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## WHY WOULD LAW STUDENTS BENEFIT FROM STUDYING ECONOMICS?

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Michelle J. White\*

Why would law students benefit from studying economics? Three reasons come to mind. First, knowing some economics should enable students to understand more fully the issues encountered in a variety of areas of the law. The economic approach to common law, for example, provides a consistent system for analyzing cases and questions in a variety of common law areas by assuming that what matters in deciding any case is giving parties involved in similar situations in the future incentives to act so as to minimize the total costs sustained in incidents of that type, or in other words, to act in an economically efficient manner. The economic approach ignores distributional or "fairness" considerations in the particular case. Applying the economic approach gives students both an organizing framework for case analysis and a normative framework for favoring one decision rule over others. Of course the economic approach may not be the best one to use in all situations. But if an economically inefficient decision rule is favored over an alternative rule which is more efficient, the economic approach is nonetheless extremely useful in making clear the costs of taking an inefficient approach.

Second, in a variety of areas of the law, economic analysis constitutes a central component of the legal arguments made in prosecuting and defending the case. Economic experts are usually brought in to make or buttress the arguments, but the lawyers involved in such cases need some knowledge of economics in order to understand the issues raised by the expert and to use them effectively. Economic arguments are often central to anti-trust and price-fixing cases, to employment discrimination cases, wrongful death, injury, and tax cases. This list is obviously not all-inclusive and, in addition, the trend over time has been for economic arguments to be used and accepted in an increasing

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variety of cases.

Third, many law students will become involved in policy-making, whether because they end up working in the executive branch of government or because they become legislators, lobbyists, or legislative staff. If so, then they will find themselves constantly mired in economic issues, because virtually everything the government does costs money—its own or someone else's—and resources are always scarce.

In the following sections, I treat each of the three points in greater detail, providing examples of the use and abuse of economic analysis.

### I. ECONOMIC ANALYSIS OF LAW

Since the early 1970's, economists and lawyers working in the "new law and economics" have used economic analysis to examine questions arising in such areas of the law as torts, contracts, environmental, and criminal law. The general approach involves analyzing legal rules and doctrines to determine, first, what the most economically efficient result would be in situations of a particular type and, second, whether particular legal rules give parties involved in similar situations in the future incentives to reach the efficient result. For example, in accident situations, the goal would be to minimize the total costs accruing to all parties from accident damage and from expenditures undertaken to avoid accidents. In pollution or nuisance cases, the goal would be to minimize the total costs of both pollution damage and expenditures on pollution abatement. Attitudes toward risk would also be part of the analysis, since different legal rules vary in terms of whether injurers or victims bear greater uncertainty, but it is economically efficient for greater risk to be borne by those who are least risk averse. In criminal law situations, the economic approach would involve minimizing the total costs of crimes actually committed, plus the costs of crime prevention efforts by both private parties and the police, plus the cost of operating the criminal justice and prison systems. Here risk considerations enter the analysis, since resources spent on police protection can be saved by having higher penalties for given offenses, because of their greater deterrent effect. But risk averse citizens would probably not choose to be subject to the uncertainty implicit in having high fines for trivial offenses, even if this allowed resources to be freed from police duties.

An understanding of the economic approach to law should

provide students with a powerful organizing framework which can be carried across course boundaries from one area of the law to others. For example, in recent years economists and lawyers working on tort law issues have proposed an efficiency defense and important support for the otherwise beleaguered contributory negligence doctrine. They have attacked on efficiency grounds the newly popular comparative negligence approach to accidents and the strict liability doctrine in products liability cases. Economists have increasingly broadened their analysis by looking across related areas of the law and advocating, for example, that a version of the doctrine of mitigation of damages in contract law be applied in accident cases and that traditional liability rules be used as the enforcement device for zoning regulations in nuisance cases.

## II. ECONOMIC ARGUMENTS AND ECONOMIC EXPERTS

In a variety of areas of the law, economic arguments are central to the theory of the case or to the remedy. Antitrust law has the longest history of use of economic arguments, but economics has surfaced in a variety of other areas. For example, a large city recently changed its property tax collection procedures to require that taxes on commercial and industrial buildings for the entire year be paid in advance; owners of residential buildings could continue to pay taxes quarterly. An economic expert backed up the legal argument that this was a disguised (and discriminatory) tax increase on commercial/industrial property owners only by calculating the actual amount of the income lost to commercial owners as a result of the earlier payment schedule. As another example, employment discrimination cases often employ economic models of wage determination to argue that women or blacks or older workers are (or are not) discriminated against on wages or chance of promotion. Financial economists often argue in bankruptcy cases that the estate is worth thus-and-such or in fiduciary responsibility cases that the "prudent man" standard requires that pension funds be invested in a diversified portfolio, but not one from which all risky investments have been eliminated. Economic evidence was used in school finance cases to predict the effects of moving away from heavy reliance on local property taxes to finance public school systems. It has also been used to challenge the fairness of traditional methods of assessing property for purposes of levying local property taxes. It was used in the debate over capital punishment to

buttress the argument that capital punishment deters potential murderers. Students whose future careers will involve some ambulance chasing will need to know how economic evidence is used to value the lost life or lost services in wrongful death and injury cases.

This list is not exhaustive, but it should suggest that for many lawyers, economic arguments and perhaps an economic expert lie in their future. And who knows, someday economic arguments may find their place in first amendment cases or constitutional law.

### III. LAWMAKING AND PUBLIC POLICY

Much of what governments do involves spending money. But any additional money spent on, say, tobacco price supports must be financed either by raising taxes, increasing government debt, printing money, or cutting back some other government expenditure. Politicians like to put together a majority to support their favorite programs by bundling together packages of provisions that appeal to various constituencies. But despite the form of the packaging, each extra dollar spent on one program consumes resources that could alternatively be spent on other programs, be they school lunches, the cost of living escalator for Social Security recipients, or the latest piece of military hardware.

Issues that do not involve spending the government's money often involve spending someone else's money. For example, occupational safety and health regulations require employers to spend their own resources to improve conditions in the workplace, while water pollution cleanup efforts are more likely to involve spending of the federal government's own funds (e.g., grants to localities to build sewage treatment plants). Either way, though, dollars are dollars and resources are scarce. The private employer's expenditure on health and safety may come at the expense of investment in new productive equipment or may replace expansion that would otherwise create new jobs. Whether the government is spending its money or someone else's, programs of this type need to be subject to rigorous economic scrutiny. Most likely, such scrutiny will suggest that some cleanup or regulation effort is worthwhile, but that pristine water or absolutely safe workplaces are not, regardless of who is footing the bill.

Lawyers often criticize economic analysis for neglecting fairness and distributional considerations. Economists react to this

criticism by arguing that their job is to analyze the efficiency implications of various ways to accomplish the desired objective. Suppose proposal A is fairer but less efficient economically than proposal B. The economist sees her job as that of setting out the menu of choices—A's more desirable distributional outcome, if chosen, will add X thousand dollars to the cost of doing the job over B's more efficient but less fair outcome. The extra fairness thus comes at a known price. The economist's job ends here; the policymaker (Congress or the President) must decide whether the sacrifice of efficiency for fairness is worth the price.

So goes the time-worn scenario of the role of the Economist and the Policymaker and their respective positions on either side of an invisible line. However, for those law students having political aspirations, it will often be handy to have some of the tools from the economist's bag of tricks ready when the Congressional Budget Office is closed for lunch (or controlled by the Other Party).

