WHY THE SHADOW OF THE LAW IS IMPORTANT FOR ECONOMISTS

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Abstract

The concept of the shadow of the law refers to the way laws can affect people's actions even when there is no direct legal involvement. Often the law is used to "send a signal". This paper presents an economics perspective on this concept. An illustrative game is presented and several related economic concepts are described. An assessment is made of the implications in terms of the suitability of the signals given and various responses that may be observed. In summary, the law is a central component of policy. The paper draws attention to an important dimension of policy implementation.

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Keyword(s): Law; shadow of the law; policy implementation; negotiation

> *By the time I had finished my research, I had spoken privately to chief constables who said it was a waste of time arresting criminals; judges who said it was a waste of time sentencing them; and prison governors who said it was a waste of time locking them up. I was confronted with the realisation that* ***the criminal justice system is rather an effective way of regulating the behaviour of law-abiding citizens, who pick up the deterrent signal and react****; but a strikingly ineffective way of controlling offenders.*
> (Davies, 2008, p. 38)

Introduction

The concept of the shadow of the law refers to the way laws can affect people's actions even when there is no direct legal involvement. Elster describes this phenomenon, but not the term, when describing what he calls the "disagreement point":

> Consider first how the government can use its legislative powers to shape the disagreement point. If the law determines the outcome when private bargaining fails, it serves as a disagreement point for the latter. The decision that would be made in a court or by an arbitrator, as well as the cost of legal fees, will have to be taken into account by the parties in their private bargaining. (Elster, 1989, p. 88)

Note also (emphasis added):

> What is regulation? Regulation is any law or other government rule that influences or controls the way people and businesses behave. (Regulatory Impact Analysis Unit, 2007, p. 3)

The law does not impact only on those directly involved with the courts. In the parliamentary debates on relationship property legislation, Lindsay Tisch said:

> The Law Society has said that it expects that after this legislation has gone through, between 75 and 80 percent of relationship property disputes and litigation will end up in the courts. That is what the Law Society is saying. Its members deal with the current matrimonial property legislation. If we look at the current legislation, we see that only 10 percent of people end up in court. [21 November 2000, 588, NZPD, 6720][1]

And, on the same topic, Katherine Rich said, "At the moment I understand that about 90 percent of all cases do not make it before a judge, and that most cases are worked out in advance between lawyers and couples" [21 March 2001, 591, NZPD, 8440].

Economic analysis is based on the idea that people react to their environment. The institutional structure, which includes law, affects the constraints that people face. Standard microeconomic theory on market failures and regulatory interventions commonly assumes that people are law-abiding, but for some possible brief mention of enforcement issues. The abstract to Heyes (2002) begins:

> Enforcement of any rule or regulation is where 'the rubber hits the road'. Many economists and policy analysts have been guilty of proposing and promoting legal and regulatory instruments having given scant or no regard to the problems that might surround their implementation.

This suggests that they are implicitly assuming that people comply with any new law or change in the law, so enforcement is costless. They assume that changes in behaviour, where required by the law, occur without recourse to court action. In other words, there is full compliance in the shadow of the law.[2]

In law itself, judges are frequently reported as basing their sentencing on whether there is a need to "send a message" to others that certain behaviour is unacceptable. For example, Judge Adeane states (my emphasis), "Having looked around this community and seen this kind of offending touching so much, from public art through to private property around the suburbs where people's homes have been defaced, a clear message has to be sent out" (NZPA, 2008). There is an implicit assumption in such decisions that legal decisions affecting some people will alter the behaviour of others without further recourse to law. The Families Commission commented on the proposed repeal of Section 59 of the Crimes Act[3], removing a defence for the use of force against children, stating, "Repeal will send a signal to society that any kind of hitting children is not endorsed by the State" (The Families Commission, 2006). And for a third example, in Parliament on 9 December 2008 at the first reading of the Sentencing (Offences Against Children) Amendment Bill, Hon Dr Richard Worth (Associate Minister of Justice) said:

> I accept, of course, that the enactment of this legislation does not of itself resolve lawbreaking, but it does send a very clear message to the community as to activity that we abhor and are determined to confront, it does send a clear signal to intending offenders, and, of course, it sends a very clear signal to the judges to seek, in the exercise of their discretion in imposing sentences, a particular weighting on the issue that is the subject of the bill. [9 December 2008, 651, NZPD, 674]

One possible signal was sent by Justice Venning in the High Court at Whangarei, when he ruled that a company director who discovered his business partner was allegedly defrauding investors had to pay half the costs of redressing the fraud[4]:

> Kensington Swan partner Rodney Craig said the decision extended recent case law making silent partners culpable for decisions made by other directors and was a stronger shot across the bow of uninvolved company directors… Craig said he expected the decision to reverse a trend of silent business partners being appointed to boards. He advised uninvolved directors to step down… (Smith, 2009).

A simple experiment

Does the law have an impact on the behaviour of others? Consider the following exercise that has been run on several occasions in both class and seminar settings. Each time, the results have been broadly the same. As an illustration, the table below presents the results from one such experiment with a group of Japanese students from Ritsumeikan University on 18 August 2008.

1) Divide people into pairs, with one person being "blue" and the other "red".

2) Give each pair 10 counters. Tell them that these are of value, and that they are to come to some agreement as to how they will be shared between the two of them.

3) Give them a few minutes to decide, then note down the results from each pair.

Most pairs will have split the counters 5 each, or close to that.

4) Repeat the experiment with the same people, but this time tell them that, if they don't reach agreement within a specified time (say 5 minutes), you (the "judge") will decide for them, giving eight counters to "blue" and two to "red".

5) Note down the results again.

Overall they will be different from those in the first experiment, even if the judge is not called on to make the allocation.

Results are shown in Table 1. In this experiment, only one of the 11 pairs failed to reach an agreement. One pair used a game of chance to allocate the counters, and 9 pairs changed the allocation on the second occasion in favour of the one who would have been favoured by a ruling. It is a simplified illustration of the effect of bargaining "in the shadow of the law".

Table 1: Counters game, player 1 outcomes

Pair number	free choice	guided choice	
1	5	7	
2	5	7	
3	5	7	
4	5	8	No agreement – judge ruled
5	5	6	
6	5	6	
7	5	6	
8	5	6	
9	5	8	
10	6	10	Allocated by toss of coin
11	5	8	

Debate on the concept

An early approach to the shadow of the law in the context of family law describes the situation as follows:

> Divorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum; they bargain in the shadow of the law. The legal rules governing alimony, child support, marital property, and custody give each parent certain claims based on what each would get if the case went to trial. In other words, the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips - an

> endowment of sorts. (Mnookin & Kornhauser, 1979, p. 968)

The authors suggest, "In negotiations under this regime, neither spouse would ever consent to a division that left him or her worse off than if he or she insisted on going to court" (Mnookin & Kornhauser, 1979, p. 969).[5] It is not stated in their paper, but any assessment should consider the time and money costs of court proceedings[6], along with any possible impact of litigation (or avoidance of litigation) on on-going relations between the parties.[7]

Jacob (1992) is critical of Mnookin and Kornhauser, not denying the existence of the shadow of the law, but only suggesting that there can be other factors also at play. He cites a study (Ellickson, 1991) of a small community where custom and social pressure are also important. In that source it is said, "some spheres of life seem to lie entirely beyond the shadow of the law" (Ellickson, 1991, p. 283). Jacob's own analysis of divorce cases distinguishes broadly two groups of people, those who follow a legalistic approach and those whose approach is relational, or based on the nature of and expectations of the relationship between the parties (some could have characteristics of both). He points out that, where the law was clear, this generally ended discussion:

> The law may also simply remove some issues from the negotiating table. This is what happened to child support issues for most of the respondents. Although its provisions specify minima, it was almost universally interpreted by both attorneys and clients as mandating a percentage of net pay. Consequently, many of my respondents simply did not deal with support in their negotiations. (Jacob, 1992, p. 584)

A related point was put forward by Wyatt Creech in relation to New Zealand's Child Support Act (1991) during the parliamentary debates on relationship property:

> When that Act came in... there was an immediate reaction from people who felt that the way things were being divided up was very unfair. But over time people have grown to accept that when they take on parenting they take on a responsibility to provide for children, whether or not they are living with someone. It is this type of change of attitude that the Matrimonial Property Act brought about, and this legislation carries on that tradition... [6 May 1998, 567, NZPD, 8287]

Note also Keith Locke in the same debates:

> There is the problem that many de facto couples find when their relationship breaks up of trying to work out the asset division. It is very hard to work out just on one's own if no legal provisions exist to assist in this process to make sure that everyone comes out of the situation satisfied. [4 May 2000, 583, NZPD, 1931]

Frédéric Bastiat (1850) made a similar point in a pamphlet on the law:

> There is in all of us a strong disposition to believe that anything lawful is also legitimate. This belief is so widespread that many persons have erroneously held that things are just because the law makes them so. Thus, in order to make plunder appear just and sacred to many consciences, it is only necessary for the law to decree and sanction it. Slavery, restrictions, and monopoly find defenders not only among those who profit from them but also among those who suffer from them.

Hence it may be reasonable to conclude that laws can shape perceptions. However, while the terms of the legislation may come to be accepted, there may be behaviour changes that arise from the different incentives. In addition, it could be imagined that, if one party was intent on litigation, the other would no longer see the situation as relational, so Jacob's categorisation may depend on both parties, rather than just one.

From the perspective of this paper, there are numerous possibilities as to the relative influence of various factors. Therefore, no single theoretical explanation is likely to provide a definitive explanation in all cases. Jacob does not show that the shadow of the law is irrelevant, but just that its significance may be tempered by other influences under some circumstances. A key factor in Ellickson's example is that there is strong social pressure on both parties to a dispute to resolve matters in other ways and according to other criteria. This lessens the risk of one party defaulting from that convention and having recourse to the court. Similarly for Jacob, where relational factors play a part there are likely to be signals that parties can trust each other. In such cases the shadow effect is less of a threat. Williams (1979) suggests that social controls such as values and morality are superior to the law, but that the law, if heavily relied on, can supersede them.

The sociological dimension could be pursued further. Felstiner, Abel and Sarat (1980) consider disputes as social constructs:

> Studying the emergence and transformation of disputes means studying a social process as it occurs. It means studying the conditions under which injuries are perceived or go unnoticed and how people respond to the experience of injustice and conflict. (Felstiner, et al., 1980, p. 632)

These perceptions as to what is unjust can be shaped by the law, custom, or by influences such as agenda setting and framing. "The perception of an injury that generates a dispute requires the invocation of a legal or a social norm of acceptable behavior that leads the injured person to feel aggrieved" (Jacob, 1992, p. 567). The factors can also be interrelated. For example, agenda setting may be used in an attempt to change the interpretation of the law, as with pressure for tougher sentencing. Conversely, law changes may be used to try to change perceptions, as with legislation related to smacking children. The shadow of the law, along with numerous other influences, can shape perceptions and expectations, with resulting implications for behaviour.

Consequently, laws and law changes should be assessed in this context. Some consideration is given to these issues in the following sections.

Related phenomena in economics

The economics literature is not devoid of references to phenomena that have implications for perceptions, outcomes and behaviour elsewhere. Within this broad area, we could consider externalities, announcement effects, indicative planning, the relationship with motivation, and expected penalties.

Externalities From an economics perspective, the shadow of the law could be considered as an external effect arising from the court decision/signal as described above. Others[8] are affected by the decision besides those participating directly. Voltaire's often quoted description in *Candide* of the execution of an English admiral (based on the execution of Admiral Byng in 1757), describes a decision made for this purpose: "[I]n this country we find it pays to shoot an admiral from time to time to encourage the others" (Voltaire, 1947, p. 111).

Announcement Effects Shaw described announcement effects as a psychological reaction to a perceived change in the environment. Hence, for example, the effect of a rise in interest rates depends on its impact on expectations. (Shaw, 1973, pp. 19-20).

Indicative Planning An economic phenomenon related to announcement effects can be seen in the economics literature on indicative planning, in particular the approach described in the Theory of Demand Expectations (Turner & Collis, 1977, pp. 65-70). Signals are given through publicised plans. These change perceptions and hence behaviour.

Expected Penalties Other literature assumes that people base their actions on expected penalties, calculated according to the possible penalty and the probability of it being incurred. This has been referred to as 'rational crime' (Cooter & Ulen, 2008, pp. 494-501) and is just one of three alternative models they present. The assumption has also been challenged elsewhere (Chapple, 2007; Torgler, Schaffner, & Macintyre, 2008), with Torgler, et al. discussing literature on the importance of social custom, giving a taxation parallel to the points in Jacob (1992).

The significance of the concept

This section considers three aspects as follows. First, if the signals being given are correct, then the shadow of the law may result in economical and desirable applications of the law. Second, the signals might be incorrect. For example, the cases being litigated may not be representative, in which case the signals would be distorted, or the signals may not be clear, in which case uncertainty is generated. Third, irrespective of the quality of the signals, people's responses to them may differ. One important dimension to explore is people's willingness to voluntarily comply with the law.

Can be economical if all works well

If the correct signal is given by the law and accepted by potential litigants, outcomes can be achieved without the expense of litigation. On that basis, the shadow of the law is allowing the law to work as intended with lower transaction costs. Such a situation may not be as common as may be thought. If cases vary, and if the signal is unclear due to case-specific details, then the information may be unclear or misread. Alternatively, if cases are handled in the same manner without regard to specific details, then the law may not be providing the intended outcomes in all instances.[9]

Can give a distorted signal

Common law or interpretation of statute law may result in others feeling obliged to act in ways that they would not have done otherwise. For a historical example, the *Poor Law Report of 1834* includes descriptions of "allowances" given by parishes as relief for unemployed or those on low wages according to their family circumstances. A Mr Tweedy, reporting from Yorkshire, described the situation at Knaresborough where a particular "rate is allowed, because the magistrates allow it; but in fact, in many cases, it amounts to *more* than a man, when trade is flourishing, could earn" (Checkland & Checkland, 1974, p. 95).

The political implications of undesirable expectations developing as a result of the law are described by Simmonds (2002). He investigated attempts to make rents for accommodation in the UK more economically realistic after decades of controls. Expectations of low cost accommodation had become so entrenched that they caused major political problems.

One attempt to reduce costs and time delays in New Zealand is through the use of Judicial Settlement Conferences in the District and High Courts. This approach has been used in the UK for the past ten years with some success. Cost savings were not realised in the UK, however, as the costs are simply realised earlier in preparation for the conferences (Radio New Zealand National, 2009).[10] While this approach may be considered a desirable way to increase the number of cases handled by each judge, it could be an extreme case of negotiating in the shadow of the law unless there is a restriction on judges presiding over both a hearing and a conference. A judge could signal the possible outcome if left to a ruling, leaving the parties little option but to reach an agreement. This would preclude the possibility of an appeal.[11] In any event, the signals given at a conference can be expected to strongly reflect the thinking that would prevail at a hearing. However, judges' views on issues may not be well informed or well reasoned. An illustration of either poor understanding or judicial rhetoric is given in Birks (2009).

This raises the question whether the signals being given are the right signals, or are being interpreted correctly.

Are representative cases litigated?

Cases may not be representative. Epstein makes this point strongly:

> A common mistake made by judges is to reason from the infrequent cases that come before them to the routine cases their rules will govern...the peculiar method of selecting cases for appellate litigation generates a sample of cases radically different from those that somebody involved in business would see on a daily basis…it is a great mistake for a judge to assume that the rules a court creates only apply to the aberrational cases. The legal rules will also govern the mundane cases that remain within the system, to be resolved without litigation. The judge needs to fear that laying down an ideal rule for this one case in a thousand may unglue the system that works well for the other 999 cases. (Epstein, 1996, pp. 30-31)

Sometimes the process of litigation changes the nature of a case. This was apparent with child custody issues. When serving as Principal Family Court Judge, Patrick Mahony and others suggested that it was conflict between the parties that caused harm to children (Birks, 2001; Haines, 2000). Consequently, under those circumstances shared custody was not a viable option. However, recourse to litigation is then seen as a demonstration of conflict, and so court rulings of shared custody were highly unlikely.

Do litigated decisions give the desired results?

Consider litigation between the IRD and individual payers of tax or child support. The sums involved for an individual, while probably significant for them, are small in relation to the costs they may incur through litigation. The outcome of litigation would have a broader relevance for the IRD and the financial implications are much greater. In other words, the benefits to the IRD are internal, whereas many of the benefits from individual litigation are external benefits.[12] Posner gives a similar example:

> An interesting question is, when can a judgment be used to bar relitigation of the same issues in a subsequent litigation (**collateral estoppel**, or in a newer phrase, **issue preclusion**), not necessarily with the same party?...To permit A to use the prior judgment [in a suit against B] to bar relitigation of this issue in his suit against C might lead A to invest excessive resources in prevailing on that issue in his suit against B. He might, for example pick as his first defendant (i.e. as B) someone whose stake in the correct determination of the issue was too small to warrant investing significant resources in having it decided in his favour, while A would spend a great deal, anticipating benefits in subsequent litigation. (Posner, 2007a, p. 623)

Posner goes on to say, "Cases such as these have given the courts little difficulty" (Posner, 2007a, p. 624), for the reason, given in a footnote, that the later party (here C), does not get "his day in court". If a precedent has been set, the same can be said in terms of arguing that point of law. The general issue is "resolved". While it may not cause difficulty for the courts, it can be very significant for the efficiency of the court system in handling such matters (having parallels with "market failure" due to external effects).[13] One possible counter could be class actions. Another might be to have a "conventional wisdom" against the large organisation or (what is perceived as) more powerful group (e.g. landlords in the UK in the 1960s, perhaps employers). In the absence of class actions, situations such as these are likely to distort the issues that are litigated and the detail with which those issues are considered. Consequently, distorted signals may be given.

Are clear signals given in decisions?

Sometimes legal decisions can generate uncertainty or false expectations, as indicated by Judge Posner in his classic law and economics text:

> …often the true grounds of legal decision are concealed rather than illuminated by the characteristic rhetoric of opinions. Indeed, legal education consists primarily of teaching students to dig beneath the rhetorical surface to find those grounds… (Posner, 2007a, p. 25)

It should also be noted that criteria for decisions and the resulting outcomes can change over time due to the preferences of judges or changing social pressures as issues gain and lose traction.

It should not be assumed that the information that is conveyed and that influences people acting in the shadow of the law is suitable for the circumstances. Consequently alternative decision making can be distorted. Even if the information is accurate, it cannot be assumed that the effects are desirable. People may react differently to the signals given.

Does the shadow effect apply equally to all?

Three approaches can be seen in the literature, in addition to the litigation versus relational distinction described on p.3 above. First, as described above, it may be assumed that there is full compliance with all laws. Second, the law could be considered to specify actions that could be taken at a penalty (commonly taken as the actual penalty, adjusted for the probability of being penalised) for contravention of the law, plus associated costs (these costs are not always mentioned).[14] Third, it may be that there is no common response, with some being more law-abiding than others.[15]

It is puzzling that the term "shadow of the law" does not appear in the index to Posner's *Economic analysis of law* (Posner, 2007a)[16], nor in Cooter and Ulen (2008). However, they both discuss deterrence, which is linked to the concept. Without the shadow of the law, enforcement costs could be very high.

> In deciding how severely to punish a crime legislators and judges consider the harm it does but also the incentive to commit it. That depends in part on the ease or difficulty of detection. The more difficult the criminal's deed is to detect, and the easier, therefore, it is for him to get away with his

> crime, the greater his incentive to commit the crime; and the greater the incentive is, the more severe the punishment must be in order to deter its commission. (Posner, 2007b, pp. 78-79)

Posner is saying that the (potential) criminal is aware of the likelihood of detection and of the penalty, and these affect his (or her?) decision.

> Like the market, the law (especially the common law) uses prices equal to opportunity costs to induce people to maximize efficiency. Where compensatory damages are the remedy for a breach of legal duty, the effect of liability is not to compel compliance with the law but to compel the violator to pay a price equal to the opportunity cost of the violation. If that price is lower than the value he derives from the unlawful act, efficiency is maximized if he commits it, and the legal system in effect encourages him to do so; if higher, efficiency requires that he not commit the act and again the damages remedy provides the correct incentive. (Posner, 2007a, p. 555)[17]

The approach where the law is considered as specifying cost of contravention has been referred to as 'rational crime' (Cooter & Ulen, 2008, pp. 494-501). They also describe a model of 'diminished rationality', where people act on impulse without due regard for longer-term consequences, and a 'civility' model as, "many people obey the law from intrinsic motivation and respect" (Cooter & Ulen, 2008, p. 506).[18]

Differing responses are described in Jacob (1992). They are also considered by Tyler (2006), who considers the importance of perceived legitimacy of the law:

> If people have an experience not characterised by fair procedures, their later compliance with the law will be based less strongly on the legitimacy of legal authorities. Therefore, not experiencing fair procedures undermines legitimacy. (Tyler, 2006, p. 172)

Just as there are alternative models, so people may have differing views. Specific behaviour types may fit one model more closely than another. Where there are a range of behaviours and these are selected due to differing perceptions or values, the efficiency effects of the shadow of the law will vary. As people are likely to learn over time, certain behaviours may be reinforced, whereas others could fall out of favour.

Similar developments can be seen in consideration of intrinsic versus extrinsic rewards and penalties, with the development of extrinsic systems having an impact on the intrinsic. Titmuss's "gift relationship" blood donor example would be a case in point (Titmuss, 1970), as are the experiments conducted by Gneezy and Rustichini (2000). Ben Kepes gave a New Zealand example:

> I attended a recent meeting where former cabinet minister Ruth Richardson talked about what she calls "regulatory creep"... This loss of focus can be directly attributed to a move from performance to compliance – that is, management and boards move from spending the bulk of their time ensuring corporate performance, to spending their time ensuring compliance with relevant regulations. (Kepes, 2007)

Don Brash described similar effects in the UK:

> In many ways, this intensive supervision by official agencies made matters worse by leading bank customers to assume that banks were effectively "guaranteed" by government, thereby enabling banks to operate with levels of capital well below those regarded as prudent in earlier decades. Perhaps even more serious, intensive supervision led even some bank directors to suspend their own judgement, and believe that they were behaving prudently provided they were observing all the official rules.
>
> I well recall meeting a man who had just joined the board of one of Britain's largest banks in the early nineties. He had spent most of his career in the British Treasury. I asked him how he found switching from the Treasury to the board of a bank. His reply was profoundly disturbing. He said that he had always assumed that banking was largely about measuring and pricing risk, and of course he had not been involved in that in the Treasury. He said he was greatly relieved to discover that all he had to worry about was whether his bank was complying with the Bank of England's rules. (Brash, 2009)

Heyes cites Frey in a generalisation of these points:

> Frey (1992, 1997) contends that the imposition of external motivation will crowd out intrinsic motivation - self-motivation may be crowded-out or diminished by the use of coercive instruments of enforcement. (Heyes, 2002, p. 528)

This point was also made in relation to the law in an address by Harold Williams, Chairman of the United States Securities and Exchange Commission (Williams, 1979).

An application of this thinking to disputes suggests some interesting implications. The specification of interventions through the court may reduce people's willingness to reach voluntary agreement, and, perhaps more significantly, result in legally specified requirements overriding any principles or intrinsic motives that might otherwise have guided people's behaviour. In some cases this is the intent of the law, as when it is designed to change social attitudes and customs. Nevertheless, the processes whereby these effects arise are complex, and there is a danger of unintended consequences.

There is an additional problem associated with the shadow of the law, namely that the way difficult cases have been resolved may not have been correct. If there are failures in the formulation and implementation of the law, then the signal could be wrong even at that stage. The potential for such failures is indicated by the possibility of group cultures and beliefs being formed

among those working in the law.[19] These can be reinforced by limited communication with other groups and the inherent authority vested in people in senior positions in the legal establishment. False perceptions can then spread through a community.

Conclusion

In summary, the relationship between law and behaviour may be complex. The shadow of the law is important, but its implications are either overlooked or brushed aside through the use of simplistic implicit or explicit assumptions. Actual responses can vary according to individual preferences, values and ethics, and in response to perceptions about institutions. This can make analysis and prediction difficult, and resulting efficiency and equity considerations are often overlooked. The framework presented in this paper may assist in a systematic consideration of the effects of legal decisions and policies implemented through the law.

Notes

[1]New Zealand Parliamentary debates are referenced according to the New Zealand Law Style Guide, namely [date, volume, NZPD, page number].

[2] There are signs that this oversight is being addressed in some circles, and Heyes' paper covers some of a rapidly growing body of literature that considers implementation issues.

[3] This section of the Crimes Act 1961 stated, "Domestic discipline---(1) Every parent of a child and, subject to subsection (3), every person in the place of the parent of a child is justified in using force by way of correction towards the child, if the force used is reasonable in the circumstances." ("The Crimes Act (Reprint as at 1 June 2005)," 1961, Section 59). The section was amended, but not repealed, in 2007.

[4] If this is seen as a major change in interpretation of the law, then it could also be an example of judicial activism.

[5] This is clear if the law or the court is seen as determining the allocation of property rights, as considered by Coase (1960).

[6] As suggested by Elster above.

[7] Ignorance or misinformation, and reliance on or avoidance of established processes, may also affect people's choices.

[8] Both those additional people who then change their behaviour, and others who are in turn affected by the changed behaviour.

[9] The existence of the shadow of the law has implications when considering whether alternatives to the law are actually independent of the law. They are not necessarily effective substitutes if the existence of one (the law) alters the nature of others.

[10] The US appears to have had a different experience when arbitration and mediation have been court-ordered:

> What I'm hearing from many of my students who volunteer as court ordered mediators is that lawyers are simply not preparing or taking the process seriously anymore. Defendants come into the mediation without an intent to negotiate in good faith and the cases lock up quickly and are put back into the court system. It would seem that history is repeating itself. Like the arbitration system before it, the mediation system that has emerged through court ordered programs has begun to slip into the same indifference that has engulfed the arbitration system. (Krivis, 2007)

[11] In the Family Court in New Zealand, if a judge has presided over a mediation conference, a party can request that the judge not then preside over a hearing on the same matters. However, this safeguard does not apply on all occasions where it might be relevant. Given the relatively informal procedures in the Family Court, judges have been known to give signals to the parties during a hearing in an attempt to resolve matters by consent.

[12] Downs has suggested, in Proposition 7 (Downs, 1957, p. 297), that politicians may favour producers over consumers. It may be that the same could be said of the law, and for similar reasons.

[13] This Posner quote suggests that he is using a court-focused perspective to assess the operation of the court. The approach is worrying as it can conceal significant failures from a broader perspective.

[14] See, for example, "Overfishing 'made legal' by fines system" (Churchhouse, 2007).

[15] There is an additional important dimension to consider. Obeying the law is considered here in a "first stage". The laws exist, and people could either obey them, or risk being penalised for contravening them. There is an additional stage after people have been convicted, or after court orders have been made in a dispute. At this stage, the issue is one of compliance with and enforcement of court orders. Will people act as agreed (consent orders), or as ordered? Will sentences (such as community service) be carried out? Can the orders of the court be ignored with impunity? If so, the law could be thought of as having no "teeth", and therefore compliance is likely to be low.

[16] Posner does hint at the concept:

> [T]he judge, and hence the lawyers, cannot ignore the future. The legal ruling will be a precedent influencing the decision of future cases. The judge must therefore consider the probable impact of alternative rulings on the behavior of people engaged in [such] activities... (Posner, 2007a, p. 26)

However, probably basing his understanding on Coase (1960), he then ignores the shadow of the law to state:

> In [areas such as contracts, and large stretches of property and torts] inefficient rules of law will be

> nullified by express agreement of the parties, while persistent judicial defiance of economic logic will induce contracting parties to substitute private arbitration for judicial resolution of contract disputes. (Posner, 2007a, p. 571)

The rules would specify property rights. While private arbitration might then occur, bargaining positions and the final allocation are likely to be influenced by the perceived rules. This would not result in them being nullified. In addition, the shadow of the law is likely to affecting outcomes elsewhere, and there are other factors to consider including cost, ignorance (as these are generally not repeat purchases), the advice of lawyers, and rent-seeking by arbitrators.

[17] Posner appears to be confusing compensation to the damaged party and opportunity cost to the liable party. It is purely coincidental if compensation equals the optimal incentive (disincentive) sum.

[18] Alternatively, note, "Doing one's civic duty can also create instrumental benefits for the actor, such as improving his reputation" (Cooter & Ulen, 2008, p. 507). Also, "People are notoriously susceptible to group pressures, variously described as conformity, herd effects, or social solidarity" (Cooter & Ulen, 2008, p. 507).

[19] Group cultures may be created or reinforced through institutional structures. For example, the Ministry of Social Development's staff training manual covering the Family Violence Intervention Programme (Ministry of Social Development, 2008) includes training for Work and Income staff. P.4 of the "Provide Support" section on "Work and Income Intervention" refers throughout to victims as female. The "Prevalence" section presents the male power and control model as the sole social model and includes data from studies assuming solely, or designed only to identify, male violence. Several of the statistics are in direct conflict with more gender-balanced Ministry of Justice and National Family Violence Clearing House violence data (Ministry of Justice, 2007; New Zealand Family Violence Clearinghouse, 2007). The Duluth Wheel approach is included and many of the sections of the manual uncritically present this and associated gendered perspectives. For some discussion in the context of a speech by the Principal Family Court Judge, see Birks (2009).

This approach to policy, ensuring that employees of key organisations see issues in the preferred way, is not unique to the area of family violence. This has been said of the New Zealand post-1984 economic liberalisation process, "In New Zealand, members of the reform-policy community appointed like-thinking colleagues and friends to positions of power on important task forces and to the boards of state-owned enterprises and the Reserve Bank" (Goldfinch & Hart, 2003, p. 242). It is through such means, along with agenda setting, framing and IDFs, that institutions may be "vulnerable to capture", as suggested for the Family Court in Birks (1998, 2004).

A retired lawyer has indicated the possible influence of this, writing of juries being given selected information and of tunnel vision that can "limit or distort both the investigation and the prosecution's presentation of facts" (Clayton, 2007).

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