

2017

# Law and Economics: Contemporary Approaches

Martha T. McCluskey

*University at Buffalo School of Law*

Frank A. Pasquale III

*University of Maryland, Francis King Carey School of Law*

Jennifer Taub

*Vermont Law School*

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/articles>



Part of the [Law and Economics Commons](#)

---

## Recommended Citation

Martha T. McCluskey, Frank A. Pasquale III & Jennifer Taub, *Law and Economics: Contemporary Approaches*, 35 *Yale L. & Pol'y Rev.* 297 (2017).

Available at: <https://digitalcommons.law.buffalo.edu/articles/524>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Journal Articles by an authorized administrator of Digital Commons @ University at Buffalo School of Law. For more information, please contact [lawscholar@buffalo.edu](mailto:lawscholar@buffalo.edu).

---

## YALE LAW & POLICY REVIEW

---

### Law and Economics: Contemporary Approaches

Martha T. McCluskey,\* Frank Pasquale\*\* & Jennifer Taub\*\*\*

#### INTRODUCTION

With a new project entitled *Law and Economics: Contemporary Approaches*, we hope to liberate casebook examples of economic analysis of law from their current cramped confines. While law and economics associations increasingly feature empirical work in their annual conferences, casebooks in property, torts, contracts, and other core legal subjects all too often feature simple models of economic activity developed decades ago.<sup>1</sup> While new ways of thinking about finance, health care, and privacy have developed rapidly in the past few decades (and particularly after the global financial crisis of 2008), casebooks all too often rely on simple models of market-driven supply and demand, out of touch with current economic realities.

This forthcoming casebook will address the shortcomings of the vision of law and economics familiar in dominant instructional materials, which took root in legal education in the 1970s. In 1995, Yale Law School Dean Anthony Kronman noted that law and economics was the “single most influential jurisprudential school in this country.”<sup>2</sup> In the decades since, it has remained not

---

\* Martha T. McCluskey is a Professor of Law and William J. Magavern Faculty Scholar at the University of Buffalo, State University of New York Law School; J.D. Yale Law School, and J.S.D. Columbia Law School.

\*\* Frank Pasquale is a Professor of Law at the University of Maryland, Francis King Carey School of Law; J.D. Yale Law School, B.A. Harvard University, and M.Phil. Oxford.

\*\*\* Jennifer Taub is a Professor of Law at Vermont Law School; J.D. Harvard Law School and B.A. Yale University.

1. For an example of the diversity of work now presented at the American Law and Economics Association, see *Annual Meeting*, AM. L. & ECON. ASS'N, <http://www.amlecon.org/alea-meeting.html> [<http://perma.cc/PHN8-Q6KA>]. See also *Other Law & Economics Associations*, AM. L. & ECON. ASS'N, <http://www.amlecon.org/alea-otherAssociations.html> [<http://perma.cc/7C7E-5ZA6>].

2. Anthony T. Kronman, *Remarks at the Second Driker Forum for Excellence in Law*, 42 WAYNE L. REV. 115, 160 (1995). For ease of reference, for the rest of this Essay, we characterize the potted models and simple accounts of economic life so common in law school casebooks as “law and economics.” Given the diversity of compelling

only dominant, but also especially powerful in its influence on the teaching of private law topics. For nearly a half century, law students have been taught that narrow and abstract modeling is the hallmark of rigorous economic analysis of legal scenarios.

The law and economics so influential in law school casebooks is particularly powerful because it so often reduces the search for the optimal legal rule to a quest for efficiency.<sup>3</sup> The concept of efficiency is, by and large, narrow: wealth maximization.<sup>4</sup> As leading proponent Richard Posner explained several decades ago, wealth maximization “refers to weighting preferences for the things that people want, either by willingness to pay for a thing, if you do not own it, or by unwillingness to part with it voluntarily, if you do own it.”<sup>5</sup> From this ground, making law “efficient” means taking most existing legal and economic privileges, constraints, and inequalities as given, and focusing law on increasing wealth regardless of who gets it, how they get it, or what they do with it. More recent versions of the efficiency goal often use the term “economic welfare” instead of “wealth” to represent the individualized gain that law should maximize,<sup>6</sup> but that ideal remains similarly narrow and misleading. The persistent message is that law can and should be guided by an economic goal of maximizing an abstract aggregate “pie,” closing off scrutiny of the quality, content, and distribution of that pie. If law makes a presumed sum of existing individual preferences bigger, it can be “efficient,” without analysis of whether that maximized “pie” is

---

and creative economic analysis of law now extant (including many works by our contributors), we do not intend to offer a blanket indictment of law and economics in general. However, we are deeply concerned that the most prevalent and popularized forms of law and economics are misleading students.

3. See, e.g., Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 834 (2000); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 669 (1994); Steven Shavell, *A Note on Efficiency vs. Distributional Equity in Legal Rule-making: Should Distributional Equity Matter Given Optimal Income Taxation?*, 71 AM. ECON. REV. 414, 417 (1981) (arguing that legal rules should focus primarily on efficiency, leaving other concerns like equality to the political process via possible taxation and transfers, without regard to how unequal or destructive economic wealth actually can impede such political “redistribution”).
4. Richard A. Posner, *A Reply to Some Recent Criticisms of the Common Law*, 9 HOFSTRA L. REV. 775, 778 (1981).
5. Richard A. Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J.L. ETHICS & PUB. POL’Y 85, 86 (1987).
6. See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 977–78 (2001) (arguing that public policy should be “assessed exclusively” on the basis of aggregate individual gain in well-being from an existing baseline).

actually toxic or temporary or totally controlled by the top one-tenth of one percent of wealth holders.<sup>7</sup>

In a 2014 essay, Harvard Law student Ted Hamilton reflected that the “most repeated word in my first year curriculum was not justice, or liberty, or order. It was *efficiency*.”<sup>8</sup> As Hamilton explains, this term continues to reduce law to the goal of maximizing economic gain without evaluating that gain, so that law students are taught that efficiency means wealth maximization, and students learn to treat legal questions as objective problems of counting divorced from complex social, moral, and political analysis. Some empirical research confirms that this emphasis on efficiency can affect students’ views.<sup>9</sup>

This understanding of economics in law is partial, in two ways. It is *incomplete*, largely ignoring new economic issues and theory, such as the excellent work done by Institute for New Economic Thinking (INET) fellows. And it is often *biased*, privileging the perspectives of the most powerful actors in the economy by presenting legal rules favoring these interests as uncontested economic truth.

*Law and Economics: Contemporary Approaches* will address the shortcomings of law and economics by examining its fundamental theories, methods, and failures.<sup>10</sup> In chapters on specific legal topics, we use examples of current issues in judicial decisions, statutes, regulations, or policy debates as the basis for showing the gaps in conventional economic analysis and the potential contributions of more complete and clear thinking. We will make a more robust economic analysis accessible to non-specialists by showing how economic analysis of law inevitably depends on and draws from other disciplines, and relies

- 
7. See Martha T. McCluskey, *Personal Responsibility for Systemic Inequality*, in RESEARCH HANDBOOK ON POLITICAL ECONOMY AND THE LAW 244–45 (Ugo Mattei & John D. Haskell eds., 2015) (explaining how framing legal analysis in terms of maximizing or equalizing individualized choice under naturalized scarcity denies law’s power to create better choices by changing systemic political economic inequalities and destructiveness).
  8. Ted Hamilton, *Why Law School’s Love Affair with Economics Is Terrible for the American Legal System*, SALON (July 26, 2014, 2:00 PM), [http://www.salon.com/2014/07/26/why\\_law\\_schools\\_love\\_affair\\_with\\_economics\\_needs\\_to\\_stop/](http://www.salon.com/2014/07/26/why_law_schools_love_affair_with_economics_needs_to_stop/) [<http://perma.cc/U5EU-HSBL>].
  9. See, e.g., Raymond Fisman et al., *The Distributional Preferences of an Elite*, 349 SCIENCE 1300, 1300 (2015) (noting that Yale Law School “subjects were substantially more efficiency-focused than were the . . . subjects drawn from the general population. . . . The YLS subjects displayed this distinctive preference for efficiency over equality in spite of overwhelmingly (by more than 10 to 1) self-identifying as Democrats”).
  10. We follow in the footsteps of leading scholarly critiques of law and economics. See, e.g., EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY, AND ECONOMICS* 233, 323 (2005) (discussing internal and external critiques of “classic market theory”).

on assumptions about facts and values that are not the subject of distinctively economic expertise.

The topics covered will include health law, international trade, labor law, minimum wage policy, civil rights, unemployment policy, securities laws, and financial regulation. The chapters offer new understandings of the assumptions, contingencies, and omissions that complicate legal applications of standard economic principles like supply and demand, comparative advantage in trade policy, externalities, or the distinction between market and state.

To move beyond existing misconceptions and oversimplifications, our casebook chapters draw on methodologically diverse approaches to economics, integrating the best of historical, anthropological, and sociological approaches with a new emphasis on macroeconomics. This approach aims to correct the methodological individualism and lack of context characteristic of traditional law and economics. Legal experts' narrow focus on microeconomics contributed to the recent financial crisis by reinforcing faith in the capacity of markets to reach optimal outcomes without strong regulatory oversight. Such misplaced faith highlights the need for a new economic analysis of law that is responsive to theories of macroeconomic conditions and financial instability.

In addition, these new approaches to law and economics will include more diverse and sophisticated understandings of law, including legal realism's understanding that economic conditions shape how law is implemented and enforced. As Columbia Law Professor Katharina Pistor's recent scholarship on law and finance adeptly demonstrates, law and markets are co-constitutive.<sup>11</sup> Just as law depends on economics, economics cannot provide a simple and unidirectional expertise in "market forces" to legal scholars and policymakers because these economic forces are at least in part a matter of law. If preferences are endogenous, and dependent upon legal rights, then the criterion of allocative efficiency<sup>12</sup> cannot determine a uniquely optimal set of legal rules. Additional normative criteria must be employed. Similarly, insights from behavioral economics have revealed the ways in which so-called "social preferences" may be crowded out by legal incentives. If this is the case, then the law cannot merely and simply respond to a pre-existing *homo economicus*; it may, additionally, be responsible for shaping it.

## I. CHANGING THE FRAME

Why transform economic analysis of law, rather than reject it altogether? Because we need more, not fewer, accounts of how law can improve economic justice and economic policy. A central barrier to that goal is precisely the idea that rigorous economics stands fundamentally apart and disengaged from mo-

---

11. Katharina Pistor, *A Legal Theory of Finance*, 41 J. COMP. ECON. 315 (2013).

12. DAVID M. DRIESEN, *THE ECONOMIC DYNAMICS OF LAW* 19 (2014) (explaining how a dynamic, macro-level, legal economic analysis improves on the standard allocative efficiency, which focuses economics on calculating the microeconomic costs and benefits of transactions).

rality, politics, and social or historical context. By deepening and broadening law's economics, we aim to free contemporary theory and policy from one of its most insidious and confining interpretive frames.

We need not cede the goal of economic prosperity to those who insist on a narrow or failed conception of economic well-being and of how to achieve that goal. Our casebook will move beyond the familiar division between policies aimed at fairness, democracy, equality, and environmental sustainability on the one hand and policies aimed at wealth maximization on the other. Though this divided frame appears neutral on the surface, permitting a choice to favor the supposedly non-economic goals, conventional law and economics teaches that rejecting economic efficiency in favor of other goals often risks producing a smaller economic pie, making those alternative goals less attainable.<sup>13</sup> The choice of moral and social goals therefore appears subjective and naive in contrast to the seemingly more scientific economic goals of wealth maximization or allocative efficiency.

Our casebook shifts the frame to question the assumption of natural trade-offs between equity and efficiency. Scholars and practitioners would benefit from understanding the economic debates about the assumptions and implications of standard ideas of allocative efficiency. By recognizing that economics includes different theories and methods, predicated on particular, debatable moral and social judgments, discussions of economics in law can better examine social justice concerns. With a contemporary curriculum that explores the imperfect empirical information and contested values involved in determining both efficiency and equity, the question becomes not whether to include normative analysis but rather how to more rigorously and openly evaluate competing perspectives, including whether efficiency should be the central goal in economics or law.

The current political context underscores the dangers of leaving in place a law and economics inadequate for the challenges of our time. In a prevailing law and economics framework that defines economic rationality as essentially unconcerned with fairness and inequality, proposals to advance economic justice can appear presumptively irrational and unrealistic, closing off the possibilities for beneficial reform. Further, when law's dominant economic rationality appears to bring substantial injustice, instability, and despair for many, this framework appears to offer little alternative for reform other than a politics disdainful of both law and rationality.<sup>14</sup> Instead, this casebook shows the possibilities for more rationally engaging law's potential for greater economic justice.

---

13. See Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 805–06 (2003) (explaining how a skewed ideal of efficiency is used to create a double bind for policies promoting economic equality).

14. See Jayati Ghosh, *The Economics of Political Change in Developed Countries*, TRIPLE CRISIS BLOG (Aug. 4, 2016), <http://triplecrisis.com/the-economics-of-political-change-in-developed-countries/> [<http://perma.cc/N878-2TG6>] (linking destructive politics of anger and racism across the United States and much of Europe to the

## II. TOWARD A SCHOLARLY AND INCLUSIVE LAW AND ECONOMICS CASEBOOK

Law schools offer law and economics in standalone courses as well as in classes on particular subject areas, including both foundational classes in torts, property, and contracts, and in elective upper-level courses in specialties such as health law, environmental law, corporate law, and regulatory policy. Law and economics is also taught outside of law schools to students in other disciplines, including management, public policy, and economics. The case method remains the dominant pedagogical tool for teaching law. Typically, casebooks compile judicial opinions from which students extract the “rule” of law in order to predict and evaluate rules governing future controversies and new situations.

Casebook authors offer commentary and questions between cases to illuminate the normative claims and policy considerations underlying and guiding the developing law. Across numerous areas of law, whether in judge-made common law, statutory and regulatory law, or constitutional law, this commentary often highlights conventional economic analysis—focused on efficiency goals—as a primary guide to evaluating law. Casebooks are enormously influential in shaping thinking about law and in promoting new legal approaches and new subject areas. The casebook lesson that economic efficiency is a central (and objective) measure for law has become especially influential in legal reasoning outside the classroom. For example, in 2011 the D.C. Circuit struck down the first Dodd-Frank rulemaking, which would have granted shareholders the power to include their director nominees on the official corporate ballot. The court reasoned that stringent quantitative cost-benefit analysis must guide the Securities and Exchange Commission’s regulatory policy, even when not required by statute.<sup>15</sup> Yet, reflecting a more contemporary approach, the same court rejected using cost-benefit analysis based in dollars as a means to dismiss human rights concerns.<sup>16</sup>

We believe contemporary approaches reject the mistaken emphasis on a narrow conception of efficiency that reflects problematic assumptions about the nature and scope of economic reasoning. We are developing *Law and Economics: Contemporary Approaches* to invite these approaches and introduce them to scholars and students. This casebook could be used as a complete volume or in chapter form, with some modules free of charge through a website sponsored

---

failure of political leaders to offer major economic change in response to deep economic dissatisfaction).

15. *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (“We agree with the petitioners and hold the Commission acted arbitrarily and capriciously for having failed once again . . . adequately to assess the economic effects of a new rule.” (internal citations omitted)).
16. *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 552 (D.C. Cir. 2015) (rehearing en banc) (“Even if one could estimate how many lives are saved or rapes prevented as a direct result of the final rule, doing so would be pointless because the costs of the rule—measured in dollars—would create an apples-to-bricks comparison.”).

by the Association for the Promotion of Political Economy and Law.<sup>17</sup> This casebook and a companion website could be the focal point for developing a community of teachers, professionals, and scholars engaged in advancing new approaches to law and economics in their teaching, research, and professional practice. Production of a companion website will help promote teaching the book, with a syllabus bank, resource bibliography, and forum for further exchange of ideas. Collaborative work on the book and related materials will include two workshops each year bringing together lead authors with selected experts who will participate in developing modules on specialized subtopics, such as environmental law. In addition, these workshops will include several invited faculty interested in developing new courses based on the casebook, to get their input as well as to build excitement and expertise among a larger group of law and economics teachers.

While *Law and Economics: Contemporary Approaches* will be inclusive, its contributions will focus on a common set of questions, including:

- (1) **Markets and Law**
  - (a) What appears to be a “market force” in judicial reasoning?
  - (b) How does a more extensive analysis reveal the underlying socio-legal institutions and rules and practices driving that “market” dynamic?
  - (c) What interests and ideas ground these particular institutions and how might alternatives create different, perhaps better markets—and better for whom?
- (2) **Efficiency and Redistribution**
  - (a) In leading cases and regulations, what assumptions about “efficiency” are being made—what kinds of gains, for whom, are being identified as the public good, and how do these assumptions compare to alternative ways of understanding the public good? Who is bearing the risks? Who is getting the rewards of these asserted gains?
  - (b) How do we decide what laws, institutions, and transactions constitute “normal” or freely chosen mutually beneficial distribution versus “redistribution”? If law is designed to prioritize the goal of some kind of economic gain separate from consideration of equitable distribution or

---

17. As co-founders of an organization called the Association for the Promotion of Political Economy and the Law (APPEAL), our team has been working for several years to build connections between law and new economic thinking. This organization developed in part out of a 2010 SUNY Buffalo Law School event. We have organized a series of informal meetings between law scholars and heterodox economists along with several conference panel presentations, all of which set the foundation for our first major conference in May 2014, *Critiquing Cost-Benefit Analysis of Financial Regulation*, in Washington, D.C. We have sponsored two other networks and events: an Education Finance Research Group, which convened in 2015 to consider the reauthorization of the Higher Education Act, and a workshop on the topic of a new law and economics casebook.



social values (like environmental well-being), on the theory that economic gain will then mean greater resources for these “non-economic” goals, what may stand in the way of that “redistribution”?

**(3) Incentive Effects and Market Failures**

- (a) Analyzing incentive effects and the unintended consequences of law in action is an important contribution of economic analysis. How can we better understand these complex causal effects by adding insights and methods from other disciplines (e.g., sociology, political theory, anthropology, and history) to the basic formal principles of neoclassical economics?
- (b) Neoclassical economics assumes market incentives produce the optimal public good through free choice via price mechanisms. When are the incentives created by existing price structures the result of market failures that instead will make society worse off?
- (c) The standard neoliberal response to “market failure” analysis is that whatever the limits of “markets,” similar or worse complexities and failures mean government is likely to do even worse at providing the optimal incentives. But what government regulatory protections and penalties drive the supposed “market” incentives that are being presented as the alternative to government regulation? How might we reframe the debate as a choice between differently regulated markets, differently distributing the risks and rewards of bad information and other failures? Might new work on capture, such as Carpenter and Moss’s collection, titled *Preventing Regulatory Capture*,<sup>18</sup> answer public choice concerns about regulatory failures?

**(4) Costs and Benefits**

- (a) Carefully weighing alternatives is another potential contribution of economic analysis of law, taking into account foregone opportunities and long-term complex consequences. How might that careful analysis be undermined by false simplistic precision from quantification of the effects of legal rules?
- (b) How do we analyze less quantifiable goods?
- (c) How does this analysis take into account the risk of catastrophe (e.g., climate change, war)? The costs of inequality?
- (d) How might scenario analysis or other methods improve our understanding of the value of highly uncertain losses or gains?

**(5) Austerity and Scarcity**

- (a) Neoclassical economic analysis focuses on making tradeoffs under scarcity. For any given legal question, what assumptions are being made about the assumed scarcity that limits the possibilities for law to

---

18. PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., 2013).

pursue equality and fairness or environmental well-being as one example? How does the “price” of a given option reflect law and politics as well as natural scarcity?

- (b) How might the insights of Modern Monetary Theory change assumptions about austerity and tradeoffs in government spending?

### III. DEVELOPING THE THEMES: CHAPTER PREVIEWS

For a summary example of how our *Law and Economics: Contemporary Approaches* will develop these themes, a chapter by Martha T. McCluskey and Mark Silverman focuses on the current policy debate about raising the minimum wage. The chapter examines comments by a leading economist, Greg Mankiw, on how the basic principle of supply and demand limits efforts to help low-wage workers by raising their wages.<sup>19</sup> That comment presents the familiar neoclassical economic argument that higher minimum wages are likely to mean fewer jobs for low-wage workers. McCluskey and Silverman offer notes and questions drawing on empirical data, closer analysis of legal context, and insights from a broader range of economic theory to question the assumptions and reliability of this standard idea of a tough policy tradeoff between higher wages and more employment.

One theme the chapter illuminates is how the standard theory fails to recognize the deep interrelationship between law and economics. If employers in some conditions respond to higher mandated wage minimums by cutting low-wage employment, that response reflects particular, contested, and changeable conditions of law rather than the general or inevitable force of economics. For example, specific laws shape the institutional obligations and interests of business organizations with regard to their workers, customers, and communities, and laws shape employers’ costs, risks, and rewards of adjusting to higher labor costs with strategies other than reduced employment. A second theme the chapter illuminates is how the standard theory’s abstraction misses crucial aspects of the context of labor, such as the fact that the nature of the “commodity”—workers’ labor—is likely to change with price, so that as wages rise above poverty levels, workers are likely to be more productive, both in individual firms (due to higher retention and morale)<sup>20</sup> and taking into consideration the macroeconomic impact (increased consumer spending).

---

19. See, e.g., Greg Mankiw, *Living Wage Redux*, GREG MANKIW’S BLOG (May 7, 2007), <http://gregmankiw.blogspot.com/2007/05/living-wage-redux.html> [<http://perma.cc/7XXC-LZSX>] (criticizing arguments for a living wage on the ground that “[i]t is a timeless economic lesson that when the price of something goes up, buyers usually buy less of it”).

20. See John Schmitt, *Why Does the Minimum Wage Have No Discernible Effect on Employment?*, CTR. FOR ECON. & POL’Y RES. 2–11 (2013), <http://cepr.net/documents/publications/min-wage-2013-02.pdf> [<http://perma.cc/YGD5-2SEE>] (reviewing the numerous empirical studies of the effect of raising the minimum wage in the period since 2000).

In a third turn from the standard analysis, the chapter uses empirical data and closer analysis to probe the value judgments obscured in the argument that higher minimum wages means higher low-wage unemployment. That argument rests on narrowing what counts as unemployment to exclude the rising numbers of U.S. low-wage workers who have dropped out of the workforce as the costs of maintaining work have outpaced basic living costs, leading to more non-elderly adults with poor health at risk of turning to drug addiction and suicide in place of work, family care, and education.<sup>21</sup> In short, the chapter explains how a nuanced and complete consideration of the interaction of law and economics does not support a simple or inevitable tradeoff between higher wages and lower employment for low-wage workers, and how minimum wage policies might be designed to avoid the risk of offsetting job losses.

Frank Pasquale's chapter on health insurance law and policy questions several premises of the economic analysis that is a staple of current health law casebooks. For neoclassical economists, pervasive regulation is the original sin of the U.S. health care system—a deviation from the market forces that are supposed to promote competition, discipline spending, and increase quality. For neoclassicals, the private insurance market is a kind of penance designed to bring market discipline to a field they view as coddled by government intervention. Patients may not be able to strike bargains well on their own, but insurers are supposed to act as their agents, negotiating for the best combination of cost and quality in care. However, private insurers are primarily responsible to their own shareholders and bondholders, secondarily to the firm that hires them (in the case of employer-sponsored insurance), and only via contract to the insured patient. These divided loyalties complicate usual assumptions about the private insurers' potential to protect the interests of the insured. Pasquale's chapter rejects the usual, consumer-oriented presentation of health insurance choices and risks as an ordinary business transaction, presenting instead the complex conditions that make fully informed, arms-length bargaining impossible.<sup>22</sup>

For the architects of the Affordable Care Act,<sup>23</sup> health insurance should be like mainstream consumer goods—offered on an internet-driven marketplace, with sufficient choice to enable consumers to expertly weigh their preferences

---

21. See *The Long-Term Decline in Prime-Age Male Labor Force Participation*, WHITE HOUSE COUNCIL ECON. ADVISERS 2, 4 (2016), [http://www.whitehouse.gov/sites/default/files/page/files/20160620\\_cea\\_primeage\\_male\\_lfp.pdf](http://www.whitehouse.gov/sites/default/files/page/files/20160620_cea_primeage_male_lfp.pdf) [<http://perma.cc/WJ9W-QB9R>].

22. See also Frank Pasquale, *Grand Bargains for Big Data*, 72 MD. L. REV. 682, 687 (2013) (identifying a “distinct field of health care economics” as a vital complement to ordinary economic reasoning in health settings); Frank Pasquale, *Access to Medicine in an Era of Fractal Inequality*, 19 ANNALS HEALTH L. 269, 287 (2010) (explaining how application of neoliberal austerity policies to reduce funding for domestic graduate medical education led to immigration of physicians trained in less-developed countries, creating shortages of medical personnel in less-developed countries that were unaccounted for in neoliberal economic theory).

23. Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 *et seq.* (2012).

for containing costs, and gaining access to a large network of physicians and convenient, reputable firms. But this model fails on many levels. A consumer can anticipate roughly how many miles she will drive a car over the next year—but has no idea if she will get in a car accident requiring intensive care. Nor in many cases is it possible to find out well in advance what various health outcomes will cost. Instead, consumers are predictably defaulting toward the lowest cost plans—which, in turn, are keeping costs low by contracting with restricted, narrow networks of physicians. Those narrow networks assure that many are stuck with surprise medical bills—a patient can easily be treated by “out-of-network” doctors in an “in-network” emergency room. The foundational mistake—of viewing health care as, more or less, a consumer market—has resulted in financial ruin for many families (who find “out of network” care uncovered)<sup>24</sup> and widespread public anger at “Obamacare’s” failure to stop what strikes many as a bait and switch operation.<sup>25</sup> Pasquale’s chapter also examines the proposed legal fixes for these problems and the epicycles of regulation and re-regulation necessary to a neoliberal model of health “consumers” which bears as much resemblance to reality as Ptolemy’s geocentric model of the solar system did.<sup>26</sup>

In another chapter, Raúl Carrillo and Pavlina Tcherneva expand the analysis of unemployment policy further beyond private micro-level decisions of employers and workers to recognize the deeper ways in which law and government actively produce unemployment through the design of public law—including constitutional law, administrative law, and legislation. This shift in understanding provides legal and economic support for policies that would instead promote full employment, such as a right to work. In a chapter that also

- 
24. Mark Hall et al., *Solving Surprise Medical Bills*, BROOKINGS (Oct. 13, 2016), <http://www.brookings.edu/research/solving-surprise-medical-bills/> [<http://perma.cc/PH9Z-GKR7>].
25. Mark Blumenthal & Jonathan Cohn, *The Surprising Reason So Many People Still Don't Like Obamacare*, HUFFINGTON POST (June 21, 2015, 8:03 PM), [http://www.huffingtonpost.com/2015/06/21/obamacare-approval-polls\\_n\\_7632070.html](http://www.huffingtonpost.com/2015/06/21/obamacare-approval-polls_n_7632070.html) [<http://perma.cc/KE3T-4974>].
26. An epicycle was an adjustment in orbit added to Ptolemaic models of the movement of the stars and planets. The geocentric system “worked” for many predictions as long as such ad hoc adjustments were made. See THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 68 (1962) (“Given a particular discrepancy, [medieval] astronomers were invariably able to eliminate it by making some particular adjustment in Ptolemy’s system of compounded circles. But as time went on, a man looking at the net result of the normal research effort of many astronomers could observe that astronomy’s complexity was increasing far more rapidly than its accuracy and that a discrepancy corrected in one place was likely to show up in another.”). The complexity of the resulting systems is analogous to the complexity of many policy ideas in health care, where complicated regulations proliferate as federal and state officials try to square circles and plug loopholes developed by attorneys far better compensated than them.

shifts the ground of law and economics beyond individualized transactions, Kenneth Casebeer leads readers through cases showing how the seemingly economic forces producing inequality and insecurity are driven by a fictional and skewed separation between state and market in constitutional law. Casebeer identifies possibilities and challenges for developing an economic rationality in law grounded in a deeper analysis of social interdependence and institutions to better advance human flourishing.

## CONCLUSION

So-called “market forces” are thoroughly intertwined with law and cannot be understood without some reference to history, sociology, psychology, and other social sciences. Economics Nobel Laureates like Robert Shiller and Elinor Ostrom have recognized the productive ecology of social sciences.<sup>27</sup> It is time for legal scholars to develop a law and economics curriculum that catches up with the advances of economics as a discipline.

The urgent challenges of the twenty-first century also call for a new law and economics. Solutions to problems such as rising inequality, climate change, de-industrialization, automation, infrastructural decline, underdevelopment, and financial instability will depend on deepened understandings of how economics is interrelated with complex legal rules and legal institutions. Lawyers with a more advanced and nuanced understanding of economics will be far better poised to help solve these problems than those lulled into thinking that simple neoclassicism reflects all that economics can offer to law.

---

27. See, e.g., GEORGE A. AKERLOF & ROBERT J. SHILLER, *PHISHING FOR PHOOLS: THE ECONOMICS OF MANIPULATION AND DECEPTION* (2015) (analyzing how, without strong regulation, markets systematically undermine the greater good by using deception and unequal information to exploit human vulnerabilities); ELINOR OLSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990) (analyzing diverse examples of successful cooperative control of economic resources, refuting and complicating assumptions of the competitive market model).