

# Teaching Law and Socioeconomics

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## I. INTRODUCTION

The field of law and socioeconomics studies the interrelationship between law and economic/social processes. It not only critiques neoclassical economics, but draws on alternative economic approaches and the other social sciences, such as psychology, sociology, anthropology, and political science, for the tools of public policy

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analysis. It offers students an interdisciplinary, values-based approach to public policy that is designed to take into account the power implications and distributional effects of laws. Law and socioeconomics stresses the importance to effective regulation of attention to historical context, philosophical beliefs, culture, existing institutions, working rules, and sources of power. The alternative economic approaches that it encompasses include behavioral, neo-institutional, feminist, binary, neo-Marxist, traditional institutional, and post-Keynesian economics. These heterodox economic approaches are united in that they disagree with one or more aspects of neoclassical economics.<sup>1</sup>

This Article, in Part II, gives a brief introduction to socioeconomics and its relevance to law. Part III presents an overview of what a law and socioeconomics course may look like, based on materials in my textbook, *Law and Public Policy: A Socioeconomic Approach*.<sup>2</sup> Part IV presents in more detail exploration of materials included in a segment of the course.

## II. AN INTRODUCTION TO SOCIOECONOMICS AND ITS RELEVANCE TO LAW

The legal academy has been mainly exposed to neoclassical economics. Many teachers are not aware of the limitations of this approach or of alternative schools of economic thought (hereinafter referred to as socioeconomics) that criticize neoclassical economics and offer alternative perspectives. I provide a brief introduction to law and

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1. For discussions of the meaning of socioeconomics, see ROBERT A. SOLO, *ECONOMIC ORGANIZATIONS AND SOCIAL SYSTEMS* v–vii (2000); Richard M. Coughlin, *Introduction: Toward an Agenda for Socio-Economics*, in *MORALITY, RATIONALITY, AND EFFICIENCY: NEW PERSPECTIVES ON SOCIO-ECONOMICS* 3, 4–5 (Richard M. Coughlin ed., 1991); Richard M. Coughlin, *Whose Morality? Which Community? What Interests? Socio-Economics and Communitarian Perspectives*, 25 *J. SOCIO-ECON.* 135, 136–37 (1996); Amitai Etzioni, *Socio-Economics: A Budding Challenge*, in *SOCIO-ECONOMICS: TOWARD A NEW SYNTHESIS* 3, 4 (Amitai Etzioni & Paul R. Lawrence eds., 1991); Richard Hattwick, *The Future Paradigm for Socio-Economics: Three Visions and a Call for Papers*, 28 *J. SOCIO-ECON.* 511, 511 (1999); Paul C. Stern, *The Socio-Economic Perspective and Its Institutional Prospects*, 22 *J. SOCIO-ECON.* 1, 1 (1993); Charles J. Whalen, *Preface* to *POLITICAL ECONOMY FOR THE 21ST CENTURY: CONTEMPORARY VIEWS ON THE TREND OF ECONOMICS* xv, xv (Charles J. Whalen ed., 1996). For discussions of law and socioeconomics, see LYNNE L. DALLAS, *LAW AND PUBLIC POLICY: A SOCIOECONOMIC APPROACH* (forthcoming Spring 2004); Robert Ashford, *Socio-Economics: What Is Its Place in Law Practice?*, 1997 *WIS. L. REV.* 611, 611, 614–15; Robert Ashford, *The Socio-Economic Foundation of Corporate Law and Corporate Social Responsibility*, 76 *TUL. L. REV.* 1187, 1189 (2002); Lynne L. Dallas, *Law and Socioeconomics in Legal Education*, 55 *RUTGERS L. REV.* 855, 855–57 (2003); Jeffrey L. Harrison, *Law and Socioeconomics*, 49 *J. LEGAL EDUC.* 224, 224–25 (1999); Jeffrey L. Harrison, *Teaching Contracts from a Socioeconomic Perspective*, 44 *ST. LOUIS U. L.J.* 1233, 1233–36 (2000).

2. DALLAS, *supra* note 1. This textbook is forthcoming from the Carolina Academic Press in Spring 2004.

socioeconomics, in this Part, by considering concepts used by neoclassical economists and socioeconomists and their relevance to law.

### A. Conceptions of Markets

From the socioeconomic perspective, markets are “social construction.”<sup>3</sup> “Consumption, production and distribution of income [are] determined in [the] context of legal/institutional environment, social norms, customs and rules, market power, corporate power, bargaining power, class, race, gender, and other forms of discrimination.”<sup>4</sup> From the neoclassical perspective, markets are “natural” and “private.”<sup>5</sup> “Persons exercising individual choice determine consumption, production and distribution of income.”<sup>6</sup>

What is the relevance of these concepts for the role of law? Reliance is often placed on the self-regulatory nature of markets when markets are perceived as natural and private. In addition, for the autonomous and self-sufficient actors exercising free choice in these markets, law is designed to ensure the enforcement of contracts and possibly to regulate fraud.<sup>7</sup>

In contrast, when markets are social constructions, the role of law is broadened.<sup>8</sup> The law may seek to influence social norms, for example. This role refers to the expressive function of law, where law is designed not only to affect incentives based on rational cost-benefit analyses, but to influence the very values that persons internalize in making choices.<sup>9</sup> Understanding markets and choice as embedded in a social milieu also emphasizes the interdependence of economic actors and how the behavior and choices of some people affect the opportunity sets of others.<sup>10</sup> If actors are interdependent, the law’s role becomes to manage relationships to assure fairness in terms of the opportunities available to various actors and the distribution of entitlements. For example, the law may prohibit discrimination on the basis of invidious distinctions, such as race, gender, and sexual orientation.

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3. Dallas, *supra* note 1, at 858.

4. *Id.* at 891.

5. *Id.* at 890.

6. *Id.* at 891.

7. *Id.* at 859.

8. *Id.* at 859–60.

9. *Id.* at 864.

10. *Id.* at 858.

## B. Conceptions of Economics as a Discipline

To law and socioeconomic scholars, economics is a study of “provisioning,” that is, “how societies provide for the well-being of their members.”<sup>11</sup> It is a study of economics in relation to culture and history and is process-oriented and evolutionary.<sup>12</sup> The economy is viewed as the result of “a complex historical process that is ever evolving and whose future is influenced by the past although not wholly determined by it.”<sup>13</sup> In contrast, neoclassical economists understand economics to be a “[t]heory of choice and how scarce resources are allocated to satisfy unlimited human wants.”<sup>14</sup> They use a timeless microeconomic model to make their predictions.<sup>15</sup>

To understand the differences, consider the neoclassical economic model, which predicts that wages result from the intersection of labor demand and supply curves and reflect the marginal productivity of individuals or, according to the statistical discrimination theory, the marginal productivity of groups.<sup>16</sup> In contrast, socioeconomic claim that wage discrimination does not necessarily reflect productivity differences, but rests on historical legacies and culture that result in differential assessments of worth, often based on stereotyping.<sup>17</sup> Supportive of this view is the failure of human capital theory to explain away economic discrimination based on productivity differences.<sup>18</sup> In addition, socioeconomic claim that wage discrimination is, in some cases, based on fairness considerations.<sup>19</sup> This observation explains, for example, inter-industry wage differentials for similar jobs.<sup>20</sup> The different economic approaches to economics as a discipline support different legal prescriptions.

Consider another example of the different approaches to economics as a discipline in the context of market reform in Russia. Based on the insights of neoclassical economists, the Washington Consensus developed to advise “shock therapy,” which refers to the rapid liberalization of markets in Russia and the privatization of enterprises.<sup>21</sup> This advice was

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11. *Id.* at 891.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. DALLAS, *supra* note 1, at ch. 7 (Discrimination), ch. 9 (Families, Markets and the Law).

17. *Id.* at ch. 7 (Discrimination).

18. *Id.* at ch. 7 (Discrimination), ch. 9 (Families, Markets and the Law).

19. *Id.* at ch. 9 (Families, Markets and the Law).

20. *Id.*

21. Bernard Black et al., *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731, 1739 (2000); see Joseph E. Stiglitz, Whither

followed based on the predictions that new property owners would have incentives to maximize the value of their corporations and that the market would inflict economic discipline. What transpired was very different, however, and confirmed the warnings of the evolutionary-institutional economic approach.<sup>22</sup> There was wholesale looting of Russian enterprises with devastating consequences to the economy and the Russian people. Per capita gross domestic product declined by forty percent, persons in poverty grew from a fraction of the population to thirty-seven percent, and the average life span of the population declined.<sup>23</sup> This was truly a story of human tragedy that was predicted by the evolutionary-institutional economic approach, but came as surprise to neoclassical economists who relied on their timeless model in a real world setting.<sup>24</sup>

A final example of the different approaches to economics as a discipline involves a research project in which I was asked by a Slovene scholar to evaluate Slovenia's recently-adopted employee codetermination system of corporate governance. In this system, employees as well as shareholders elect directors to the supervisory board of a two-tiered board system.<sup>25</sup> I did not adopt a one-size-fits-all model based on the theoretical arguments of neoclassical economic scholars who reject stakeholder theory and argue in favor of shareholder representation on corporate boards to achieve the "efficient" objective of maximizing profit and shareholder gain.<sup>26</sup>

In contrast, I took an institutional-evolutionary economic approach. I explored why employee codetermination had been adopted in Slovenia. What functions did it serve as Slovenia was emerging as a market economy? I found a number of reasons why employee codetermination was effective in the historical context in which Slovenia found itself. For example, Slovenia was unique among Eastern European countries in having a history of employee self-management of state-owned

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Reform? Ten Years of the Transition, Keynote Address at the World Bank Annual Bank Conference on Development Economics (Apr. 28–30, 1999), available at <http://www.worldbank.org/research/abcde/pdfs/stiglitz.pdf>.

22. DALLAS, *supra* note 1, at ch. 12 (Emerging Market Economies).

23. Black et al., *supra* note 21, at 1780–81; John Peters et al., *Economic Transition as a Crisis of Vision: Classical Versus Neoclassical Theories of General Equilibrium*, 28 E. ECON. J. 217, 227 (2002).

24. Black et al., *supra* note 21, at 1733, 1767–77, 1797.

25. Lynne L. Dallas, *The Evolutionary-Institutional Approach to Corporate Governance: The Case of Slovenia* (2004) (unpublished manuscript, on file with author).

26. DALLAS, *supra* note 1, at ch. 10 (Corporate Social Responsibility, Markets and the Law).

enterprises.<sup>27</sup> Employee codetermination provided a mechanism to gradually introduce a governance system in which shareholders also played a part. In addition, for Slovene corporations to become competitive, it was necessary for the employees to make sacrifices in terms of wages and benefits.<sup>28</sup> Codetermination provided employees with some assurance that they would share in the future rewards that these sacrifices would entail. Therefore, it was easier to institute these changes without undue discontent and adverse motivational effects. It was also the case that many of the shares in Slovene corporations were to be owned by Slovene political entities and investment companies associated with political parties.<sup>29</sup> In this context, employee representation provided a counterweight to the exercise of political authority within Slovene corporations. Additionally, the two-tiered board structure, which provides for a separate management board, would serve to discourage political interference into the day-to-day management of the corporation.<sup>30</sup> Slovene corporations also did a substantial amount of trade with Germany and expected this trade to increase.<sup>31</sup> They sought to make their corporations compatible with German corporations that have codetermination.<sup>32</sup> Finally, emerging from communism, employee codetermination—rather than shareholder wealth maximization—was a system of corporate governance that Slovenians were prepared to accept based on the values that they held.<sup>33</sup> In this research I was reminded of a statement by Philip Mirowski, an institutional economist, who explains that:

[t]he economy is primarily a process of learning, negotiation, and coordination, and not a ratification of some pre-existent goals or end-state. Economic rationality is socially and culturally determined. . . . The economy itself may be conceptualized as the prosecution of inquiry by material means, with the community both constructing and discovering its values.<sup>34</sup>

### *C. Conceptions of Economic Actors*

Another area of difference between law and socioeconomics and law and neoclassical economics involves assumptions of human behavior. Neoclassical economics is based on assumptions that people are self-

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27. Dallas, *supra* note 25.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Dallas, *supra* note 1, at 861 (quoting Philip Mirowski, *The Philosophical Basis of Institutional Economics*, in 1 *EVOLUTIONARY ECONOMICS* 51, 69 (Marc R. Tool ed., 1988)).

interested and rational.<sup>35</sup> Socioeconomists challenge these assumptions.<sup>36</sup> First, consider the self-interested assumption. In my law and socioeconomics class I have students play the ultimatum game. In this game:

one student assumes the role of an allocator and decides what part of a dollar he or she is willing to offer to another student, the recipient. The recipient may accept the offer, in which case both players receive the amounts allocated. If the recipient rejects the offer, however, neither player receives anything.<sup>37</sup>

Based on assumptions of the rational actor, neoclassical economists predict that recipients will accept any offer above zero.<sup>38</sup> In reality, many recipients will accept only offers for higher amounts that they deem “fair.”<sup>39</sup>

This finding concerning the importance of fairness is relevant to the law. People are concerned about outcomes, but also about fairness.<sup>40</sup> When people are treated in a procedurally fair manner, they will accept adverse outcomes and comply with them more readily than people who perceive the procedure to be unfair.<sup>41</sup> For example, a study of civil litigation in federal courts found that there was a strong relationship between litigants’ judgments of procedural fairness and their acceptance of arbitration awards.<sup>42</sup> Moreover, judgments of procedural fairness were found to relate to the acceptance of the legitimacy of authorities, and these perceptions of legitimacy were related to greater legal compliance.<sup>43</sup>

In addition to challenging the assumption of self-interest, the rationality assumption has also been challenged by law and socioeconomic scholars.<sup>44</sup> The law reviews now contain numerous articles that explore the significance to various areas of law of bounded rationality, cognitive biases, and heuristics.<sup>45</sup> Illustrative are articles on discrimination, which

35. Dallas, *supra* note 1, at 862.

36. *Id.* at 864–68.

37. *Id.* at 864–65 (footnotes omitted).

38. *Id.* at 865.

39. *Id.*

40. DALLAS, *supra* note 1, at ch. 3 (Economic Fairness and Well-Being), ch. 4 (Fairness and Legal Socialization).

41. *Id.* at ch. 4 (Fairness and Legal Socialization) (citing Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC’Y REV. 163, 167–71 (1997)).

42. *Id.*

43. *Id.*

44. Dallas, *supra* note 1, at 866–68.

45. See DALLAS, *supra* note 1, at ch. 2 (Law and Cognitive Psychology) (exploring findings of cognitive psychology that suggest alternate legal rules and procedures).

point out the adverse effects of categorizing and stereotyping people by race, gender, and other social characteristics. Cognitive psychologists explain findings relevant to the employment context: (1) persons disproportionately attribute ingroup members' failures to situational or circumstantial factors and outgroup members' failures to dispositional or character traits; (2) persons are better able to recall the undesirable behavior of outgroup members than the similar undesirable behavior of ingroup members; and (3) persons have a more negative reaction to the problematic behavior of a token or "solo" than to the problematic behavior of a person who is not a token.<sup>46</sup> All of these biases affect employment and promotion decisions and are important for lawmakers to understand if they are concerned about discrimination.

#### *D. Interpersonal Utility Comparisons and Conceptions of Well-Being*

Law and neoclassical economic scholars will not make interpersonal utility comparisons.<sup>47</sup> That is, a dollar is taken to mean the same to all persons. A dollar used for food to survive is equivalent to a dollar used to buy diamonds.<sup>48</sup> This position is contrary to that of economists in the past who believed in the declining utility of the dollar as a person's wealth increased.<sup>49</sup> In addition, many socioeconomists maintain the feasibility of ascertaining objective and universal needs.<sup>50</sup> Institutional economist Geoffrey Hodgson claims that rational discourse is possible on the subject of human needs, given the human condition and context.<sup>51</sup> Moreover, feminist economist Paula England believes that persons are capable of empathy, which enables them to make interpersonal utility comparisons.<sup>52</sup> To socioeconomists, social welfare analysis requires consideration of the extent to which human needs are satisfied.<sup>53</sup> This analysis includes considerations of social and economic rights and distributional concerns.

Law and socioeconomic scholars also consider both hedonic and eudaimonic well-being.<sup>54</sup> That is, their focus is not simply on maximizing

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46. DALLAS, *supra* note 1, at ch. 7 (Discrimination) (citing Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1192, 1194–95 (1995)).

47. Dallas, *supra* note 1, at 881.

48. *Id.*

49. *Id.* at 881–82.

50. *Id.* at 882.

51. *Id.*

52. *Id.*

53. *Id.*

54. See DALLAS, *supra* note 1, at ch. 3 (Economic Fairness and Well-Being).

pleasure versus pain, but also on considering the psychological conditions necessary for psychological well-being and human actualization.

### *E. Approaches to Legal Regulation*

Law and neoclassical economic scholars apply economics to seek “efficient” laws. In some situations they recommend that markets should allocate property. The popular version of the Coase Theorem, for example, provides that private parties acting in their own self-interest will allocate property through their contracts so that this property will be put to its most efficient use.<sup>55</sup> However, if a market solution is not readily apparent, law and neoclassical economic scholars seek to have courts “mimic” the market.<sup>56</sup> One such method is embraced by their hypothetical bargaining model.<sup>57</sup> According to this method, courts must hypothesize bargaining among the parties and come up with a solution based on this hypothetical bargaining. In addition, they recommend that choices of laws and public projects be based on cost-benefit analysis.<sup>58</sup> The solutions reached by these methods are deemed to be “efficient.”<sup>59</sup> Efficiency is understood as a state that maximizes social welfare and that is neutral or indifferent as to the distribution of wealth.<sup>60</sup>

Law and socioeconomists question whether social welfare is maximized when there are great disparities in wealth.<sup>61</sup> To law and neoclassical economists, there is no difference, from an efficiency perspective, whether ninety percent of the wealth is owned by ten percent of the population or by ninety percent of the population.<sup>62</sup> This makes a difference to law and socioeconomists. They are concerned with distribution.<sup>63</sup> They ask the additional questions of efficient for whom and at what cost to others.

Institutional economists also point out that prices are not neutral but rights specific. That is, prices “reflect the property regime under which the commodities are produced and traded.”<sup>64</sup> In other words, “laws that

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55. Dallas, *supra* note 1, at 893.

56. *Id.* at 872.

57. DALLAS, *supra* note 1, at ch. 3 (Economic Fairness and Well-Being).

58. Dallas, *supra* note 1, at 884.

59. *Id.* at 876–77, 884.

60. *Id.* at 877, 879.

61. *Id.* at 878.

62. *Id.* at 877–78.

63. *Id.* at 878.

64. *Id.*

affect entitlements determine demand and supply curves, prices and costs. Thus, ‘efficiency is a function of existing rights’ and it is ‘circular to maintain that efficiency alone can determine rights.’”<sup>65</sup> Trading reflects the “normative distributive premises underlying the existing legal regime.”<sup>66</sup> The recommendation of mimicking the market, therefore, begs the question of which market we are talking about. There is not one market, but as many markets as different legal rules can create. Consider, for example, the problem used to describe the Coase Theorem with the court allocating property rights to the cattleman. The price at which the farmer is willing to purchase the land from the cattleman and the cattleman is willing to accept is determined by a slew of regulations applicable to farming, grazing, and food products.

The market mimicking solution is even more unhelpful when one takes into account the endowment effect.<sup>67</sup> Behavioral economists have found that the price people are willing to pay if they do not own the property is less than the price that they are willing to accept for the property if they own it.<sup>68</sup> Ownership matters then to the valuation of property. This behavioral finding further supports the conclusion that market trading or “efficiency” is dependent on existing entitlements.

Cost-benefit analysis as a tool of public policy analysis suffers from the same problems of valuation.<sup>69</sup> It is important to recognize the normative assumptions underlying prices and rules used in cost-benefit analysis. Cost-benefit analysis is not a neutral tool of public policy analysis, but necessarily makes value judgments.<sup>70</sup>

Finally, the hypothetical bargaining model is also problematic. As previously explained, it asks the court to determine what the parties would have bargained for if they could have foreseen the problem confronting the court. DeMott captures the problems with this model. She states the following:

[T]he “hypothetical bargain” view of fiduciary obligation does not help to explain the law. For one thing, how hypothetical is the bargain? If it is an approximation of something that *particular* parties would have agreed to, the content of the bargain will, like actual bargains, reflect many factors, including the scarcity of the subject matter of the bargain, the parties’ relative skills in negotiation, and their relative degrees of aversion to risks of varied sorts. In the absence of an actual bargain, one cannot know the import of each of these factors. On the other hand, if the “hypothetical bargain” represented by fiduciary obligation is truly hypothetical, and not an approximation of what

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65. *Id.* (quoting NICOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM* 118 (1997)).

66. *Id.*

67. *Id.* at 868.

68. *Id.*

69. *Id.* at 885.

70. *Id.* at 885–87.

particular parties would have agreed to, why characterize it as a “bargain” at all? In this respect, the metaphor of the hypothetical bargain is like the Wizard of Oz. Behind the curtain is less than appearances might suggest.<sup>71</sup>

#### F. *The Invisible Hand of Adam Smith*

Finally, I will comment on the “invisible hand” of Adam Smith, which is at the heart of neoclassical market analysis. Studies of the prisoners’ dilemma game show that persons pursuing their individual self-interest often obtain outcomes that are not in their self-interest.<sup>72</sup> These findings are contrary to Adam Smith’s invisible hand, whereby individuals pursuing their self-interest are expected to unintentionally maximize social welfare.<sup>73</sup> For example, the invisible hand of Adam Smith is the basis of neoclassical economic arguments in favor of trade liberalization. While this complex topic is beyond the scope of this Article, two observations are in order. The first is that Adam Smith was writing at a time when capital was not mobile as it is today.<sup>74</sup> Daly and Cobb write:

Consider . . . how the system is supposed to work. When enhanced productivity displaces workers in one area, the profits generated thereby are invested in something else. New jobs are created. The workers move to this new industry. The economy as a whole advances.

But when investment capital becomes supranational, there is no assurance that the new investment will be in the country where the jobs are lost. Indeed, acting on individualistic economic principles unencumbered by community, investors seek the best return on their money. A factory employing docile and cheap labor that can export its products to the American market from abroad will be more profitable than one built in the United States. Labor-intensive industry will naturally move to countries where labor is cheaper. Wages will decline in countries where capital investment is reduced.<sup>75</sup>

Thus, the invisible hand does not work from a national perspective if

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71. DALLAS, *supra* note 1, at ch. 3 (Economic Fairness and Well-Being) (quoting Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 889–90) (emphasis added).

72. *Id.* at ch 6 (Cooperation, Trust and the Law) (quoting Robert M. Axelrod & Geoffrey M. Hodgson, *The Evolution of Cooperation*, in THE ELGAR COMPANION TO INSTITUTIONAL AND EVOLUTIONARY ECONOMICS 80–84 (Geoffrey M. Hodgson et al. eds., 1994)).

73. *Id.* at ch. 11 (Globalization: A Revisionist Approach) (quoting HERMAN E. DALY & JOHN COBB, JR., FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARD COMMUNITY, THE ENVIRONMENT, AND A SUSTAINABLE FUTURE 209–23, 226–27 (2d ed. 1994)).

74. *Id.*

75. *Id.*

capital is mobile. Actually, Adam Smith understood this fact.<sup>76</sup>

The second observation is of the collective action problem presented by Daly and Cobb. They explain:

Consider . . . a U.S. Firm that moves its production across the Rio Grande into Mexico. It lays off U.S. workers earning 10 to 12 dollars per hour and hires Mexican workers at less than two dollars per hour. The U.S. capitalist-owner is much better off, the Mexican workers are slightly better off, and the U.S. worker is much worse off. . . . [The U.S. firm acting in its individual self-interest] wants to buy labor in the low-income country, and sell its product in the high-income country. It wants to take advantage of high incomes in the U.S. product market while failing to contribute to the maintenance of that high-income market by buying labor in the U.S. factors markets.<sup>77</sup>

While it is in the collective interest then of such firms to maintain a rich consumers market in the United States, it is not in their individual interest to do so. Again, the invisible hand of Adam Smith fails to deal the cards predicted.

### *G. Two Further Examples*

Consider two further illustrations contrasting law and socioeconomics and law and neoclassical economics, one in legal scholarship and one in teaching. Concerning legal scholarship, I recently completed an article on corporate ethical climates.<sup>78</sup> I believe that a law and neoclassical economic scholar exploring this subject would focus mainly on incentives that would encourage a person to act ethically, such as monitoring systems and punishments for unethical conduct. In contrast, from a law and socioeconomic perspective, I also focused on factors that would encourage employees to internalize ethical values, such as the organization's values, its decisionmaking procedures, certain compensation systems, and organizational leadership.

An illustration of different approaches to teaching involves the *Baby M* case,<sup>79</sup> which I cover in my law and socioeconomics seminar. In that case the surrogate mother did not want to give the child to the natural father and his wife. A student after class told me that her contracts class had discussed the *Baby M* case, and the conclusion was that the contract should be enforced because, after all, the parties were adults, and the procedure was initiated by the father, who intended to care for the child after birth. However, unlike the contracts class, I assigned contextual

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76. *Id.*

77. *Id.*

78. Lynne L. Dallas, *A Preliminary Inquiry into the Responsibility of Corporations and Their Officers and Directors for Corporate Climate: The Psychology of Enron's Demise*, 35 RUTGERS L.J. 1 (2003).

79. *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

material to students. This material contained information on the surrogacy industry and motivations of surrogate mothers.

According to Anderson, women who are motivated purely by money are often rejected by the surrogacy industry.<sup>80</sup> It selects women based on traits of submissiveness and emphasizes motives of generosity and love in giving a baby to a childless couple.<sup>81</sup> The industry stresses the surrogate mother's altruistic motives should she object to contract terms.<sup>82</sup>

Many women become surrogate mothers believing that surrogacy will fulfill some emotional need, which is unlikely to happen.<sup>83</sup> For example, many of them wish to feel special and appreciated and desire emotional support and personal connections.<sup>84</sup> Of course, most adoptive parents want the baby and to have nothing to do with the birth mother.<sup>85</sup>

After separating from the baby, most surrogate mothers have emotional issues, some quite serious.<sup>86</sup> The women have no idea in advance of the psychological attachment that they may develop to the child, although this is well known in the surrogacy industry. While this emotional fallout is predictable, these contracts do not contain provisions for therapy for the surrogate mother after separating from the child, but often contain provisions that require the surrogate mother to do "emotional labor" in suppressing the development of feelings of parental love.<sup>87</sup>

The industry refers to these mothers as "hatcheries," "plumbing," "rented property," or "surrogate uteruses."<sup>88</sup> This dehumanization obviously serves the purpose of making it easier for employees to deflect and belittle the expected emotions of these women.

There are also societal issues involved in enforcing these contracts that concern the effects of commodifying babies and pricing them. It may change norms and the ways parents view their children and children see themselves.<sup>89</sup> Children are affected. For example, children of some

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80. DALLAS, *supra* note 1, at ch. 8 (The Domain of Markets) (citing ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 169–72, 174–81, 185–89 (1993)).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* (stating that motives also include punishing oneself for a prior abortion and coming to terms with emotions associated with losing another child in the past).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

surrogate mothers have expressed fears that they too will be sold and feel they have lost a brother or sister when the surrogate mother gives up the baby.<sup>90</sup>

In addition, there is the issue of introducing the profit motive in such a sensitive area fraught with emotions. The intermediary used in the *Baby M* case, for example, failed to disclose to the adoptive parents and the surrogate mother the results of the surrogate mother's psychological test, which was part of the procedures agreed to.<sup>91</sup> The psychologist reported that the surrogate mother, Ms. Whitehead, exhibited traits that indicated she would have a difficult time separating from the baby and that further testing should be done.<sup>92</sup> No further testing was done.<sup>93</sup> In fact, Ms. Whitehead could not separate from her baby and took the baby out of the state.<sup>94</sup>

Finally, there are issues associated with having a production system for babies. Will we see baby farms? What if the market should dry up—should we have liquidation sales for babies? Also, there is the issue of the slippery slope: why not have a market for older children as well?

After considering these issues, the student was not so sure that surrogacy contracts should be enforced and appreciated the complexity of this public policy issue, which is not clearly reducible to a simple ideology connecting autonomy with enforcing contracts among adults.

### III. THE SCOPE OF LAW AND SOCIOECONOMICS COURSES

I present in this Part the subjects that I selected to include in my textbook on law and socioeconomics. There are many other subjects that teachers may wish to pursue. This discussion, however, is intended to give a good overview of what a course on law and socioeconomics may look like.

A law and socioeconomics course might profitably begin with an introduction that compares law and socioeconomics with law and neoclassical economics in terms of perceptions of markets, economics as a discipline, assumptions concerning human behavior, methodologies, and legal analysis.<sup>95</sup> These comparisons may provide a conceptual framework for the course that students can follow. Introductory material may also include an institutional and behavioral critique of neoclassical “efficiency” concepts and present the Coase Theorem and an

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90. *Id.*

91. *Id.* (quoting *In re Baby M*, 537 A.2d 1227 (N.J. 1988)).

92. *Id.*

93. *Id.*

94. *Id.*

95. See DALLAS, *supra* note 1, at ch. 1 (Introduction to Law and Socioeconomics).

institutional and behavioral critique of it.<sup>96</sup>

In my view, the course should include, early in the semester, material from the vast law and behavioral economics literature that challenges the rationality assumption of neoclassical economics.<sup>97</sup> This material will permit students to consider the relevance to law that humans are boundedly rational, use heuristics, and are prone to systematic biases in their decisionmaking.

I also believe that the course should give attention to distributive fairness concepts as well as human well-being paradigms and their relevance to the law.<sup>98</sup> Students may explore the relevance of economic fairness to legal and business decisionmaking and the relationships between social and economic rights and well-being paradigms.<sup>99</sup>

In addition, the course may consider factors that lead to perceptions of the legitimacy of legal authority and compliance with the law. This discussion may refer to materials on procedural fairness and on socialization and internalization processes as suggested by social learning and moral development theories.<sup>100</sup> Students may particularly find of interest materials on the impact of legal education on moral orientation and on the relationship between moral orientation and judicial decisionmaking.<sup>101</sup>

Flowing logically from the consideration of internalization processes, a course may address the nature of norms and the reasons they are followed.<sup>102</sup> Students may also consider the interrelationships between law and norms, and explore questions such as the following: Should judicial decisionmaking take into account norms? What role should custom play in legal decisionmaking? Is there an expressive function of laws? Do laws change norms, and if so, should legal regulation be designed to serve this function?<sup>103</sup>

A law and socioeconomics course may also profitably explore trust and cooperation because they are important to the law and economic life.<sup>104</sup> Discussions may address the possible motivations and conditions

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96. *See id.* at ch. 1 apps. A & B.

97. *See id.* at ch. 2 (Law and Cognitive Psychology).

98. *See id.* at ch. 3 (Economic Fairness and Well-Being).

99. *See id.*

100. *See id.* at ch. 4 (Fairness and Legal Socialization).

101. *See id.*

102. *See id.* at ch. 5 (Culture, Norms and the Law).

103. *See id.*

104. *See id.* at ch. 6 (Cooperation, Trust and the Law).

for cooperation, the neoclassical and socioeconomic meanings of trust, and the relationship between altruism and selfishness and contract law and fiduciary duty law.<sup>105</sup>

As discussed in more detail in Part IV of this Article, the course may also examine the subject of discrimination by considering the perspectives of alternative schools of economic thought and the findings of psychologists concerning stereotyping.<sup>106</sup> Relevant issues that may be explored include whether the Civil Rights Act of 1964 should exist, the theories for including certain groups under the Act, and the advisability of affirmative action policies and programs.<sup>107</sup> Students may also discuss whether the antidiscrimination laws have been successful in combating gender discrimination in the workplace by reference to materials on different perspectives and information on the gender wage gap, gender job segregation, and the glass ceiling.<sup>108</sup>

A particularly relevant issue for a law and socioeconomics course is when markets should operate, or the appropriate domain of markets. I discuss this issue by asking students whether markets should exist for babies and the services of surrogate mothers.<sup>109</sup> Students are able to explore the likely consequences of having such markets. In addition, they may address questions such as whether the essence of the relationships between mothers and children are captured when law and neoclassical economists use market terminology to describe these relationships and whether the use of market rhetoric has the fearful potential of changing the very nature of the relationships themselves.

I recommend that courses discuss families, markets, and the law because students view these subjects as particularly relevant to their lives.<sup>110</sup> I begin with an exploration of historical perspectives on gender roles as markets and social norms have changed.<sup>111</sup> I also include materials on the sources of power (including economic power) and manifestations of power within marital relations.<sup>112</sup> Students may consider the following issues: How have laws and legal decisions affected conceptions (or images) of women, and in addition, in what ways have conceptions (or images) of women held by society at large affected the law and legal decisions?<sup>113</sup> Moreover, how have

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105. *See id.*

106. *See id.* at ch. 7 (Discrimination).

107. *See id.*

108. *See id.* at chs. 7 (Discrimination), 9 (Families, Markets and the Law).

109. *See id.* at ch. 8 (The Domain of Markets: Markets for Babies and Surrogate Mothers?).

110. *See id.* at ch. 9 (Families, Markets and the Law).

111. *See id.*

112. *See id.*

113. *See id.*

perceptions of gender roles, images of women, and sexual mores and practices changed national family policies, family law (divorce and child custody law), and welfare law, and what are the economic and social consequences of these changes?<sup>114</sup>

A law and socioeconomics course may also address whether the workplace has accommodated families with two working parents and single parents.<sup>115</sup> Students may relate to this subject by considering workplace changes that law firms have made.<sup>116</sup> An important issue raised is whether workplace practices are geared to the nature of the work or are culturally determined, namely, based on a historical conception of the full-time, ideal male worker with few home responsibilities. Other relevant issues include the following: Are women and men downshifting to accommodate children and more balanced lives? Are mothers and fathers working longer hours? Do they have time for their children? What are the values and practicalities facing fathers and mothers at this point in history concerning competitive consumerism, careerism, and living balanced lives?<sup>117</sup>

Corporate governance and corporate social responsibility issues arise when families are considered. In this connection, a course may cover the perspectives of progressive corporate scholars on stakeholder theory and managerial accountability as they differ from those of conservative contractarians, who claim that the corporation's management should act solely in the interests of shareholders.<sup>118</sup> It may address the corporate social responsibility debate and explore issues concerning the limitations of legislation and markets to assure moral decisionmaking by managers.<sup>119</sup> Of course, Enron is of particular interest. In this regard, attention may be given to the corporate culture at Enron and the factors that contribute to an ethical corporate culture.<sup>120</sup> In addition, a course may consider problems in regulating the conduct of multinational corporations by exploring the importance and limitations of international human rights norms, internal corporate codes of conduct, and the work of nongovernmental organizations in regulating the conduct of multinational corporations, and by considering different perspectives on whether and

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114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.* at ch. 10 (Corporate Social Responsibility, Markets and the Law).

119. *See id.*

120. *See id.*

how regulation may contribute to responsible corporate conduct.<sup>121</sup>

A law and socioeconomics course may also include classes on globalization.<sup>122</sup> The theory of comparative advantage and free market theory as applied to today's global marketplace and the critique of this theory are relevant.<sup>123</sup> Also important is a revisionist approach to globalization that examines who benefits and who loses from specific decisions to liberalize trade rather than assuming that all such decisions are positive.<sup>124</sup> Students may profitably explore the consequences for legal regulation of a global marketplace and consider the impact of trade and capital liberalization on U.S. workers and others.<sup>125</sup> Finally, in the context of the Asian financial crisis and the Tequila effect, students may consider the dangers of instability resulting from capital liberalization and the possible legal remedies that may diminish these dangers.<sup>126</sup>

In classes on emerging market economies students may explore the philosophy behind the introduction of liberalized markets and privatization in such nations as Russia, Czechoslovakia, and China.<sup>127</sup> Subjects may include the shortcomings of the rapid introduction of liberalized markets, the social preconditions for effective markets, and the importance of pragmatism rather than free market ideology in economic and social transformation.<sup>128</sup> This discussion is most instructive when it occurs in the context of comparing the neoclassical and evolutionary-institutional economic approaches to liberalized markets and privatization.<sup>129</sup> In addition, teachers may wish to raise issues concerning the interrelationships in developing nations between democracy, ethnonationalism, and market capitalism.<sup>130</sup>

From the above description of the potential scope of a law and socioeconomics course, it is obvious that there is not enough time in such a course to cover all of these issues. This leaves the teacher considerable flexibility. Teachers may wish to have students write papers on some of the issues not covered in class.

There are also many subjects that a law and socioeconomics course might address that are not covered in my materials, such as immigration and the privatization of public utilities, prisons, and social security. In my view, law and socioeconomic materials on additional subjects would

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121. *See id.*

122. *See id.* at ch. 11 (Globalization: A Revisionist Approach).

123. *See id.*

124. *See id.*

125. *See id.*

126. *See id.*

127. *See id.* at ch. 12 (Emerging Market Economies).

128. *See id.*

129. *See id.*

130. *See id.*

(1) compare neoclassical economic and heterodox economic perspectives, (2) address the implications to law and public policy of modifying neoclassical economic assumptions, such as the assumption of rationality, and (3) consider the perspectives and findings of other social science disciplines.

#### IV. THE APPROACH IN A SELECTED SUBJECT AREA

In this Part, I describe the approach I take in exploring one subject area, which is discrimination. This discussion is intended to give a more in-depth understanding of the teaching and materials used in a law and socioeconomics course. I begin my classes on discrimination with a statistical comparison of white and black families concerning income, wealth, home ownership, and hours worked to capture the students' attention. I then explore with them various economic discrimination theories. I start with Gary Becker's associational preference theory, that is, his taste for discrimination theory and the general claim that markets can deal effectively with discrimination.<sup>131</sup> I separate out Becker's arguments concerning the economic consequences to minorities depending on whether the discriminatory tastes come from employers, coworkers, or consumers. I also include material from Richard Epstein's provocative book concerning the advantages of freedom of contract.<sup>132</sup>

I then turn to the statistical discrimination theory, which relaxes the neoclassical assumption of perfect information and explains why some minority members may receive wages below their marginal productivity, which is referred to as *economic* discrimination. The statistical discrimination theory suggests that discrimination by employers is rational and profit maximizing because it serves as an effective means to reduce the employers' cost of acquiring information about individual employees. The theory assumes that the discrimination is based on real differences in productivity among groups. I include Epstein's argument that antidiscrimination laws hurt minorities, because employers cannot offer them discriminatory wages to overcome the disadvantages that statistical group assessments create for them. I further discuss the views of economists, historians, and philosophers that raise questions and provide information supporting and countering these arguments and

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131. See GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 2–3 (1957).

132. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 3, 4, 9 (1992).

theories. For example, I cover the competing views concerning the effect that statistical discrimination has on human capital investments by minorities, Richard McAdams's status-production model of race discrimination,<sup>133</sup> and arguments that discrimination will persist only if it is based on real differences in productivity among groups.

I then turn to the perspectives of traditional institutional economists who consider discrimination based on race, gender, and the like as invidious distinctions and who view behavior as "mediated by cultural interpretations, habituated behaviors and prescriptive social norms. Institutionalists reject the neoclassical faith in market rationality, seeing economic processes as ordered by systems of cultural belief and practice that evolve historically."<sup>134</sup> This perspective presents the possibility that employment decisions may reflect and reproduce discriminatory social and cultural norms. I then briefly consider the cultural and historical origins of stereotyping about minority groups and how the content of social categories are transmitted among society members. I return to this subject of stereotyping later in the materials.

Next, I include materials on the best known institutional theory, the dual labor market theory, which focuses on the importance of internal administrative structures. I also present criticisms of this approach. To make this material meaningful to law students, I draw on David Wilkins and Mitu Gulati's excellent article, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*.<sup>135</sup> In this article, the authors explain how high wages and partnership tournaments adversely affect market pressures on law firms to hire and promote black lawyers.<sup>136</sup> They also discuss how lawyers are placed on dual tracks, on a "training" or a "flatlining" track, and how this process affects the opportunities and incentives of black lawyers.<sup>137</sup> I also make passing references to other relevant labor market theories.

I then consider the views of feminist economists, who take a number of different approaches. Most feminist economists, however, contrary to Becker's theory, and like institutionalists, treat discrimination as a systematic problem rather than a matter of individual "taste."<sup>138</sup> I also

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133. Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1044–45 (1995).

134. Ann L. Jennings, *Economic Policies to Counter Discrimination*, in THE ELGAR COMPANION TO INSTITUTIONAL AND EVOLUTIONARY ECONOMICS 161, 162 (Geoffrey M. Hodgson et al. eds., 1994).

135. David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996).

136. *Id.* at 519–20.

137. *Id.* at 539–41.

138. Ann Jennings, *Theories of Labour Markets*, in THE ELGAR COMPANION TO FEMINIST ECONOMICS 511, 515–16 (Janice Peterson & Margaret Lewis eds., 1999).

introduce materials on gender theory that suggests that discrimination affects not only hiring and promotion, but the very definition of occupations and their values, thus shaping the division of labor as a whole. I present information on gender job segregation, the wage gap, and the glass ceiling. I explore the explanations that human capital theory offers for these phenomena and various criticisms and findings concerning these explanations.

After discussing the glass ceiling, I give an overview of Title VII of the Civil Rights Act of 1965,<sup>139</sup> which is intended to outlaw employers' expression of tastes for discrimination and statistical discrimination in employment decisions. I set forth the U.S. Supreme Court opinion in *Price Waterhouse v. Hopkins*,<sup>140</sup> in which Ann Hopkins sued Price Waterhouse for failing to promote her to partnership.<sup>141</sup> The record reflected gender stereotyping—her mentor at Price Waterhouse told her she needed to wear make-up and jewelry and walk and dress more femininely.<sup>142</sup> I also include *Oncale v. Sundowner Offshore Services, Inc.*,<sup>143</sup> which provides some protection for homosexuals from discrimination resulting from their failure to meet gender stereotypes.<sup>144</sup>

I follow this material with information on implicit or unconscious stereotyping from the psychological literature and draw on excellent law review articles by Charles Lawrence<sup>145</sup> and Linda Krieger<sup>146</sup> to present the psychoanalytic explanation for racism and the cognitive psychology approach to discrimination. Concerning the latter approach, I include materials relevant to employment and promotion decisions that show how “[s]chemas serve essential heuristic functions in human cognition,”<sup>147</sup> which can result in the biasing of incoming information and lead to predictable types of errors in social judgments. The relevance of this psychological information is then explored in the context of the *Price Waterhouse* case, drawing on an article by Susan Fiske, a social psychologist, who testified in that case.<sup>148</sup>

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139. 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2000)).

140. 490 U.S. 228 (1989).

141. *Id.* at 231–32.

142. *Id.* at 235.

143. 523 U.S. 75 (1998).

144. *See id.* at 82.

145. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

146. Krieger, *supra* note 46.

147. *Id.* at 1200.

148. *See* Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping*

I then turn to the implications for the law of implicit or unconscious stereotyping. Should plaintiffs have to prove the intent to discriminate in cases such as *Price Waterhouse*? What should plaintiffs have to prove? Subjects explored include the recommendation of David Oppenheimer concerning providing a cause of action for negligent discrimination,<sup>149</sup> other measures suggested by social psychologists for combating implicit stereotyping, and the possibility of affirmative action as a remedy. The arguments for and against affirmative action are examined, including consideration of studies on stereotype threat.<sup>150</sup> The students are brought back to Wilkins and Gulati's article to discuss affirmative action arguments in the context of law firms.<sup>151</sup>

Next, I raise the legal issue concerning which groups or classes of persons should be covered by Title VII. Should homosexuals be included? How about ugly or overweight persons? Evidence shows a negative correlation between wages and obesity. What is the significance to this issue of the halo effect, in which physical attractiveness is often considered to be associated with other positive characteristics?<sup>152</sup> I question whether the determination of these issues is assisted by the rationales for determining suspect classifications under the Fourteenth Amendment.<sup>153</sup>

In addition, I include material on the exception to Title VII, which permits certain forms of discrimination on the basis of "bona fide" occupational requirements.<sup>154</sup> I ask the class the following question: What is the appropriate role of consumer preferences in establishing a bona fide occupational qualification, and does the standard applied by courts in determining whether a bona fide occupational requirement exists permit the perpetuation of societal stereotyping? Lastly, materials are included that attempt to assess whether the antidiscrimination laws have been effective.

This Part has reflected the approach that I take in all the materials I use in my law and socioeconomics course and textbook. I consider various schools of economic thought and the contributions of other social sciences to our understanding of socioeconomic decisionmaking,

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*Research in Price Waterhouse v. Hopkins*, 46 AM. PSYCHOLOGIST 1049 (1991).

149. See David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 899 (1993).

150. See Claude M. Steele, *Thin Ice: "Stereotype Threat" and Black College Students*, ATLANTIC MONTHLY, Aug. 1999, at 44.

151. See generally Wilkins & Gulati, *supra* note 135.

152. See Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem and Stereotypes*, 102 PSYCH. REV. 4, 9 (1995).

153. U.S. CONST. amend. XIV, § 1 (providing that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

154. 42 U.S.C. § 2000e-2(e) (2000).

and explore the relevance of this material to various legal issues.

#### V. CONCLUSION

Law and socioeconomics courses expose students to alternative schools of economic thought and other social science materials that are relevant to law and public policy issues. In addition, through comparisons of neoclassical and heterodox economic approaches, a law and socioeconomics course provides students with a framework for identifying different perspectives concerning the role of law, the role of economics in legal decisionmaking, and methods for designing and evaluating laws and public policies. I hope that the approach I take will catch on and that it will encourage other teachers to follow a similar path.

