

Filling a Gap in New Zealand Legal Education: The Economic Analysis of Law

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Introduction

Over the past several decades there has been a broad diffusion of the insights and methods of the social sciences into legal scholarship and law school curricula. In particular, the "law and economics" approach to understanding and resolving legal issues has become established as a respected mode of analysis that has the power to illuminate relationships and trade-offs often obscured by conventional legal categorizations. The incorporation into legal education and scholarship of the powerful insights of economics is arguably one of the two most significant jurisprudential developments over that period.¹ Many if not most major American law schools, for example, now regularly offer at least one upper-level elective course, generally titled either "Economic Analysis of Law" or "Law and Economics," that reviews the concepts of basic and intermediate-level microeconomic theory² and applies those concepts to analyse the core doctrines of property, contract, tort and criminal law.³ Such courses are usually taught by a law professor who has both academic credentials in law and a substantial graduate school background in economics, generally a Ph.D. degree.⁴ Such

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¹ The other highly significant jurisprudential development, in my opinion, is the incorporation into legal thinking of the various branches of "critical theory," including critical legal studies, critical race theory, feminism and deconstructionism.

² The more basic concepts usually covered are those relevant to understanding and applying the standard supply-and-demand models of price and output determination. The somewhat more advanced microeconomic concepts presented generally include the concepts of producer and consumer surplus, the Pareto and Kaldor-Hicks efficiency criteria and their normative premises, the Coase Theorem, externalities and public goods, certain basic statistical measures, the implications of risk-aversion, cost/benefit analysis, and basic game-theoretic concepts. For a detailed discussion of one professor's attempt to structure such a course, see generally Gregory Crespi, "Teaching the New Law and Economics," 25 *Univ. Tol. L. Rev.* 713 (1994).

³ The *AALS Directory of Law Teachers* lists 153 law professors who teach law and economics courses and notes that 78 of these professors are currently teaching the subject. *Association of American Law Schools, AALS Directory of Law Teachers* 1153-54 (1995-96). This information understates the number of law professors qualified to teach the subject, and probably the number of courses offered as well, since it omits many noted law and economics scholars including, among others, Henry Hansmann, Mark Kelman, Duncan Kennedy, and George Priest.

⁴ There are professors teaching these courses, as well as leading scholars in the area, who have graduate degrees only in one of the two fields, and have through informal

courses are also offered by a number of law schools located in other English-speaking countries, although they are not as widely available elsewhere as in the United States.

However, there is not a single law faculty in New Zealand offering an Economic Analysis of Law or Law and Economics course during the 1996 academic year!⁵ As an American observer with little prior exposure to New Zealand legal education, I was quite surprised and puzzled when I discovered this fact. A major and probably irreversible political shift has taken place in New Zealand since the introduction of "Rogernomics" social policies by the government in 1984. Subsequent governments, regardless of their party composition, have consistently put great emphasis on the efficiency of resource allocation, and on restructuring economic relationships to enhance the country's competitive position in world trade. Given this fact of political life, one would have thought that the law faculties here in New Zealand would have eagerly incorporated economic analysis of law courses into their curricula.

They have not done so, however, and the lack of these courses is a disadvantage to their students. The basic price-theoretic concepts that are elaborated and applied in such courses provide the framework and language in which public debates on major social policy issues are now conducted in this country. The justification for the current programme of replacing much of the welfare state

study developed the necessary level of expertise in the other field. For example, Judge Richard Posner, long one of the leading scholars in this area, does not hold a Ph.D. degree in economics. As another example, Alvin Klevorick, long a teacher and scholar in this area at Yale, has a Ph.D. degree in economics, but does not hold a law degree. However, it is difficult to teach economic concepts effectively if one has not had the opportunity for the advanced study and teaching of the subject provided by graduate economics programs. It is, of course, a rare person who can effectively teach law courses without having formal legal training. The standard credentials required today for obtaining a position at a major American law school that would involve teaching law and economics courses, particularly for a person seeking to obtain an entry-level position, are both a J.D. (or post-graduate L.L.B.) degree in law and a Ph.D. in economics.

⁵ The Universities of Auckland, Canterbury, and Waikato do not even list such a course in their catalogues. Victoria University of Wellington has had a "Law and Economics" law faculty elective listed in its catalogue in recent years, but that course was not offered during the 1995 or 1996 academic years. Similarly, the University of Otago has had a "Law and Economics" law faculty elective listed in its catalogue for some time, but that course has not been offered for at least the past several years. Several of these universities offer Economic Analysis of Law electives elsewhere in their curricula, but these courses are targeted at economics majors with strong economics backgrounds, and are taken by relatively few law students. For example, the Economics Department of the University of Canterbury had 22 students enrolled in its Economic Analysis of Law elective in 1996, but only one of these students was majoring in law (conversations with Alan Woodfield, University of Canterbury). Such courses are also offered by the Economics Department at the University of Auckland, and by the School of Management Studies at Waikato at both the graduate and undergraduate level, but with similarly quite small law student enrollments. For example, at Waikato only one out of 11 students enrolled in the graduate elective in 1996, and no more than 6 out of 45 students enrolled in the undergraduate elective in 1995, were law students (conversations with Peter Fitzsimons, University of Waikato).

network of regulatory restrictions and cross-subsidies with a more efficient, market-oriented, “user pays” regime is based, at bottom, upon acceptance of the wealth-maximization principle as a proper and operationally feasible normative criterion for social policy making. A close scrutiny of the merits of that principle against the background of competing utilitarian, Kantian, and theologically-based normative criteria, and demonstration of its application in policy assessment, is at the core of well-designed survey courses in the economic analysis of law. Such courses can impart to law students a valuable additional perspective on many questions of great public import.

If today’s law graduates are going to be able to function effectively in the coming years as MP’s or top civil servants, or be able to influence the decisions of such government officials, they must develop some facility with economic analysis and discourse. It is therefore crucial that their legal education provide them with an opportunity to reflect critically upon and apply the concepts underlying the economic efficiency orientation. Such training will also serve to make them more effective advocates before the courts, especially since some New Zealand judges now appear to be embracing a more quasi-legislative conception of their role and giving increasing emphasis to economic efficiency considerations in their rulings. The failure of New Zealand law faculties to provide students with opportunities comparable to those widely available in the United States—and also available, although less widely, in the rest of the English-speaking world—to develop this economic expertise is therefore a serious shortcoming that calls for explanation and, if possible, correction.

In the following sections of this brief article I will offer my assessment as to why this gap exists in New Zealand legal education, and what actions could be taken to overcome it. In brief, I believe that the deficiency stems from a combination of financial and political factors that have retarded the incorporation of such courses into law school curricula. I think that the financial impediments can be overcome, but I am somewhat less optimistic about the pressures for surmounting the more political obstacles.

Why Does the Gap Exist?

It is not immediately apparent why none of the New Zealand law schools currently offers an economic analysis of law elective. There certainly does not appear to be any general tendency on the part of the law faculties to resist incorporation of recent jurisprudential developments into their curricula. For example, the various forms of critical, feminist and interdisciplinary law and sociology-type scholarship are all reasonably well represented in the curricula of all of the schools. The problem here is specific to the law and economics area.

There is also no reason to expect that economic analysis of law electives would fail to attract sufficient numbers of students to be viable. It is true that only a very limited number of New Zealand law students currently enroll in those few economic analysis of law courses that are offered outside of the law faculties by several of the universities.⁶ Such courses, however, are usually taught by faculty members with extensive economics backgrounds but little if any formal training

⁶ *Id.*

in law. Those persons would naturally tend to emphasize the pure economic theory that is their special expertise, rather than the legal applications of that theory. It is probably this emphasis that is holding back law student enrollments, rather than any general law student reluctance to enroll in courses that take an economic approach to legal issues. On the contrary, experience elsewhere suggests that those courses when offered by law faculties are likely to be relatively popular, particularly with the better students, and to attract enrollments that exceed those of many other existing electives. In my view, the problem here lies on the supply side, not with demand.

I surmise that there are two independent causes that have contributed to the failure of New Zealand law faculties to offer economic analysis of law electives. First, the faculties may feel that they are financially unable to hire qualified teachers. Secondly, there may be "political" resistance both within law faculties and arising elsewhere in the university communities. Let me briefly discuss each of these possible explanations, and then consider whether and how those obstacles might each be overcome.

First of all, the New Zealand education system is not currently producing a significant pool of potential law faculty candidates who have the ideal background of a law degree, a Ph.D. degree in economics, and teaching experience in both fields that best qualifies one to teach these broad-ranging and pedagogically challenging courses. None of the country's universities offers a joint J.D./Ph.D. or LL.M./Ph.D. program that would allow a motivated person to obtain both of those credentials in as little as five or six years of post-graduate study—as now do, for example, a number of the leading American universities. If one seeks to obtain both of these graduate degrees in New Zealand one must complete the two degree programs separately and sequentially, which is a long-term and expensive undertaking. As a result, very few New Zealand residents have obtained both credentials. Moreover, those who have done so may often be reluctant to accept academic appointments here, since they generally have attractive private sector opportunities that offer substantially higher initial compensation than entry-level academic positions in New Zealand, and promise better long-term prospects for amassing significant wealth.

For at least the next few years, therefore, the faculty best qualified to teach these courses would most likely have to be imported, probably largely from the United States which is the only nation where the pool of qualified candidates is of significant size. The American law schools, however, offer compensation packages that are much more generous than those provided by New Zealand law schools to faculty of comparable expertise and experience.⁷ Such imported

⁷ The "better" American law schools currently pay entry-level salaries in the range of NZ\$75,000 to \$90,000 to candidates with such qualifications, and the overall median full-time law professor salary in the United States, all ranks combined, is now approximately NZ\$125,000. *Consultant's Digest*, Office of the Consultant on Legal Education to the American Bar Association, V.5, No. 1, p.6 (May 1995). Moreover, the supplementary retirement contributions generally paid by American universities to the accounts of their faculty members are quite generous by New Zealand standards, and Americans have further opportunities for making deductible personal contributions to tax-deferred retirement savings accounts not available in New Zealand. It is common for American universities to contribute annually to a

faculty would therefore be quite expensive to hire if competitive salaries had to be paid.

Moreover, in recent years the New Zealand government has been increasingly subjecting the universities to the same sort of efficiency-oriented restructuring that much of the rest of the society has already undergone. The universities are thus currently caught in an uncomfortable financial squeeze. On one side, they face a gradual reduction of government subsidies for education, to be replaced by higher student tuition fees. On the other side, there is student resentment of recent sharp tuition increases and resistance to the prospects for further significant increases, as evidenced by vigorous public demonstrations and other forms of student protest.

Law schools are certainly not exempt from these increasingly severe financial constraints, and it will be a challenge to their deans and faculties simply to maintain their existing staffing and programmes unscathed in such an environment. Under these financial circumstances, bringing in expensive specialists from abroad to offer these new electives would be difficult even if there were fairly widespread support for the initiative.

However, supporters of such an initiative are likely to encounter some opposition to the introduction of economic analysis of law courses into law school curricula that is based upon grounds other than their possible impacts upon law school budgets, or possible concerns as to low student enrollments. Some of this opposition may arise within the law faculties themselves, and be brought to bear upon faculty and deans in their curricular decision-making. In addition, further opposition may come from economics departments located in schools of commerce or management science, making itself felt more at the higher levels of university governance than at the faculty or decanal level.

Doubtless there are some legal academics in New Zealand who would oppose adding economic analysis of law electives to their curriculum, despite their judgment that those courses would be of some value to their students, simply because they are not convinced that such courses will be of sufficient value to justify their inclusion at the expense of existing electives or other potential curricular additions. However, given the strong arguments noted above that can be made for the special relevance and value of economic analysis electives, I doubt that such reluctant opposition based on the perceived greater value of other courses or potential curricular additions is very widespread or intensely felt. I suspect that most of the resistance to introducing such courses, apart from that based upon the previously noted financial concerns, is of a more "political" character.

Let me explain what I mean by this term. There is apparently a fairly widespread perception among New Zealand legal academics that the conventional "Chicago School" framework through which the economic analysis of law is generally conducted is based upon assumptions that have a strong status quo bias, and that its primary normative criterion of wealth maximization

faculty member's tax-deferred retirement account a sum equal to 10% of his before-tax income, so long as the faculty member also makes the maximum personal tax-deductible contribution allowed by law (5% of before-tax income) to that account.

over-emphasizes the efficiency advantages of markets and unduly minimizes their distributional shortcomings. Persons with such convictions tend to regard law and economics analysis as being of doubtful validity, viewing it largely as a rhetorical ploy invoked by those on the "right" wing of the political spectrum to further entrench their vested interests.⁸

One would expect persons who are generally opposed to giving greater sway to market forces as social co-ordination mechanisms also to have reservations about adding this course to the curriculum. The law and economics framework certainly emphasizes the power of market forces to bring about efficient resource allocations, and highlights the inefficiencies and other unintended adverse consequences that often result from governmental efforts to supersede market mechanisms or redistribute wealth. Critics of such courses may feel—with some justification—that their favoured proposals for various forms of state intervention or redistribution of wealth are more likely to receive favourable political action if they are debated in the traditional legal language of "rights," "duties" and "equitable concerns" rather than if they are assessed by the criteria of economic efficiency and their impact on economic growth and international trade competitiveness. These dissenters may therefore elect to oppose curricular innovations such as the introduction of economic analysis of law courses that would serve to encourage such a change in the discourse through which social policy is made.

Such political opposition may not always be articulated in such a candid fashion. The current financial constraints facing legal education in New Zealand conveniently provide a plausible and apparently neutral ground on which to oppose the addition of such electives. Those faculty that have such essentially political objections to such courses, but who for whatever reasons are reluctant to risk transmuting a routine faculty curricular debate into a potentially divisive clash over first principles, can thereby plausibly invoke financial constraints as a basis for their opposition and thus avoid having openly to frame the question in more political and controversial terms.

⁸ I will not offer in this short essay any opinion on the merits of this critical position. I will say that my experience is that people's views in this area are usually deeply grounded in their basic ideological orientation and are quite resistant to change through argumentation and evidence. I have published several recent articles that address in various ways some of the heated controversies surrounding the foundational assumptions of the economic analysis of law. See, e.g., Gregory Crespi "Teaching the New Law and Economics," 25 *Univ. Tol. L. Rev.* 713 (1994); Gregory Crespi, "Microeconomics Made (Too) Easy: A Casebook Approach to Teaching Law and Economics," 91 *Mich. L. Rev.* 1560 (1993); Gregory Crespi, "Market Magic: Can the Invisible Hand Strangle Bigotry?," 72 *B. U. L. Rev.* 991 (1992); Gregory Crespi, "The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Nonfalsifiability and Normative Bias," 67 *Not. Dame L. Rev.* 231 (1991).

There exists a voluminous literature concerning the proper role of economics in legal education and analysis. Two major symposia collections published in the early 1980s provide a particularly good introduction to this literature. See "Symposium: The Place of Economics in Legal Education," 33 *Jour. Leg. Educ.* 183-368 (1983); "Symposium on Efficiency as a Legal Concern," 8 *Hof. L. Rev.* 485-972 (1980).

The other potential source of political opposition to such electives within the university community stems largely from the more prosaic grounds of departmental turf and budgets. Under the current framework of state funding of university education in New Zealand departmental budgets are linked, sometimes quite directly and immediately, to the size of course enrollments. An economic analysis of law elective taught by a professor with full academic credentials in law could well prove to be quite attractive to many students—most obviously to the numerous students pursuing joint law / commerce majors, but also to economics majors or business majors with some interest in legal questions. Many of the students enrolling in such courses would likely do so in lieu of taking an additional economics elective, particularly an economic analysis of law course offered elsewhere in the university by a faculty member who lacks the advantage of formal legal training. This could cost the economics departments (and their respective schools of commerce or management science) a significant amount of state funding.

One might therefore expect economics departments to be inclined to take a dim view of such courses being offered by law faculties. This is particularly likely to be the case if those courses are being taught by law faculty without Ph.D. degrees in economics, and if an alternative economic analysis of law course is offered elsewhere in the university by a fully credentialed economist. Under those circumstances the opposition could be articulated in terms of departmental responsibility for maintaining appropriate standards of excellence in instruction taking place in their discipline, rather than in the more self-serving and less persuasive rhetoric of departmental budget impacts.

My conclusion, therefore, is that there are at least two significant reasons why none of the law schools in New Zealand are now offering instruction in the economic analysis of law, despite the likely popularity of such courses and their obvious value to students. First, it would appear to be a relatively expensive undertaking to offer these courses, at a time when departmental budgets are very tight. Secondly, there would probably be significant opposition of an essentially political character to such courses that would arise both within and outside of law faculties, although such opponents may at times be less than fully candid as to their true concerns.

What Can be Done About the Gap

I think that it is reasonably possible to overcome the financial obstacles that now stand in the way of offering economic analysis of law courses. I am somewhat less sanguine, however, about the ability to surmount the more political forms of resistance discussed above, though I am not entirely pessimistic.

It seems a given that New Zealand law faculties will not in the foreseeable future be able to offer internationally competitive salaries at either the entry-level or at more senior levels to those persons most qualified to teach the economic analysis of law. However, the market for legal academic positions is currently extremely tight in the United States and elsewhere, and a number of very well qualified young graduates cannot now obtain even temporary visiting appointments with which to begin their academic careers. Given the well-known environmental amenities associated with life in New Zealand that are available

to a young, active person, I would think that there would be some Americans with quite strong law and economics credentials who would be willing to accept a New Zealand entry-level salary, at least for the first few years of their academic careers, particularly if their only alternative were to forswear academic careers altogether.

Recruiting efforts need not be restricted to the entry level. At a more senior level, there is a significant pool of young American (and other) legal academics each year that have just received tenure and are now eligible for their first paid sabbatical leave. Again, given the attractiveness of the non-financial aspects of New Zealand life, and given the substantial sabbatical pay such persons generally receive from their home university, some of these persons may well be willing to accept a one-semester or one-year visiting appointment that paid little more than their marginal family travel and living costs. Consequently, a level of compensation comparable to that paid to a typical domestic faculty member of Senior Lecturer rank might well be sufficient to attract a rising scholar in the field to accept at least a visiting position.

It thus appears that electives in the economic analysis of law could be offered by New Zealand law faculties at a per-student instructional cost comparable to or even below that of many of their existing electives, should those faculties undertake a serious international recruitment effort for qualified staff. The real problem that will have to be overcome, therefore, is likely to be the opposition by those law faculty members who regard instruction in such a mode of analysis as constituting a wedge for the displacement of traditional normative legal principles by an impoverished capitalist conception of justice, and by economics departments which may have concerns as to the quality of economics instruction provided, and who also fear a loss of students to such courses.

Such opposition to the introduction of economic analysis of law courses proved to be little hindrance to their adoption in America. However, New Zealand law professors have traditionally been more sceptical of the merits of market-oriented approaches to social organization than have been many of their American counterparts. In addition, the post-graduate nature of American legal education has sharply reduced the potential for turf conflicts and other disputes relating to course content or staffing with economics departments or other undergraduate-oriented departments within the university setting. Political resistance to such courses is consequently likely to be more powerful and persistent in New Zealand than it was in the United States.

I do not see any reason to expect that either of these sources of political resistance to law faculties offering economic analysis of law courses will weaken in the near future. To the contrary, I believe these political obstacles are likely to become even greater impediments. The painful financial restructuring of New Zealand higher education will continue for at least several more years, and will likely reinforce such resistance. The general climate of opinion in university communities almost certainly will become increasingly anti-government as more and more of the traditional subsidy of higher education is removed and tuition rates continue to climb towards full-cost levels. Such a predictable change in the university community's general attitude concerning the merits of the Government's "user pays" orientation, as the effects of moving towards aligning

costs with benefits hit ever closer to home, is likely to reinforce any existing tendencies on the part of some law faculty to be sceptical of market-oriented forms of legal analysis. Moreover, the increasingly severe financial pressures on economics departments are likely to make them even more reluctant to embrace curricular changes that have the likely effect of reducing departmental enrollments and budgets.

If those political problems are eventually solved, it will, ironically, probably be due to the same market forces that are the core subject matter of the needed course. The future of legal education in New Zealand, all agree, will likely involve greater competition between law faculties to attract qualified students, who in turn will become more discerning in their choice of school given the substantially larger financial commitments that will be required. Law faculties will be increasingly forced to identify and publicize their particular assets, and to develop attractive and distinctive specialized programmes within their overall curricula.

If one of the New Zealand law faculties were to offer an economic analysis of law course,⁹ it could feature that course as a special attraction in materials provided to prospective students. If such advertising proves to be effective in convincing these prospective students of the course's special relevance and professional value—and its attractiveness to potential employers—the other law schools would be placed under strong competitive pressure to match the offering to avoid losing students. Given such direct financial pressure to offer the course, I think that the internal university political opposition both inside and outside of the law faculties would likely be overcome, and the course would soon be offered by most if not all of the country's law faculties.

If I am correct as to how the competitive dynamics would play out once such a course were in place, the crucial question then becomes whether one of the five New Zealand law faculties will bestir itself to overcome the obstacles and offer and publicize such a course, and thus steal a march on its rivals and force their competitive responses. I surely hope so, because the next generation of lawyers in New Zealand need to have a strong and discerning grasp of economic principles and their application to legal questions if they are to adequately serve their clients.

⁹ Victoria University of Wellington, as of May 1996, was giving serious consideration to offering such a course in the near future through the joint efforts of a number of members of its current law faculty (conversations with Geoffrey McLay, Victoria University of Wellington).