

Socioeconomics: Choice and Challenges

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TABLE OF CONTENTS

I.	INTRODUCTION	257
II.	EXPLAINING CHOICES AND PREFERENCES	257
III.	CHALLENGES	263
	A. <i>Moving from "See, e.g." to "See"</i>	264
	B. <i>Socioeconomics as an End</i>	265
	C. <i>A Positive Message for Teaching and Beyond</i>	267

I. INTRODUCTION

I am delighted to offer some closing observations regarding this remarkable set of articles. My comments fall into two categories. First, I will discuss an important theme that I have found throughout these articles and argue that it is fundamental to virtually all law school teaching. This theme is the importance of linking policy with the rules that further those policies by examining the determinants of how choices are made. Second, I will focus on what I perceive to be some of the challenges that socioeconomics must contend with if it is to continue to flourish.

II. EXPLAINING CHOICES AND PREFERENCES

The shared ideal I find in these articles, and among all those employing a socioeconomic approach, is at once both very pragmatic and broadly

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relevant. To understand why, imagine four types of law professors. I think most law professors have elements of these types depending on the course or the subject matter within the course. First, I want to separate “tellers” from “teachers.” The “teller” reports the law, or more accurately, his or her interpretation of it, and questions nothing. There are three types of “teachers,” but each has a different emphasis. The first of these is the law and economics disciple. This professor may question some aspects of the law as being “inefficient” and suggest that transaction cost reducing and market mimicking rules are preferable to others. The second type of “teacher” is the public interest professor. This type of professor is willing to take on distributive issues as well as suggest that specific outcomes in the context of families, race relations, environmental issues, and so on, are fair. Finally, there is the utopian. This “teacher” has views like that of the “public interest” counterpart, but does not think that it necessarily makes sense to take people as they are. For this teacher, law is a possible preference shaping or therapeutic agent. It is likely that many professors are a combination of these types, from course to course and from topic to topic within a course.

In addition to these four professorial types, consider what all of these professors are likely to spend time on. The first is rules. Even if it is only for the sake of criticism, it seems to me that it would be difficult to teach a law course without saying what the law is.¹ By this, I mean the black-letter law as expressed by judges, in statutes, or in administrative rulings. Obviously, there will be variation from professorial type to type in the level of scrutiny they apply to the rules. The second theme is policy. Presumably, the rules are designed to promote some overall goals.

If it can be agreed that a great deal of what goes on in the classroom is about rules and policy, then it seems to me that the use of socioeconomics, except perhaps by the “teller,” is unavoidable. This is because the crucial link between rules and policy is choice. Rules require people to make choices that further policy. In addition, a single rule that is claimed to advance a specific policy involves a behavioral assumption of one kind or another. This means that the evaluation of choice is as important to the teaching and study of law as are the rules and policies themselves. It is implicit, although probably not accurate, that the people adopting the rules—judges, legislators, agencies, and the like—believe that they understand why people select one thing over another, what will motivate people, and the means by which people express their preferences.²

1. I would exclude from this statement many seminars in which existing law or even possible law seems to be of little importance.

2. I do not mean to understate the importance of socioeconomics as a tool for piercing formal law in order to determine what the real rules are.

The importance of socioeconomics to the analysis of choice is probably obvious to those with a socioeconomic perspective. However, there is a more subtle and related point. A law professor can choose to ignore socioeconomics and even the fact that choices and preferences are critical to law, but this does not mean that the professor is not teaching about this linkage. In effect, virtually every professor “says” something, either explicitly or implicitly, about choices and preferences. The only real issue is whether the professor does so in an effective way or assumes them away. The professor who does not address them sends the unfortunate and inaccurate message that they are irrelevant.

Going back to the four professorial types, even the economics oriented teacher needs a socioeconomic perspective. For example, suppose the purpose of contractual remedies is to encourage “efficient breaching.” Or suppose that punitive damages or criminal penalties are designed to encourage efficient levels of generally dishonest behavior. Even if one is devoted to the most sterile economic descriptions of the policies behind different bodies of law, it seems inescapable that one must examine the connection between those goals and the rules. And more importantly, if the traditional assumption about rational self-interest is inaccurate, then so is the connection between expectancy as a baseline measure of damages.³ At bottom, a traditional law and economics professor who does not alert students to the questions that have been raised about rational choice theory is teaching only a partial course.

For the second and third types of “teachers,” the socioeconomic approach is even more critical. For what I have called the public interest professor, there are two important areas of the application of socioeconomics. The first is what policy should be, and the second is what rules encourage achieving these policies. I can understand that the public interest professor, being a bit of an idealist, may object to needing a socioeconomic approach to determining appropriate policies. For example, it seems safe to say that one need not consult a variety of social and behavioral sciences to conclude that racism and child abuse are unacceptable. But beyond obvious truths and their basic statements, the need for socioeconomics is clear. There are two reasons to rely on socioeconomics even at this policy level. First, some of the clearest and

3. This can be carried even to questions of antitrust policy, which now seems to be based on the inference that consumer welfare is independent of distributive outcomes. Whether this is true is at least an empirical question. See Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 1, 4–5 (1982).

most morally-based goals are not easily translated into operational subpolicies. For example, all can agree that racism is unacceptable, but how does a policy against racism translate into subpolicies like college admission standards or policies about hate speech? What is the relationship between reduction in child abuse and greater funding for foster parent programs? No doubt many will think it is self-evident that the elimination of racism has implications for college admissions and speech, but the proponent who is unable or unwilling to link these overall policies to the subpolicies with an argument supported by interdisciplinary research will make a far less convincing case. Second, the reasoning behind some policies is not always evident. Whether it is saving the whales, or the trees, or a more equitable distribution of wealth, it is important to present these objectives as something more than moral imperatives. This is not to say that they are not moral imperatives. However, those with a deep commitment to these ideals and those who want to make real headway are more likely to succeed when they support their goals with interdisciplinary research.

The second general need for a socioeconomic perspective for the “public interest” professor is similar to that for all professors beyond the “teller.” This has to do with the connection between specific laws and overall goals: a connection that can be explored by understanding how choices are made. Sometimes, this is a matter of having a better understanding of cause and effect. A short personal experience may be useful here. Not too many years ago, a colleague and I decided it would be great for a first-year class to meet at a local pub for beer. The class included both white and African-American students but only the white students appeared at the party. My colleague’s conclusion was that African-American students, did not come because they were too “poor” and probably could not afford to go out. My interpretation was that African-American students did not feel welcome, or were attempting to keep their distance for one reason or another, but I imagined it had more to do with social or racial matters than with economic ones. In any case, understanding the reason for choosing not to come would be essential to creating an environment in which all students would have felt comfortable.

The greatest need for socioeconomics comes with the utopian professor. This professor needs socioeconomics for all of the reasons the idealist needs it, but has another layer to add. From this professor’s perspective, law has the ability to actually change people. This ability is one of the important consequences of conceiving the definition of socioeconomics as a constitution.⁴ The important benefit to be derived from the law does not involve merely changing behavior but actually involves changing

4. See Robert Ashford, *What Is Socioeconomics?*, 41 SAN DIEGO L. REV. 5 (2004).

preferences or values. For example, a public policy against an activity may make it less attractive.⁵ Vindicating those taken advantage of in contracts by allowing them to avoid such contracts may raise their self-esteem.⁶ The pioneering work of those in therapeutic jurisprudence illustrates the array of healing possibilities for law.⁷ Yet, it is necessary for those who think seriously about the impact of law on choice and preferences to base their case solidly on an understanding of the complex linkage between legal rules, choice and preferences, and behavior. Without understanding the variables that influence choice, it is not possible to effectively teach and write about the potential for law to be more than simply reactive.

These themes have played out repeatedly throughout these articles.⁸ Lynne Dallas makes an important claim for socioeconomics when she distinguishes the argument that choices are the result of differing unquestioned tastes from the possibility that they have institutional determinants.⁹ The traditional economic view that one does not question taste misses a great deal of what law is about. For example, is the taste that results from addiction, abuse, or deprivation the same as the taste that is developed through a variety of experiences? Is not one function of law to decrease the influence of some taste-determining factors? These issues can best be addressed by adopting a socioeconomic approach and looking at choices and preferences very closely.

The need to pierce the choicemaking process is also evident in the sad account provided by Charles Pouncy when he discusses his experiences in attempting to present unconventional but essential information to his classes.¹⁰ I do not think that Professor Pouncy is the only African-

5. See, e.g., Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 4–5 (discussing the preference shaping impact of criminal law).

6. Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445, 450, 466–67, 493 (1994) (discussing the therapeutic effects of unconscionability claims).

7. See Allison R. Shiff & David B. Wexler, *Teen Court: A Therapeutic Jurisprudence Perspective*, 32 CRIM. L. BULL. 342, 347, 354 (1996) (discussing teen court as a means of generating empathy); Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCHOL. PUB. POL'Y & L. 6, 7, 9 (1995) (discussing the antitherapeutic effect of labeling).

8. I note but a few examples here.

9. Lynne L. Dallas, *Teaching Law and Socioeconomics*, 41 SAN DIEGO L. REV. 11 (2004).

10. Charles R.P. Pouncy, *Applying Heterodox Economic Theory to the Teaching of Business Law: The Road Not Taken*, 41 SAN DIEGO L. REV. 211 (2004).

American professor who feels that he is scrutinized more closely in the classroom because of his race. But I would also link his experience to the more general process of student rationalization. When confronted by difficult or status threatening material in the classroom, students often search for a scapegoat or some means of avoiding looking inward.¹¹ The process of classroom rationalization is pervasive but generally less dangerous than that experienced by Professor Pouncy. For example, I know of a white male professor who attempted to bring a socioeconomic perspective to a class in which it would have been especially relevant. The students complained to the dean, who told the professor to stop what he was doing or be banned from teaching the course. In my own case, in a slightly different context, I have found that when I teach anything that is complex, the students, who know I have degrees in economics, frequently say, “I did not understand class today because I really do not ‘get’ economics.” Of course, this happens even if I am working through offer and acceptance in contracts in precisely the same way as a colleague who has no background in economics.

The race rationalization experienced by Professor Pouncy is especially nasty, but I think the work of socioeconomics can come into play even here if, as a means of becoming more effective teachers, we strive to “unpack” the reasons for choosing one rationalization or another. To put this in more general terms, it seems that teaching from a socioeconomic perspective means being value conscious, attempting to understand the sources of resistance, and then addressing them openly with students and administrators with the goal of achieving a therapeutic outcome.¹² I also see the need to understand the choicemaking process at the heart of Robert Ashford’s case for including a socioeconomic perspective in professional responsibility and other courses.¹³ Clearly, assisting clients in defining and refining their goals and understanding the process requires the attorney to go beyond simplistic assumptions about choicemaking. For example, we know that expectations and aspirations are often the function of relative deprivation¹⁴ and can be associated with class-based influences. To not recognize the influence of these factors

11. The tendency of some students and professors to equate “affirmative action,” in those instances in which it may have played a role, with “otherwise unqualified” gives rise to this scrutiny and reflects a misunderstanding of our resistance to what affirmative action means.

12. Robert Ashford, *Socioeconomics and Professional Responsibilities in Teaching Law-Related Economic Issues*, 41 SAN DIEGO L. REV. 133 (2004). It appears to me that the dean at Professor Pouncy’s law school and the deans at other law schools consistently shy away from socioeconomic opportunities when it comes to racial issues.

13. *See id.*

14. *See generally* Harrison, *supra* note 6, at 460–62 (discussing relative deprivation as a source of expectations).

on what a client expects or regards as “fair” means the attorney has stopped short of being fully responsive.

Margaret Brinig, in referring to men’s attitudes about taking on domestic work, writes, “[I]t is not just what is chosen that matters, but how the people involved feel about the choice.”¹⁵ I am not sure there could be a more bedrock statement illustrating the connection between law and socioeconomics. Professor Brinig’s article illustrates the potential for law to have therapeutic effects and the importance of a socioeconomic perspective in getting there. It suggests that law has an important and complex role in shaping expectations and relationships.

The notion of choices in the context of relationships and interactions is carried forth by Edward Rubin.¹⁶ The problem he identifies in the traditional teaching of first-year contracts is a near complete absence of a relational texture. Jumping from topic to topic, all of which fall under the umbrella of “what courts do when contracts break down,” is a wholly different exercise from actually examining the process of contracting. It is at this level that motivations and choices are critical and, as Professor Rubin points out, where a socioeconomic approach creates an opportunity for real understanding. In his words, even in a commercial context the contract represents an effort to “achieve a complex variety of purposes.”¹⁷ The organizational structure means that efficiency, in a conventional sense, is only one of a number of objectives to consider.

III. CHALLENGES

I think that this collection of articles, submitted from a broad diversity of law professors, illustrates just how established socioeconomics has become as the most relevant interdisciplinary approach to law. Initial resistance to socioeconomics was overcome relatively easily because there was, in effect, an intellectual demand for an alternative perspective with a solid theoretical and empirical base. My sense, though, is that socioeconomics will only be interesting to those in law as long as it provides something that is useful in the classroom and in the practice of law. With that in mind, I believe that there are three challenges ahead for socioeconomics if the momentum is to continue.

15. Margaret F. Brinig, *The Role of Socioeconomics in Teaching Family Law*, 41 SAN DIEGO L. REV. 177, 182 (2004).

16. Edward Rubin, *Why Law Schools Do Not Teach Contracts and What Socioeconomics Can Do About It*, 41 SAN DIEGO L. REV. 55 (2004).

17. *Id.* at 62.

A. Moving from “See, e.g.” to “See”

One challenge that needs to be met is the development of a body of research that is identifiably “socioeconomics and law.” By this I mean more than examining the works prepared by those in other disciplines and asking what can be gleaned from them that may be important to the study of law.¹⁸ For example, in my own case, I have attempted to study empirical work about self-esteem and apply these findings to bargaining and ultimately to contracts. A more direct approach is one that skips the inference or adaptation step and examines in a direct way the connection between rules and behavior.

Perhaps one way of capturing this notion is to think about the oft-used citation “*see, e.g.*” I clearly recall, when I moved from teaching economics to teaching law, wondering how I could write a declarative statement without being able to back it with either solid theoretical or empirical evidence. For example, if I wanted to write something like, “It appears that the Court is moving away from its previously held position,” I was stumped on how the statement could be supported. Finally a colleague reminded me of the “*see, e.g.*” citation. In some respects, I think the initial stages of socioeconomics too have been characterized by “*see, e.g.*” Instead of cases, one cites selected empirical research from another field that supports the position taken.

The article by Margaret Brinig in this collection¹⁹ is a good example of the type of work we need more of. This type of analysis is scattered throughout law reviews, but it is far from the norm, even among those who share a socioeconomic perspective. Ultimately, this means having law professors directly involved in either doing or evaluating the empirical work relevant to their teaching and scholarship. Since few law professors are trained to do complex methods of statistical analysis, this may seem like a poor match. Yet those who have studied law are in an ideal position to understand the questions that must be asked, the relationships that must be explored, and the ways in which to interpret the results of the research. In short, an important breakthrough for socioeconomics and law will arrive when the conclusions it reaches flow from empirical research conducted or evaluated by law professors with the assistance of those from related disciplines. Put simply, maybe it is time to stop singing the praises of socioeconomics quite as much and actually start doing socioeconomics.

18. A good example of this adapted work can be seen through some of my own writing. *See generally* Harrison, *supra* note 6.

19. Brinig, *supra* note 15.

B. Socioeconomics as an End

I think that socioeconomics is likely to be more useful to more people if it can stay clear of ideology and a specific political agenda. I am not suggesting that those who take a socioeconomic perspective should not have aspirations to reshape the law in ways that address social ills. I am suggesting that socioeconomists should not pick and choose from among the articles in various disciplines for those things that support their points of view and then claim that the view espoused is supported by multidisciplinary research. The distinction I am attempting to draw here is between conducting research in order to “prove a point” as opposed to testing a hypothesis. To do the former is analogous to an attorney pouring through depositions, cases, and affidavits in order to find excerpts that support a position in litigation. In other words, socioeconomics should not be a process of “sampling” works to find what is helpful and filtering out what is not.

I would hope that socioeconomics might become known as a process for information seeking and testing ideas and hypotheses. This can be a difficult and dangerous process. It is almost always hard work to be thorough, and as law professors, many of us come from a culture in which a position is first adopted, followed by the identification of a process that defends it. For many law professors this change will require a more scientific method of approaching research. This is risky because it may mean finding answers one would prefer not to find. To me, at least, that is the test of a committed socioeconomist: Are you willing to conduct research without knowing what it will reveal and then make the results public? There is an analogy here to the old saw about questioning a witness, the upshot of which is: “Do not ask a question for which you do not already know the answer.” The point is that as an advocate you do not want any surprises that may undercut the position you are advocating. To me, one of the challenges of socioeconomics is to convince others that a socioeconomist asks many relevant questions, even if it means finding uncomfortable answers.

I am not saying that the person conducting the research is then obligated to change to the other side of an issue. For example, suppose a prohibitionist abhors drinking because of religious convictions. As a means of furthering his or her understanding of the dangers of drinking, the prohibitionist undertakes a study to determine the relationship between health and the consumption of alcohol, only to find that drinking wine is associated with better health. This information does not require the

prohibitionist to change his or her view about drinking because it was based on principle. On the other hand, if the view was a function of a belief that drinking was detrimental to health, it seems that the abolitionist would change his or her message and be willing to explain why.

The problem is that often our views are based on some intuitive notion of what is right or moral and a belief that we can show, as an empirical matter, that our point of view, if it resulted in action, would make people better off. For example, suppose I oppose the “at-will” rule in employment contracts. I may view the rule as unfair and believe that the rule leads to lower levels of job satisfaction and productivity. If I am a socioeconomist and my position is based in part on an empirical belief, I think that I have an obligation to put that hypothesis to a test even though it creates a risk that the empirical support for my position will be disappointing. Suppose I conduct an econometric study comparing countries that do not permit at-will terminations with states in the United States that do and discover that workers in those foreign countries are not happier or more productive than those in at-will jurisdictions in the United States. Although that may not alter my belief in the unfairness of the at-will rule, I do believe that I am obligated to drop my empirical claim and make my research available.

Although this discussion of empirical research may seem to be based on some ideal about what it means to be a scholar, there is an important instrumental basis for openness and avoiding agenda-driven research. My sense is that if socioeconomics is viewed as having been captured by those with a specific political agenda, it will, like other movements within the profession, become less attractive and eventually be composed of those who preach to the choir and no one else. Like other agenda-driven groups in the law teaching profession, the remaining members will have their yearly meetings, nod knowingly about the ignorance or insensitivity of those who have not joined, and ultimately have little impact. I think that socioeconomics is destined for a long and meaningful impact only if its “cause” is perceived to be honest and open in research.

I do not want to be too glib about the ease with which the ideal of intellectual independence can be attained or maintained. Unfortunately, for some law professors, the quality of a colleague’s work depends less on intellectual rigor than on ideology. To these people, writing the “right” message is more important than the quality of the research that leads to the “wrong” message. This can lead to some discomfort for senior level faculty, but I think it is particularly important to be sensitive to the impact this can have on young tenure-seeking scholars.

C. A Positive Message for Teaching and Beyond

A great deal of the first decade of socioeconomics has been devoted to illustrating, in one way or another, the shortcomings of conventional economic analysis. It is now a story that has been told so many times by others and me that it is hard to believe that anyone has not heard it. And they either believe it, or they do not. Socioeconomics within the law teacher profession more generally is unlikely to have “legs” if this is its only contribution. In other words, is socioeconomics anything more than “not neoclassical economics”?

Does it have a message, proposals, or results to report? If not, then its history, though effective, is likely to be short. This Symposium is a terrific example of the enormous potential for growth. It represents the next step of establishing what socioeconomics can do. Each article, in one measure or another, answers the question of “What difference does it make in teaching if I adopt a socioeconomic perspective?” The answers range from classroom exercises²⁰ to calls for curricular reform.²¹

Articles and ideas about how to incorporate a socioeconomic perspective into the classroom are an essential first step in the “activation” of socioeconomics. The next step in bringing socioeconomics into the classroom is not simply to teach it as a separate course or as part of a law and economics course, but to integrate it into the mainstream courses of torts, contracts, property, and the like. This means developing books for classroom use that are written from a socioeconomic perspective and confronting the question of whether or not they will be adopted. My sense is that a contracts book, for example, that emphasizes not just rules and policy, but the all important linkage between the two that I discussed above would give students a better feel for how things actually work than most books currently offered. If markets work when it comes to teaching materials, these books are likely to do well.

Aside from deepening the commitment to teaching from a socioeconomic perspective, the other thing that law professors do is write. Generally, when law professors write, they present an interpretation of history or criticize current law or policy and suggest changes. My view is that the next step is to do these things with an explicit and identifiable socioeconomic

20. Jeffrey Evans Stake & Kenneth Glenn Dau-Schmidt, *Teaching in a Larger Social Context: Using Simulations to Demonstrate Socioeconomic Principles and Their Relevance to Law*, 41 SAN DIEGO L. REV. 75 (2004).

21. See generally Ashford, *supra* note 12; Rubin, *supra* note 16.

perspective. This means making proposals for change when appropriate and backing up these positions with sound reasoning and empirical research faithful to the definition of socioeconomics.²² Fundamental in this approach, when offering proposals, is recognition of the importance of behavioral assumptions in all legal contexts and sensitivity to the need for understanding the complex matrix of factors influencing choice. If for no other reason than it would be more relevant than what is often found in law reviews, this is a vacuum waiting to be filled by socioeconomics.

22. See Ashford, *supra* note 4.