility of improvement but rather on the actual results of introducing the proposed institutional alternative, taking into account the problems of framing and implementing a legal solution examined in the course on Government Processes. Before the solution is determined to be desirable it is also necessary to make a normative judgment as to its distributional consequences in accordance with the methodology developed in the first year course focussing on this question.1 The course in Empirical Methodolgy assists in this



decision making process by providing the means of quantifying the relevant variables. And the course in Law and Culture offers a number of qualifications about purposive change in the legal system which should also be useful in evaluating the desirability of introducing any proposed mode of regulation. But although the issues examined in the other courses thus must be taken into account before a final judgment about any actual or proposed legal rule is made the potential allocative gain or loss resulting from introducing the rule surely plays an important role in the analysis.

The principal theoretical grounds for favoring a particular legal rule on allocative grounds are, I think, well understood. To begin with, an incomplete specification of property rights may preclude efficient allocation of resources. For example, if no one owns a tree before it is cut down or a fish before it is caught there will be an absence of incentives to maximize the value of the stock of trees or fish over time. The legal system can improve the outcome by establishing such property rights.

And, as the Coase theorem<sup>2</sup> demonstrates, if there are no impediments to transactions among owners of property, an efficient allocation of resources will be achieved no matter how the property rights are defined so long as there is a complete specification of property rights so that every relevant cost or benefit is included in the decision making of some individual.

When, however, a particular allocative choice, such as utilizing a production process which emits harmful substances into the air, affects numerous parties, high transaction costs,

deriving in large measure from strategic considerations introduced by the indivisibility of the benefit of the reduction in the amount of emission or whatever other harmful activity affects large numbers of person, may frustrate private arrangements maximizing the total social product of the interdependent activities. Other factors, such as the existence of opportunities to employ strategic behavior against competitors<sup>3</sup> or other parties to a contract<sup>4</sup> may likewise impair the process of private adaptation. In these cases government intervention can, in principle, be utilized to get the parties to the value maximizing solution they would have adopted if their interaction had not been infected by strategic considerations or other factors creating prohibitive transaction costs.<sup>5</sup>

From this perspective the legal system provides a foundation for private arrangements realizing the gains of trade available through efficient specialization in production and consumption and a means of replicating the results which private negotiations would yield were there no transaction cost barriers. The law then does not impede individual adaptation but rather facilitates it. It is for this reason that there should be wide agreement that this function of the legal system is socially useful.

Analysis of this kind not only illuminates the basic rationale for government intervention on grounds of increasing the total social product it also provides a theoretical basis for understanding the more complex forms of voluntary arrangements into which individuals enter. One reason, for example, for placing multiple activities under a single ownership is that this

avoids the necessity of having interdependencies taken into account either by negotiations or legal rule.<sup>6</sup> If the same person owns the farm and the ranch in the hypothetical employed in Coase's seminal article than the reduction in the value of production from one associated with the increase in production of the other will be taken into account in maximizing the value of production from both. And to cite another example, which has actually been accepted by the Supreme Court,<sup>7</sup> territorial restrictions imposed on distributors by manufacturers can enhance the efficiency of the distribution system as a whole by removing opportunities for one distributor to free ride on the advertising and promotional expenditures of another. Long term contracts, vertical integration, corporations, private clubs, trade associations, and franchising are additional examples of arrangements designed to increase the value of the activities embraced by the organizational structure by improving the process of taking relevant costs and benefits into account.

This approach is, of course, useful in analyzing these arrangements and determining the legal rules which should control their functioning. In addition, however, before an intrusive form of government intervention, such as prohibiting manufacturers from restricting a distributor's activities in the interest of protecting the distributor, is employed the possibility that the arrangement constitutes an adaptation to existing opportunities which is in the interest of the group as a whole should be examined.

The preceding discussion is, of course, simply a rough

sketch of the rich subject of how government intervention can aid in the private adaptation to prevailing conditions of production and consumption. It is, however, sufficient to make the point. This is an important way for the government to be employed to enhance total welfare. Consequently, failing to introduce efficient forms of intervention or introducing inefficient ones decreases aggregate welfare. This analysis applies to literally all legal regulation. Its systematic development in the first year of law school, at an appropriate level of theoretical generality, illuminated by examples chosen from the wide range of legal subjects to which it applies, seems to me to constitute one essential element in a properly designed first year curriculum.

I should add one important caveat. I have emphasized economic analysis as a means of detecting flaws in existing processes of private adaptation and prescribing ways for the legal system to correct them. But there is no reason in principle for the course I have described to be limited to economic analysis. If other useful theoretical bases for detecting the existence of systematic imperfections in the process of private adaptation and curing them by legal means exist they should be incorporated in the course I have proposed. The test for their inclusion is the theoretical rigour and empirical validity of the explanations offered. I am satisfied that economic analysis passes this test. In the ideal intellectual world assumed in this part of the paper all competing hypotheses would similarly be evaluated on their merits and incorporated in the course accordingly. I am simply

unqualified to make a judgment as to the contribution of the other disciplines which appear on the basis of my superficial familiarity with them to offer the possibility of clarifying the relevant issues. I am, however, convinced that the question of the impact of legal regulation on the total value of production should be addressed systematically in the first year of law school. I also have no doubt whatever that economic analysis is extremely useful in considering this question.

Government Coercion and the Just Distribution  
of the Social Product

Economic analysis, of course, has nothing to say about ultimate issues of value. Moral philosophy provides a variety of theories for formulating the normative structure which an individual utilizes in evaluating actual or potential outcomes. I simply assert here (since I have not been asked to write about the future of moral philosophy in legal education) that this subject should be included as an essential component in the course I am now discussing.

The conclusions which are drawn as to the system of values which should control the functioning of government do, however, have considerable bearing on the relationship of this course to the one which focusses on the issue of maximizing the total social product. Some normative analysis focusses on questions of equality of wealth, in a broad sense including all sources of personal gratification, but treats the total value of production as a relevant issue because the wealth of any individual is a function not only of how the social product is divided but of its

total size as well.<sup>8</sup> If this is the position taken the two courses complement each other.

Other value systems, however, reject a maximizing approach entirely.<sup>9</sup> Rights are asserted to exist whose legitimacy has nothing to do with the impact of their exercise on any aggregate measure of social welfare. If this approach is taken it is necessary to devise a legal system which is fundamentally different than the one responsive to considerations of value maximization which emerges (conditionally, it must be remembered) from the course dealing with the impact of law on the allocation of resources. In this respect then the course focussing on distributional issues is a substitute for rather than a supplement to the course focussing on allocative considerations.

Another major issue turns on whether one adopts an egalitarian or individual rights' oriented theory of justice qualifying or supplanting the aggregate value maximization perspective. If the normative theory is egalitarian it is possible to pursue a strategy of generally focussing on aggregate value maximizing concerns in designing the legal system and utilizing specific measures like a negative income tax to achieve distributional goals. If, however, the underlying normative theory is based on a notion of individual rights it must be applied across the full range of legal regulation. Consequently, the relevant distributional criteria, whatever they are, must be taken into account in every case.

I believe that economics has two basic contributions to make to this course whatever view is taken as to questions of ultimate

value. First, the positive analysis of the distributive consequences of non-legal events and legal intervention itself is a necessary ingredient in the application of normative theory. This is a complex subject implicating issues of ex ante and ex post adaptation to changes in the environment and the controlling body of law.<sup>10</sup>

A simple example may be illuminating. Suppose, purportedly to increase the welfare of people living in poor housing, landlords are required to provide some specified standard of maintenance and repair. It would, of course, be foolish to treat this simply as a transfer in perpetuity from all landlords to all tenants equal to the difference in the value of the maintenance and repair which would be provided with and without the regulation. To be sure if a tenant has a lease, the maintenance and repair which he is entitled to under it is less than is required by the law and the law is enforced the tenant will realize a benefit. But in subsequent leases higher rentals will tend to be charged since the cost of providing rental housing has been increased. There will also be a decrease in the stock of rental housing to the extent that the additional costs are borne by suppliers of housing. Moreover, if the legal regulation were to any degree anticipated, these adaptations would have been occurring from the time that any possibility of enactment was entertained by any relevant decision maker.

To the economist all of this is simply conventional incidence analysis. All I am asserting here is that if distributional consequences are to be taken seriously analysis of

this kind must be pursued rigorously in every case. The inescapable reality is that persons upon whom the legal system confer a benefit or impose a cost are unlikely to capture the entire benefit or bear the entire cost.

The second basic contribution of economic analysis to an understanding of legal regulation designed to accomplish distributional ends is with respect to the problem of implementing whatever distributional rationale is adopted. One dimension of this will be considered in the course on Government Processes. Every means of achieving distributional objectives has allocative consequences. The undesired incentive effects on production and consumption that inevitably result when wealth is taken away from or given to any class of persons must simply be taken into account in designing the distributional program.

An even more fundamental contribution of economic analysis to an understanding of the process of accomplishing distributional objectives derives from the notion of trade-offs as a means of maximizing the value of any activity. Normative discussions often take the form of asserting that a particular distributional outcome is good or bad. However, the legal system cannot be utilized to produce any outcome without incurring costs. These consist of the resources devoted to the government process itself and the reduction in the value of private production resulting from undesired incentive effects associated with the distributional program. It is not enough, consequently to say that the distributional outcome is good. For if this means only that it would be worthwhile if it could be achieved



costlessly the assertion is not useful in dealing with actual or proposed government actions--all of which do entail social costs. The question must be whether the result is worth the sacrifice of other things required to achieve it. This requires some common scale for comparing what is sacrificed with what is achieved. A normative theory to be useful as a basis for framing a legal system must provide such a scale.

#### Government Processes

This course has two main parts. In one, it is assumed that the social objective has been formulated and the issue is how to accomplish it. In the second the various difficulties associated with aggregating individual preferences through government processes into a controlling social mandate are examined.

#### Incentives

The first part constitutes an extension of the allocative analysis developed in the course on Government Coercion and the Allocation of Resources to government processes themselves. Two essential types of incentives must be established. First the legal system must establish a series of rules and sanctions (positive rewards, are, of course, also possible) which create incentives such that the desired value maximizing conduct will occur. Secondly, incentives must be established so that individuals when involved in the process of formulating and enforcing the law are induced to behave so that their conduct in the aggregate satisfies the controlling social criteria.

The first aspect of this question, creating incentives to shape private behavior unrelated to government processes, is in

many respects straightforward. Presumably people will respond to the relative costliness of various activities in essentially the same way whether the cost consists of a price charged by a private individual or a fine or damage award imposed by the legal system. But paying a price in a market or a fine or damages in a court are not exactly the same. The process of arriving at the price is surely different. There is, moreover, often greater uncertainty in the legal context that the price will have to be paid. In addition, the imposition of legal liability may have consequences, such as a feeling of shame at having violated the law, which may have bearing on how individuals react to the threat of legal action being taken against them. And, when sanctions like imprisonment or the death penalty are considered, many people are inclined to reject the notion of rationality entirely. They believe that there is no systematic relationship between the "price" set by the legal system (that is the likelihood that a sanction will be imposed and the severity of the sanction) and the number of violations which will occur. An examination of these various questions constitutes one part of this first aspect of the course dealing with government processes.

The second part focusses on the establishment of incentives for behavior which affects the legal system itself. In this regard, both private and public sector behavior must be considered.

Private individuals commit resources in seeking to influence the political, administrative and judicial processes in which

legal rules are formulated. They also incur costs in maintaining and defending enforcement proceedings. The social objective of maximizing the total value of production is, of course, equally applicable to these activities. The fundamental problem, however, is that the product of this type of private conduct is some legal outcome. It is extremely difficult to assess the contribution of any individual act to the occurrence of any particular legal outcome or the social value of the outcome itself. And if both of these things were known it would still be necessary to array the incentives of private decision makers so that their behavior in the aggregate satisfies the controlling social criteria.

An example may help to illustrate this problem.<sup>11</sup> We now have a system of private enforcement of the antitrust laws with a number of characteristics, including the award of treble damages and the recovery of attorneys' fees by a successful plaintiff from the defendant but not by a successful defendant from the plaintiff. There is also a system of public enforcement conducted not by one but by two government agencies. It is, of course, not obvious that this system is superior to a host of alternatives which might be proposed. Selecting the appropriate system implicates the range of difficult issues which I have identified above. The social value of the range of activities which contribute to the shaping and enforcement of the legal rules must somehow be determined. Incentives which will induce individuals to behave so that their conduct in the aggregate is socially desirable have to be devised.

The second class of people for whom appropriate incentives must be created are the public officials, legislators, administrators, prosecutors, and judges who are involved in formulating and enforcing the law. The objective is, of course, no different. It is in our common interest for these people to act efficiently. The issue of designing an appropriate incentive structure for them incorporates all of the complexity encountered with respect to private persons but additional ones as well. The returns to public officials are not specifically tied to any activity in which they engage. By contrast, for example, a private plaintiff prevailing in an antitrust action can anticipate the recovery of some amount of money. It is relatively straightforward to predict the impact on his behavior of increases or decreases in this amount. The incentives of the counterpart group of government officials who bring a public action are, however, much more difficult to understand. Whatever fine may be imposed on the defendant does not go to them. Their rewards consist of such things as advancement in the enforcement agency, employment in the private sector and favorable legislative action in providing resources to the agency. Defining these rewards such that socially desirable behavior will occur is, of course, a task of formidable difficulty.

#### Aggregating Individual Preferences

The second part of the course dealing with government processes examines a set of issues which form the focus of the subject known as Public Choice.<sup>12</sup> There are essentially two sets of problems which involve many common theoretical elements.

First, even if every member of the society shared the goal of achieving some posited objective, let us assume maximizing the value of the social product, there would be profound methodological obstacles, "imperfections" if you will, standing in the way of achieving the goal through the invocation of government intervention. Secondly, government intervention offers the possibility of those groups who are relatively efficacious in influencing the outcome of government processes enriching themselves at the expense of less efficacious groups.

The most fundamental problem involved in aggregating individual preferences into a controlling social mandate is that of the cyclical majority. When individual preferences are not single peaked, that is not arrayed along one dimension so that a majority prefers a particular quantity, there may be no basis whatever for characterizing one outcome as superior to another. To take a simple example, if there are three candidates for one faculty position it is entirely possible for those voting to have preferences such that candidate 2 defeats candidate 1 and candidate 3 defeats candidate 2 but candidate 1 defeats candidate 3. Consequently there is no candidate who can defeat all other candidates. If there is no procedural limitation on the voting the process will be unending with a cycle of victories depending on which two candidates are opposed to each other. This is not an unusual situation. It will occur frequently when majority voting is used to make a decision.

This analysis is, of course, normally unsettling for those who naively justify outcomes because they are the result of

majority voting. It also is of extreme importance for positive analysis because it demonstrates the importance of the procedure governing the voting process. For a person seeking to achieve a particular result, control of the agenda becomes the crucial factor so that the process will stop when the desired proposal defeats one of the alternatives over which it can command a majority. This basic insight is extremely useful in understanding the functioning of institutions which utilize voting as the method for making decisions.

The second basic flaw in the process of aggregating individual preferences derives from the so called free rider phenomenon as manifested in various types of political behavior. If costs are borne to achieve a particular political outcome the benefits of that outcome are shared by all people affected by it, not only those who contributed to its accomplishment. Consequently the incentive to shirk in political activity and "free ride" on the activities of others is very strong. This may produce an inefficiently small amount of political activity and create a systematic advantage for those groups who are better able to overcome the free rider problem.

The final basic flaw in the process of aggregating individual preferences is the problem of demand revelation.<sup>13</sup> In markets, individuals are induced to express honestly the value they place on goods by the threat of being denied them if the amount they offer is insufficient to induce suppliers to provide the goods to them. In the case of so called public goods, like clean air or public safety, if one person purchases the good

others who do not pay enjoy it as well. Thus there is no way to fix the value of the good by reference to the manifested willingness to pay for it. It is for this reason that the good is supplied by the government and financed by taxation rather than charges for the good. But this does not solve the problem of how much the good is worth and how much should therefore be supplied by the government. The incentive that is provided to induce a person to reveal the value he places on the good is the threat that he may have to pay for it as a taxpayer. But this evaluation is manifested through the indirection of the political process, infected, as indicated above, by free rider effects since support or resistance of a measure produces an outcome whose consequences extend to everyone affected by it whether or not they were politically active.

The primary means of registering preferences politically, voting, is itself in certain respects fundamentally flawed. The basic difficulty is that a vote is the equivalent of indicating that you are for or against something which offers no way to register intensity of preferences. Consequently a majority vote does not mean that a result is "good" unless one assumes that the correct measure is how many people are for it and thus chooses to ignore how much particular individuals care about the outcome. The common occurrence of logrolling, in which votes are traded across issues, is strong evidence that people in fact do wish to take intensity of preferences into account.

#### The Competition for Rents

The second major dimension of public choice theory draws on

these various theoretical elements to raise the substantial likelihood that groups who are relatively efficacious in exercising political influence can utilize government intervention to enrich themselves at the expense of less efficacious groups. This possibility creates two fundamental risks for the society. First the actual result of government action may be both inefficient and unjust. Secondly, there may be a substantial waste of resources as groups compete for favorable political outcomes.

The appropriate response to these problems implicates difficult and fundamental issues of institutional design. The organizational activities of certain groups can be limited or those of other groups supported by public funds. Decision making rules can be used which require more than simple majorities to enact particular types of legislation. Certain results can be precluded by constitutional prohibition. The complexity of the issues and the variety of possible legal responses combine to make this one of the most challenging of intellectual questions confronting legal scholars.

The preceding discussion, although hardly a profound or complete examination of public choice theory, demonstrates its explanatory power in understanding the issues which underly present law school courses like Legislation, Constitutional Law and Administrative Law where questions of appropriate institutional design are considered. It seems clear to me that systematic examination of these questions should be included in the first year curriculum.



The qualification that economics may not be the only fruitful source for the theory required to understand and evaluate the relevant phenomena applies with particular force to the study of government processes. The economic paradigm which focusses on each individual's effort to maximize his utility subject to the environmental constraints with which he is confronted is certainly helpful in understanding the efforts of people to shape governmental outcomes and their responses to the incentives created by the legal system. But the institutional structure in which this behavior is manifested is so complex, the relationship of individual act to governmental outcome so attenuated and the contours of the controlling incentive structure so hard to discern that it is extremely difficult to generate good predictions by utilizing hypothesis derived from economic theory. Whether a useful positive theory to explain the outcome of government processes can be constructed using elements derived from any source is one of the most challenging questions confronted by legal scholars. The course in Government Processes would be one forum in which this interesting question would be considered.

#### Empirical Methodology

It would seem evident that one would like to know the magnitudes of the variables which are relevant under whatever normative or positive theory may be adopted. Understanding the various techniques for doing this is, consequently, one of the essential elements in the theoretical framework required to understand and evaluate the legal system.

I have very little to add to buttress this obvious conclusion. The basic methodological problem is how to determine the effect of various legal phenomena, such as levying a fine or imposing the death penalty (upon some proportion of the people who commit violations) on the behavior of people subject to the possibility of having the sanction imposed. Economic theory predicts the direction of change, if an activity is made more costly, less of it is likely to occur. But the problem is how to determine the magnitude of the effect when many factors are relevant and controlled experimentation is not possible.

The one respect in which this inquiry takes on special methodological content in the legal context is the problem of integrating empirical estimation into the processes of government.

Articles estimating the empirical effects of various types of legal regulation are, of course, extremely useful in choosing an appropriate legal response. But often what is needed is an ongoing assessment of the effects being produced by the regulatory system which is in place. Indeed a principal teaching of economics, or any other aggregate value maximizing perspective, is that the important point of the individual decision is its incentive effect on the full range of behavior to which the expectation of similar treatment is relevant. But if this is so the individual decision must always be based on an estimation of the social parameters in which it is taken.

Thus, for example, if the present provisions of the antitrust laws were changed to allow single rather than treble

damages, and everything else remained the same, it would be expected that fewer actions would be brought. In deciding whether to introduce such a change one would, of course, want to know, among other things, how great the decline in the number of actions would be. But even if this were known at the outset, changes in the cost of maintaining an action or in other aspects of the legal system which lead to smaller or greater recoveries might affect the number of cases which were brought. Consequently, if the purpose of the change from treble to single damages was to produce some desired level of enforcement activity, continuation of that level might require adjustment to say double damages in light of other relevant changes in the legal or factual environment.

The simple point I am making is that if a value maximizing perspective is to be applied the legal system itself must have some means of reassessing the relevant variables and adjusting the legal rules accordingly. The design of the appropriate institutional device to do this depends in part on the issues considered in the course on government processes and in part on an understanding of the theoretical and practical difficulties of utilizing various types of empirical methodology to estimate the relevant effects. The design of appropriate institutions to perform this task is an interesting and important question for consideration in the first year of study.

It may also be so that an understanding of empirical issues can clarify the student's thinking about law in important respects. The emphasis on ex ante rather than ex post analysis

and on the variability of outcomes, which is an essential element in the thinking of economists and other social scientists, is by no means universally shared by legal scholars and students. The apparently obvious point that the individual case under consideration may be an extreme outcome in a distribution of outcomes resulting from the application of a legal rule is not habitually incorporated into the thinking of many persons interested in law. Systematic consideration of the relationship among events may thus prove to have an important impact on how law is analyzed.

The question of the role of economics and other disciplines in the course on empirical methodology is an important one about which my own thinking is quite tentative. For me the essential coherence of the utility maximizing approach of economics lends credibility to, and makes intuitively comprehensible, the empirical work which is based on the hypotheses generated by economic theory. Since I lack the skill to evaluate empirical work technically I am puzzled about how to evaluate work which does not seem to proceed from a theoretical basis that rests on some plausible and rigorous conception of how human being behave.

It would seem that the general questions as to the relationship of theory to empirical investigation and the characteristics of good positive theory should be explored in the course on methodology. Again, although my own limitations preclude any definite predictions of the consequences of such an inquiry, my intuition is that it will lead to a much better grasp of the full range of issues which are relevant to understanding

and evaluating the legal system.

### Law and Culture

The final subject which I propose for the first year curriculum is the one about whose content I am most tentative. My starting point is that the common economist's approach of taking what are blandly called "tastes," as given, is inadequate for the purpose of understanding the functioning of legal systems. In other words, I would, for a variety of reasons, like to have a positive model in which tastes, or as people other than economist refer to them, values, are endogenous rather than exogenous. It is also possible that in devising a normative theory one may wish to go beyond tastes as they exist as a benchmark of value. For if "tastes" derive from some social process and defects in that process can be identified one may wish, for example, to treat as controlling those tastes which would exist if the process had not been flawed.

My thinking about these questions is at a very early stage. The range of issues which I would like to have considered can be illustrated by a problem upon which I have been working.<sup>14</sup> The incidence of bribery of public officials appears to vary among countries. In some places it represents a routine method for private individuals and public officials to arrive at an outcome. In others the phenomenon is relatively rare. The parameters for a possible bribe transaction include the definition of permissible conduct in the legal system, the organization of the public sector in granting the power to appoint to positions in which bribe income can be earned and in authorizing various

officials to impose a cost or confer a benefit on private individuals, the content and actual enforcement of the laws against bribery and the compensation system for public officials.

A positive theory to explain the variations in the incidence of bribery would have to account for the development of these various features of the legal system which determine the profitability of paying or receiving a bribe. The analysis developed in the previous courses I have described does offer a number of apparently useful elements for devising such a theory.

The bribe transaction does, for example, provide an incentive for officials to apprehend persons who anticipate some probability of having a sanction imposed if they do not avoid further legal proceeding by paying the bribe.<sup>15</sup> And the bribe itself operates as a deterrent of conduct which creates a likelihood of a penalty being imposed and thus leads to the necessity to pay the bribe to avoid the penalty. Thus bribery can be analyzed as one of several possible means to provide incentives for law enforcement and to deter violations.

The efficacy of bribery as a means of providing incentives for law enforcement and deterrence of potential violations turns, however, on a number of issues which relate basically to the divergence of the incentives for public officials created by the possibility of extracting a bribe from those which would obtain in an "optimum" system of enforcement and the anticipated disparity in the expected value of the sanction as it would be determined by a bribe transaction and what it would be if a sanction of optimum-value were imposed. If this inquiry were to

be completed the outcome when bribery is employed would then have to be compared not with the theoretical ideal but rather with the actual results of alternative arrangements (all of which are imperfect) for producing the requisite incentivess for enforcement and penalties for violations.

But all of this is only preliminary. One can, in principle, determine the efficiency in various circumstances of a system utilizing bribery with others employing alternative means for creating incentives for law enforcement and deterring violations. This is, however, only one piece in the puzzle. Are other features, such as the intensity of enforcement of the bribery laws or the behavior of officials at subsequent stages like that of judges who decide guilt or innocence if a bribe is not paid to a policeman to forestall prosecution, explicable as part of some larger process of achieving an overall institutional arrangement which leads to efficient enforcement of the laws? And if all of this is happening why does no one acknowledge that it is occurring? Indeed, why, to the contrary, is bribery universally made illegal, subjected to severe penalties and condemned as immoral?

How then can one explain the apparent wide spread toleration in fact, but avowed condemnation of, a phenomenon which appears to have very mixed elements when viewed from the perspective of efficiency. Is the hypothesis that an efficient amount of bribery will tend to occur in each country? And if the desire for efficiency is one of the forces shaping the outcome how does it manifest itself in the complex series of choices which define

the opportunities of public officials to receive and private persons to pay a bribe?

The positive theory I am looking for is one which would permit one to sort all this out.<sup>16</sup> I am able to identify one element of such a theory, derived from economic analysis, which I believe will prove to be useful. The prisoner's dilemma underlies many of the externality problems which create the necessity for legal intervention. At bottom, the difficulty is that each person is individually better off by "cheating" on the cooperative solution which represents the value maximizing solution for the group as the whole. And indeed if only one person cheats, while he may to some small degree thus impair the cooperative solution and in that respect make himself slightly more off, that person is likely in balance to be better off since his personal gain from cheating exceeds his personal loss from the slight decrease in the value of the outcome for the group as a whole resulting from his cheating. Thus cheating is individually rational. But as more people thus cheat the cooperative solution unravels and the group as a whole, in the limit every member of the group, is worse off.

This analysis, of course, underlies an enormous range of legal regulation designed to create incentives to counter the tendency to individual cheating on the cooperative solution. But the legal system is only one way to induce socially cooperative behavior. Many traditional values such as honesty, bravery, generosity, lawfulness and cleanliness are substitutes for legal regulation as means of countering socially deleterious cheating.



These values represent, if you will, self enforcing sanctions consisting of a personal sense of unworthiness when these social norms are violated. If these sanctions are operative they avoid the necessity of the monitoring, guilt determining and punishment costs associated with legal regulation.

Explaining the extent to which attitudes of this kind are influential in shaping the behavior of various groups of people is, of course, a question of considerable complexity. Returning for a moment to the bribery question, one positive explanation of the variations in the incidence of bribery which are observed is that attitudes toward bribery are different in different countries. To pursue the positive inquiry it is therefore necessary to account for these differences.

One irony is clear. It is essential that adherence to these attitudes not be viewed in instrumental terms as a means of avoiding the effects of the prisoner's dilemma. If, for example, it is carefully explained to a population that the costs of enforcing the tax laws will increase if everyone cheats and that everyone will therefore be better off in the absence of cheating the result is to make clear the gains of cheating. Indeed if the campaign works and most people don't cheat the net gains of individual cheating are correspondingly increased. But if this is understood the cooperative solution will unravel.

What is necessary is that people come to believe that the cheating is simply wrong no matter what anybody else is doing. In other words unless everyone feels obligated to act as if everyone else is conforming to the cooperative solution no one

will and the cooperative solution will not occur. An individual calculation based on a realistic expectation of how other people will act based on their own self interest will never lead to the cooperative solution. Thus a fiction of general cooperation, or viewed in slightly different terms, an absolute commitment to the course of conduct required for the realization of the cooperative solution, is essential if the cooperative solution is to be achieved. The irony, of course, is that if everyone thus acts contrary to self interest the result serves everyone's self interest.

It would appear then that the existence of social norms inducing people to engage in conduct which produces cooperative solutions is one element in defining the efficacy of the social process in taking interdependencies in human behavior into account. And these norms are substitutes for legal regulation. Moreover, the choice between these substitutes may be affected by changes in the relevant legal or factual environment. Richard Posner has suggested, for example, that retribution was a social attitude which was useful in inducing individual law enforcement at a time when the processes of public law enforcement had not yet developed.<sup>17</sup>

The emergence of social norms of this kind, over time, and how they influence and are influenced by the legal system would be the focus of the course in Law and Culture which I propose. This is, if you will, a study of the dynamic, largely unconscious, gradual, development of legal and cultural means to deal with human interdependency. It provides an important

contrast for the purposive, static, essentially contemporary perspective of the other courses. It will be particularly useful in areas like Family Law and Criminal Law in which interrelated changes in attitudes, non-legal forms of social control and technology have been so important in shaping the content of the legal system.

It is, of course, obvious that other disciplines have much to contribute to this course. Its underlying concerns are shared most directly by Anthropology, Sociology and History. Appropriately combining the elements from the various disciplines to pursue this inquiry should provide an exciting challenge. It seems to me one to which legal education must respond if it is to perform its intellectual function of contributing to the understanding and evaluation of legal systems.

### The Positive Determinants of the Future of Economics in Legal Education

#### Introduction

It seems to me (not surprisingly) that economic analysis provides a useful means for structuring the inquiry into the question of what role economics in fact will play in the future of legal education. But my prior observations with respect to the contribution of other disciplines apply to this question as well.

The markets in which the supply of and, most significantly, the demand for, economics in legal education are determined are not ones in which explicit economic transactions constitute the only, or in some cases, the most important means through which

preferences and productive capabilities are expressed. In particular, the bureaucratic process within the law school itself in which issues concerning personnel and curriculum are resolved does not correspond to the market for widgets which exemplifies the most commonly employed economic paradigm. That is not to say, of course, that economic theory is not extremely helpful in understanding this decision making process. However, the interaction among law school professors, as they decide critical questions of law school governance, is so subtle and complex that it would be foolish to rule out a priori the claim of any discipline that it can shed light on what is happening. My point simply is that the prices being paid and the goods being purchased in the process of decision making within a law school bureaucracy are so obscure that non-economic modes of analysis may well have much to contribute to an understanding of the relevant behavior.

#### The Supply of Economics in Legal Education

But much is explained by relatively straightforward economic analysis. I believe that the supply of economic inputs is more easily understood than is the demand for them. The supply is of essentially two kinds, that provided by economists who specialize in law and that provided by legally trained persons who learn and apply economic analysis.

In so far as economists who are prepared to specialize in law and teach in law schools are concerned, I see a (substantially) horizontal supply curve of economists, roughly equal in ability to the economists now teaching in law schools,

extending well beyond the intersection with the present demand curve. In simple terms there are a large number of extremely competent economists who would teach in law schools at the wages now prevailing for economists at law schools. I would hazard the guess that the number of economists on law school faculties could be tripled with little or no loss in quality at the salaries which are now being paid.

There are essentially two reasons why this is so. First, salaries in economics departments are lower than those in law schools. Second, the investment in human capital required for many economists to specialize successfully in law is low as compared to that required to excel in one of the specialties within economics.

Of course, neither of these factors apply uniformly to all economists. Moreover, other returns associated with academic appointments, such as prestige, greater leisure, intellectual stimulation, opportunities for remunerative consultation, will not necessarily be of the same relative value as between appointment in a law school and an economics department for all economists. Nevertheless, there are a significant number of economists for whom these factors do not dictate a preference for appointment to an economics department, for whom the costs of achieving success are lower (or at least not sufficiently higher to offset the other factors) in a law school setting than in an economics department and who prefer the higher salaries in a law school to the lower salaries in an economics department to constitute a large supply of competent economists available for

law school employment.

I should perhaps explain one of the factors I have emphasized which may not be obvious to people unfamiliar with the role of the economist in the law school. This is that it is very easy for the economist to learn about law. This is essentially because, as has been repeatedly emphasized here, the economic analysis does provide an extremely useful framework for understanding law. The theoretical tools the economist brings to the study of law permits him to sort out the essential from the inessential, grasp the fundamental issue underlying the case or statute and relate it to a range of other legal questions raising the same theoretical issues. As an economist starting out as a teacher in a law school put it to me: "I sat in on a contracts class and I kept guessing the answer long before they ever got to it." His ability to guess the answer derived, of course, from the framework of analysis he brought to the issues.

I do not mean to suggest that it is not costly for the economist to gain familiarity with the details of legal regulation. I only submit that the process is easy in the sense that it requires little extension and refinement of the theoretical apparatus which the economist brings to the task.

This factor is quite different in the case of the legally trained person learning economic analysis and incorporating it into his teaching and research. What one knows from one's training as a lawyer does provide some basis for understanding the theoretical underpinning of economics. But many of the habits of thought inculcated by traditional legal training are in

conflict with economic theory or indeed, more generally, with the methods employed by the social sciences. The emphasis on *ex post* rather than *ex ante* analysis, the failure to link the result in the particular case systematically with the impact on behavior which may occur in similar circumstances, the naive rejection of rationality in human behavior, the confusion of allocative and distributional consequences, the inability to analyze problems by holding everything else constant and focussing on a single factor and the hostility to models as devices for clarifying analysis are all habits of mind often found among people trained as lawyers who have not paid serious attention to any social science. To all of this must, of course, be added the fact that many legally trained persons are totally unfamiliar with any of the mathematics employed by economists.

For all of these reasons the costs of a lawyer learning and using economics are high. If one adds such commonly asserted factors as a fear that economic analysis may undermine one's cherished beliefs the costs, of course, become even greater.

The determinants of the supply of economic analysis by legally trained persons are not, of course, simply the associated absolute cost but the magnitude of these costs as compared to alternative types of research and training in which the law professor might engage.<sup>18</sup> These "traditional" activities are, cheaper precisely because they can be pursued by utilizing the human capital produced by the legal training which all law professors already have. But the experienced law professor will be even more disinclined to learn and incorporate economic

analysis. He (I mean or she at all places) has additional investment in human capital consisting of his familiarity with the details of the legal regulation in which he specializes. He has, moreover, organized his course over time to facilitate the exposition of the detail at his command. To revise his teaching so as systematically to incorporate economic analysis is an extremely costly undertaking.

In sum then I see a (substantially) horizontal supply curve of economists willing to teach at law schools and a negatively sloped supply curve of law professors willing to incorporate economic analysis into their teaching, with the supply more elastic with respect to relatively new teachers who have less investment in subject matter specific information. In order to know the quantity which will be supplied it is only necessary to know what will be the demand for economic analysis in law schools.

#### The Demand for Economics in Legal Education

The demand for economics in legal education is in material part a derived demand. Presumably as legal institutions increase their use of economic analysis law students will wish to know more about economics in order to succeed as lawyers. Thus one principal determinant of the amount of economics found in law schools is the use made of it in the activities in which lawyers engage.

I confess that I am basically puzzled by what seems to me the surprisingly small use made of economics by lawyers in attempting to influence legislatures, administrative agencies and



courts. It seems to me that there are many instances in which a party (or someone advancing a position to a legislature or administrative agency) could improve his chances for success by employing an argument based on economic analysis in which the argument is not in fact made. This is so even though a skillful advocate could easily have found a way to advance the argument within the doctrinal constraints imposed by the controlling law. Indeed, on the whole it is my perception that the use of economic analysis to formulate the position which will be advanced is still extremely rare. Most use of economics in litigation continues to be with respect to limited stereotyped questions like market definition or damages for loss of life rather than as a source of organizing principles which will be dispositive in the decision of the case.

I do not understand why this is so. Competition among lawyers should lead to the use of inputs which increase the likelihood of success. The much speculated about aversion of lawyers for economics analysis can thus not account for its limited use. The explanation must lie in some failure in the competitive process controlling the behavior of lawyers.

The alternative explanation, of course, is that I am wrong about the existence of unrealized opportunities to affect the outcome by using economic analysis. Under this hypothesis the lawyers are acting efficiently and the amount of economics being employed accurately reflects the demand for it of legal institutions. If this is the right explanation we must pursue the inquiry by determining why legal institutions make the use

they do of economic analysis.

I am, of course, unable to answer any of these questions definitively. It is, however, clear that whatever are the determinants of the use of economics in the activities engaged in by lawyers, changes in these factors over times will have an important influence on the use of economics in legal education. How changes in the use of economics by legal institutions will, however, actually affect the amount of economics employed in legal education depends, of course, on the nature of the decision making process by law schools.

Presumably if law schools were simply profit maximizing institutions competing for the revenue derived from the tuition paid by law students then changes in the use of economics in legal institutions would alter the demand of law students for education in economic analysis and each law school would respond accordingly in order to avoid the loss of revenue which would result from students choosing a law school which did offer training in economics. Changes in institutional practice would thus have direct and dramatic impacts on legal education. Moreover the economic content of legal education would reflect the perceptions of law students as to what they need to know in order to succeed as lawyers.

However, most law schools are either public or non-profit institutions which are not simply maximizing their profits from tuition revenues. They are also "selling" their services to legislatures and private contributors. These, and perhaps other forces, constrain the law schools from raising tuition to market

clearing prices or altering quality to maximize profits. Thus decision making, as it is conceived in the law schools, allows considerable discretion to the controlling bureaucracy as to the legal education which will be supplied, since there is excess demand at prevailing prices for a wide range of possible packages of legal education which could be offered.

For these reasons law professors have the opportunity to increase their non-monetary income by choosing a curriculum they prefer. They can exercise this power either by lowering their personal costs or increasing their benefits. They can reduce their costs by resisting curricular change which would make more costly the performance of their duties. Thus a curriculum which involves systematic incorporation of economics or other disciplines may be rejected in favor of one which permits continued utilization of existing human capital. In general then faculties will have an incentive to resist changes which increases the costs of performing their teaching responsibilities.

I do not suggest that this is necessarily the only or indeed the most important incentive which operates. Law professors may also derive non-monetary benefits from studying and teaching. This possibility implicates an aspect of legal education which is related to but fundamentally different than its role in training students to function effectively in the environment they will encounter. This is so, basically, because as lawyers people function as advocates. Theories are formulated and evidence marshalled to advance a particular point of view. We entertain

the hope that this adversary process will tend to yield socially desirable answers to questions concerning the appropriate regulation which should be employed. But the adversary process is not the only means of exploring social issues.

There is also an important place for objective inquiry unaffected by the desire to advance the interest of any particular person or group. The demand for such inquiry by law professors constitutes another essential determinant of the amount of economics which will be utilized in legal education. For, as I have attempted to demonstrate above, economics is an extremely important component of such an inquiry.

The desire for objective inquiry may also be part of the utility function of the non-consumers of legal education who contribute to its financial support. Legislatures, private foundations, alumni groups, etc. may wish, (among other things, of course) to have the law schools improve our understanding of issues of social policy. In order to obtain support from these groups law schools must take their preferences into account.

I have so far ignored one major complication. I have assumed that the law school faculty maximizes its own welfare subject to existing constraints by avoiding personally costly and introducing personally gratifying types of legal education. My simplifying assumption was that teaching activities did not affect other income sources. This is, of course, not true. Reputation gained through teaching and research often produces income from consulting, selection to public office or entrance into full time practice. This phenomenon affects the inclusion

of economics in legal education in two ways.

First, and most obviously, the use of economics in teaching and research, may be affected by its anticipated effect on these other opportunities. It is by no means clear to me in which direction in balance this factor influences the outcome in using more or less economics at the present time. Many opportunities for non-academic income derive from a detailed familiarity with a subject rather than theoretical insight. On the other hand, some theoreticians have done very well indeed. What does seem clear is that changes in the demand for law professors as sources of economic insights will affect decisions as to the content of courses which are offered and the research which is pursued.

The second aspect of this question is to me at least somewhat troubling. The primary demand for law professors (and economists) to engage in non-academic work is in support of particular adversary positions. The adversary process requires systematic suppression of the uncertainties and complexities which characterize objective analysis. The incentive to maximize income from non-academic sources tends to lead to the avoidance of explicit mention in objective scholarly work of just those uncertainties and complexities which would be regarded as defects if the analysis were advanced in the adversary context. This is so, of course, because the more qualified scholarly work can be used to refute the less qualified adversarial presentation. Moreover, the work actually done for adversary purposes is systematically less enlightening as a source of objective analysis precisely because of the suppression of many of the

intellectually interesting issues.

Thus the increasing use of economics in adversarial processes is not an unmixed blessing for the development of economics as a means of improving our understanding of the legal system. People employing economic analysis will be inclined to turn to those questions which create the greatest opportunities for outside income. Areas like criminal law, family law and the redistribution of income in favor of the poor, which offer rich intellectual prospects for economic analysis may receive systematically less attention than fields like antitrust where the opportunities for outside income are much greater. Moreover, if scholarly work is done with (among other things) an eye to outside income there is a risk that quality will be impaired by the felt necessity to simplify the analysis and overstate the conclusions which are reached. I do not wish to overstate this tendency. The adversary process does provide a check on unsubstantiated conclusions. If an article is discredited reputation suffers. Nevertheless, the essential differences between objective scholarly work and adversarial presentations do create the danger that subtle pressures may impair scholarship when the possibility of income from adversarial presentation is contemplated when the scholarly work is done.

The possible response to this difficulty of course, consists of the creation of counter incentives inducing people to engage in objective inquiry governed only by the standards of good scholarship. Whether such incentives will be created will depend on the demand for the public good of improved understanding of

the legal system by those who support legal education and the personal tastes for objective inquiry of people holding positions on law school faculties.

### Conclusion

In writing the theoretical part of this paper I often felt I was belaboring the obvious. There are many exciting intellectual possibilities to increase our understanding of the legal system by incorporating economic analysis, and theory derived from other disciplines, into the study of law. That more of this is not now being done is a result of the practical factors discussed in the second part of the paper rather than any doubts which can be supported on intellectual grounds that much useful work can be done.

What will happen in the future with respect to these practical factors is a question about which I am uncertain. The supply of economists to teach in law schools seems ample. But the supply of legally trained people to utilize economic analysis is more problematic. I have no good theory to explain the rate at which the amount of economics employed by legal institutions will change. But whatever the rate of change, law professors will retain considerable power over the law school curriculum. How that power is exercised will depend on the relative importance of the cost reducing and intellectual benefit increasing motives which determine their actions.

The outside activities of law professors complicate the analysis but in ways whose effects in balance are hard to estimate. As legal institutions use more economics, the

incentive to include economic analysis in law teaching and scholarship in order to obtain outside opportunities is strengthened. But the choice of subject matter may be affected in directions which are not appropriate from a purely intellectual perspective. And some risk to the objectivity of scholarly work may also be created.

What then will emerge from all of this? I think the most important factor will be, curiously enough, the one suggested by the proposed course in Law and Culture. A taste for learning is another one of those attitudes which successfully divert us from our self interest so that we engage in conduct which is beneficial for the group as a whole. After all the full value of essential insights about the ordering of society cannot be captured by the people who commit the personal resources necessary to obtain them. The importance of this "taste" for learning in the utility functions of members of law school faculties will be extremely important in determining the future of economics in legal education.



### Footnotes

\* Professor of Law, Georgetown University Law Center. A number of economists have displayed a remarkable taste for teaching economics to me. Many people would characterize their behavior as generous and consider gratitude the proper response. I am strongly inclined to this view. Charles Goetz, in particular, in the course of our teaching and writing together, has introduced many of the ideas discussed in this paper to me and in general assisted me greatly in understanding the behavioral postulates which underlie economic analysis. Steven Salop, with whom I have recently begun to collaborate in teaching, has already had a marked impact. I cannot believe his prediction as to the extent of the influence he will exert in the future is accurate--but we will see.

1. I do not mean to suggest that distributional issues must be examined in every instance. It is possible, for example, to pursue a strategy of focussing exclusively on allocative concerns with respect to the great majority of regulation and using specific devices like a negative income tax to achieve desired redistributive objectives.
2. R.H. Coase, The Problem of Social Cost, 3 Journal of Law and Economics 1 (1960).
3. See Strategy, Predation and Antitrust Analysis (S. Salop Editor 1981).
4. See Vertical Integration, Appropriable Rents and the

Competitive Contracting Process, 21 Journal of Law and Economics 297 (1978).

5. They would have adopted it in the sense that it would have created a surplus as compared to the outcome which did result. They all would not agree to the alternative, of course, unless each of them were actually made better off.
6. See G.W. Nutter, The Coase Theorem on Social Cost: A Footnote, 11 Journal of Law and Economics 503 (1968).
7. Continental T.V. Inc. v. GTE Sylvania, Inc. 433 U.S. 36 (1977).
8. John Rawls, A Theory of Justice (1979) exemplifies this approach.
9. Robert Nozick, Anarchy, State and Utopia (1974) exemplifies this approach.
10. These issues are considered in J. Quinn and M.J. Trebilcock, Compensation, Transition Costs and Regulatory Change, 32 University of Toronto Law Journal 117 (1982).
11. See W. Schwartz, Private Enforcement of the Antitrust Laws, An Economic Critique (1981).
12. See D.C. Mueller, Public Choice (1979). I do not mean to include only work which is specifically denominated as falling within this specialty. All economists and other social scientists who concern themselves with an analysis of government processes are meant to be included.
13. A number of recent theoretical works address this problem and attempt to circumvent it. See D.C. Mueller, note 12, supra at 68.

14. I have completed a draft, entitled "Toward a Positive Theory of Bribery: Competition, Collusion and Culture."
15. If at some subsequent stage someone is "playing it straight" the probability that a sanction will be imposed should be correlated with the fact of guilt. Bribery can also be approached from the perspective of positive public choice theory. Bribery affects the total gains derived from government intervention and the distribution of those gains among various persons in the public and private sectors.
16. R.C. Clark, The Interdisciplinary Study of Legal Evolution, 90 Yale L.J. 1238 (1981) and J. Hirshleifer, Evolutionary Models in Economics and Law: Cooperation Versus Conflict Strategies, 4 Reserach in Law and Economics 1 (1982) are recent works dealing with questions of this kind.
17. R. Posner, The Economics of Justice 207, Chapter 8, Retribution and Related Concepts of Punishment (1981).
18. Unlike the economist choosing between specializing in law or some branch of economics the returns to the two activities, at the present time at least, I perceive as roughly the same.