

Working Draft

## Social Entrepreneurs and the Management of the Regulatory State

*The Latent Need for an Updating of Law School Curricula<sup>1</sup>*

A leading professor<sup>2</sup> of law has stated:

***Law students need to know about more than administrative procedure and judicial review.***

*Since the days of Felix Frankfurter, the Administrative Law course has been a staple of American law schools. It's a great course, but it's limited. The same is true of most of the courses on legislation and regulation in the first year, which also focus on how courts interpret statutes and how they review administrative actions. But a student could emerge from these courses with an A+, yet without understanding the reasons for regulations to exist or how to argue before an administrative agency. They also wouldn't learn much about the compliance process, which may well be the stage where lawyers are most active. They may learn about the existence of OIRA (the White House office that reviews agency actions), but not about how cost-benefit analysis really works. Yet as regulatory lawyers, that's something they really need to understand.*

Like it or not the legal profession is the discipline which establishes the rules for the management for the regulatory state although they have been augmented in recent years by members the economics profession. Members of other important disciplines such as public administration and public policy should exhibit a comparable interest in obtaining a foothold within the legal community since the implementation of their ideas rests in large part on the exploitation of the regulatory process.

A number of individuals outside the legal profession have concluded that the early advances of the United States in the management of the regulatory state

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<sup>1</sup> [Jim Tozzi](#), Center for Regulatory Effectiveness

<sup>2</sup> [Dan Farber](#), Berkeley Law

are now second to advances made by other nations. Consider the following conclusion from Council on Foreign Relations<sup>3</sup>

*In particular, the U.S. regulatory management system, or the way in which federal regulations are designed, could be improved. The system has changed little since the early 1980s and focuses almost exclusively on cost-benefit analysis before regulations are put into place, instead of in hindsight when it is clearer whether a regulation is working.*

*The United States used to be the trailblazer in regulatory reform. But the rest of the rich world has caught up. Countries like Australia, Canada, and the United Kingdom can now lay claim to being at the cutting edge of regulatory management. They have implemented systems that better manage existing stock, for example, with regulatory budgets and automatic reviews, while also improving the filter for new regulations through empirical study.*

## **A Program to Expand Law School Curricula**

Recognizing that the information deficit in law school curricula often leads to a misunderstanding of the societal contributions of the Office of Information and Regulatory Affairs (OIRA) in the White House Office of Management and Budget, the Center for Regulatory Effectiveness (CRE) embarked upon an initiative to revise and update law school curricula.

Prior to doing so CRE contacted a number leading<sup>4</sup> legal scholars, editors of legal publications, think tanks and professional organizations who have examined in detail the implications of revising law school curricula to make them more responsive to established legal markets. Nearly without exception CRE was advised that the issue was addressed over the past decade(s) and that it is virtually impossible to gain traction by going to the top of the legal pyramid by approaching national organizations; instead they recommended a bottom's up approach, that is, start by approaching individual professors and request they address the issue in their LegReg courses.

The aforementioned recommendation could have been easily adopted

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<sup>3</sup> [Council on Foreign Relations](#)

<sup>4</sup> [List of Contributors](#)

by CRE because of its [promotion](#) of an OIRA Teaching Module.

Notwithstanding their advice CRE approached national organizations only to be told that it unlikely that the CRE recommendation would ever be adopted. The reason for no action by the national organizations is that many therein believe administrative law is an outlier. With that conclusion in mind CRE revised its plan of attack and again sought the advice of veterans of previous campaigns. Their invaluable input to the process is presented in the previously mentioned list of contributors. (Footnote 4)

Based upon the aforementioned discussions CRE concluded that LegReg courses are a very meaningful step in the desired direction but fall short of the skills needed to equip law students to work as regulatory practitioners.

## **Attorneys as Social Entrepreneurs**

Social entrepreneurs<sup>5</sup> are individuals in the public sector who possess skills comparable to those who establish successful enterprises in the private sector. The difference between social entrepreneurs and private sector entrepreneurs is that private sector entrepreneurs chronicle their accomplishments in bank books whereas social entrepreneurs tally their accomplishments in history books.

In any generation only a handful of individuals in a particular discipline are in fact social entrepreneurs; social entrepreneurs are the game changers that lead to the attainment of societal goals. Consequently one objective of any law school curriculum should be to serve as an incubator for future social entrepreneurs. In fact a retrospective review of the record of some of the giants in the field of law would most certainly lead to their designation as being social entrepreneurs.

The question raised herein is why discourage the formal development of social entrepreneurs in the field of law by failing to implement a needed change in law school curricula?

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<sup>5</sup> [Wikipedia on Social Entrepreneurs](#)

The concept of social entrepreneurs has a minimal presence in the United States but it is promoted to a much greater degree in other countries. Nonetheless a growing number of educational institutions offer course work, if not degrees, in social entrepreneurship. Here is a list of nineteen universities<sup>6</sup> which offer courses in social entrepreneurship. It just happens that a number of the same universities have law schools that are among the most highly rated in the world, including Berkeley, Cornell, Duke, Harvard, Oxford, Michigan, Northwestern, Stanford and Yale.

Consequently the recommendation herein for updating law school curricula might be designated as *LegReg Plus* meaning a formal recognition of LegReg but placing additional emphasis on regulatory compliance, regulatory oversight (OIRA) and social entrepreneurship all aimed at developing innovative individuals who need not rely on command and control measures to address the increasingly complex regulatory changes necessary to cope with globalization.

In *LegReg Plus* 3L law students would be encouraged to take courses such as economics, statistics, public administration and public policy.

## **A Select List of Social Entrepreneurship Interventions in the Regulatory State.**

The Center for Regulatory Effectiveness (CRE) has been promoting social entrepreneurship for the management of the regulatory state for a number of years. CRE's interest stems from the fact that the ever increasingly complex regulatory state should benefit from a multidisciplinary approach to its problems. CRE's emphasis has been to work with legal community because it is the profession which produces judges, legislators, academics and practitioners all of which dominate the landscape of the regulatory state. However the attorney domination of this field need not crowd out other disciplines such as economics, public administration and public policy.

The simple fact is, for example, that members of the legal profession are

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<sup>6</sup> [A Select List of Universities Offering Courses in Social Entrepreneurship](#)

more likely to master economics and then economists are likely to master administrative law. That observation coupled with the fact that the legal profession is currently running the show lead CRE to work within the legal community for a number of decades.

From the onset the concept of centralized regulatory review was the product of a group of social entrepreneurs, none of which were attorneys, working in the Department of Defense who eventually led the first centralized regulatory review program in the White House Office of Management and Budget<sup>7</sup>

Several of the most significant cornerstones of the regulatory state, the Clean Air Act and the Clean Water Act, were in large part the work of the late Leon Billings who by all accounts was an accomplished social entrepreneur. CRE provided an in-depth review of his work in an article published by the Environmental Law Institute<sup>8</sup>.

CRE's activities dealing with social entrepreneurship have been the subject of articles written by a number of authors. A landmark book titled *Lobbying and Policymaking*<sup>9</sup> has been published by the *Congressional Quarterly* based upon a decade of research sponsored by the *National Science Foundation*.

The focus of the book is to highlight the activities of social/policy entrepreneurs in their private pursuit of the public interest by affecting the activities of regulatory agencies. The authors state that the presence of policy entrepreneurs has lead to significant changes in the operation of federal agencies. More specifically, "Policy entrepreneurs use their knowledge of people and institutions to get their issue on the agenda and to ensure that their preferred policy alternative has the best chance of success".

An article in the *Penn RegBlog*<sup>10</sup> expands upon one of the case studies described in the aforementioned *Lobbying and Policymaking* which emphasizes the role of social entrepreneurs in the passage of the Data Quality Act. One last concern deals with the funds required to finance social

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<sup>7</sup> [OIRA's Formative Years](#), page 68.

<sup>8</sup> [Environmental Law Institute](#)

<sup>9</sup> [Lobbying and Policymaking](#)

<sup>10</sup> [Penn RegBlog](#)

entrepreneurial activities. One source is a reprogramming of funds<sup>11</sup> from those dedicated to sustainability to social entrepreneurship.

## All Is Not Lost

Notwithstanding the fact that many practicing attorneys consider administrative law to be an outlier, a confluence of forces is resulting in it receiving greater recognition. These forces include an increase in:

- (a) the size of the regulatory state
- (b) the number of LegReg courses offered
- (c) the number of law schools requiring courses in administrative law
- (d) the number of journal articles written in support of broadening law school curricula and
- (e) the precedent-setting [joint MPA/JD program](#) presently in existence at the Maxwell School at Syracuse University; students complete the requirements for both degrees in three years and are enrolled simultaneously in the Maxwell School and the Syracuse College of Law.

CRE recognizes that some of its past work which changed how the government operates is a cakewalk compared to making comparable changes in the manner in which universities operate. **Nonetheless private sector firms who purchase legal services should explore whether they should continue to pay for on the job training for first year associates in major law firms because of the recalcitrance of some Colleges of Law to modify their curricula.**

Previously we have mentioned a number articles and symposia held on expanding the breadth of law school curricula. However it should be noted that virtually all such publications centered on LegReg with scant attention to regulatory compliance and centralized regulatory review and no attention devoted to the utilization of social entrepreneurs. To this end Colleges of Law bring a lot to the table but they are not the preferred discipline for the education of social entrepreneurs, a task best left to other disciplines.

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<sup>11</sup> [Monthly Manifesto](#)

Fortunately CRE is no longer one of the very few lone voices in the wilderness promoting the use of social entrepreneurs in the management of the regulatory state with an emphasis on attorneys assuming the role of social entrepreneurs.

Recently, January 2017, a noted legal scholar, Philip Weiser, Dean Emeritus of the University of Colorado College of law published a seventy-one page paper titled *Entrepreneurial Administration*<sup>12</sup>,

Professor Weiser concludes:

*The traditional administrative law model calls on Congress to enact a clearly defined, hierarchical regime that empowers a single agency to act, generally by rulemaking and adjudication... The traditional model of regulation is coming under strain in the face of increasing globalization and technological change....*

*A core failing of today's administrative state and modern administrative law scholarship is the lack of imagination as to how agencies should operate. On the conventional telling, public agencies follow specific grants of regulatory authority, use the traditional tools of notice-and-comment rulemaking and adjudication, and are checked by judicial review. In reality, however, effective administration depends on entrepreneurial leadership that can spearhead policy experimentation and trial-and-error problem-solving, including the development of regulatory programs that use non-traditional tools.*

*Despite the importance of entrepreneurial administration in practice, scholars have failed to examine the role of entrepreneurial leadership in spurring policy innovation and earning regulatory authority for an agency (or private entity)... This Article explains that the conventional view of agency behavior—either following the specific direction of Congress or the President to use notice-and-comment rulemaking or adjudication processes—fails to portray how public agencies and private entities develop innovative regulatory strategies and earn regulatory authority as a result. In short, this ...shows that where Congress is frustrated by the lack of an effective initiative, it can and does empower alternative institutional actors to step in.*

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<sup>12</sup> [Philip Weiser](#)

CRE concludes that current Congressional moves to enact a wide range of measures to “regulate the regulators” is in part, a manifestation of the absence of social entrepreneurs capable of developing tailored made solutions to the more significant issues in the regulatory state.

## **Implications for Centralized Regulatory Review**

It is the view that of CRE that if the federal regulatory process were pro-active in terms of social entrepreneurs providing ingenious solutions to regulatory issues there would be less incentive for politicians to resort to Draconian measures to correct a tilt in the regulatory state.

The strong presence of social entrepreneurs would also lead to the formation of a national constituency<sup>13</sup> for OIRA<sup>14</sup> which would shelter it In part from interest group demands for ideological solutions to regulatory issues.

We have often heard of the need for smart regulation but what we need is smart regulators. Smart regulators look outside the narrow stovepipe solutions of their particular discipline, take ownership of an issue and remain with it as a passion until the said solution is implemented; smart regulators are social entrepreneurs. An expansion of law school curricula sets the stage for the development of social entrepreneurs.

In a recent article the internationally recognized *National Affairs*<sup>15</sup> implicitly highlighted the need for social entrepreneurs to participate in the management of the regulatory state by employment within OIRA:

*The President must manage the administrative state much more energetically and effectively. He must take actual responsibility for his agencies’ regulations. To that end, the President and Congress must strengthen the White House’s Office of Information and Regulatory Affairs (OIRA) to reflect its actual role as the headquarters of the administrative state. The White House should manage the agencies’ planning process more effectively, by holding each agency to a*

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<sup>13</sup> [National Constituency](#)

<sup>14</sup> [OIRA](#)

<sup>15</sup> [National Affairs](#)



*“regulatory budget” and by carrying out its own regulatory oversight role much more systematically and transparently. Finally, the White House must improve the information and methodologies upon which the administrative state relies, by setting consistent standards across all agencies, and by actively supporting better and more diverse economic research.*

CRE’s letter<sup>16</sup> to the American Bar Association echoed the same concerns; the need to address these concerns has been documented in the rich data base produced by the *Journal of Legal Education*<sup>17</sup>. The bottom line is best represented by the fact that a recently issued Executive Order requires the implementation of a [regulatory budget](#). Apart from whether one agrees or disagrees with the directive, graduates from law schools, schools of public policy and economics are, in the overwhelming number of instances, simply not prepared to discharge such a responsibility.

Although this presentation is focused on law schools, it is equally relevant to a wide range of college curricula whose graduates will work actively on regulatory matters, including scientists, economists and those enrolled in schools of public administration, public policy and political science all of which need a strong dose of legal training.

*Based upon our research conducted thus far, with the exception of actions taken by individual professors, the changes presented herein will occur at schools of law if and only if those who employ attorneys demand such changes.*

## **Recommendations**

- (1) Authors of legal articles should make a passing reference of the need for LegReg, LegReg Plus, Social Entrepreneurship or Entrepreneurial Administration to advance the causes set forth in the said paper.
  
- (2) Those teaching LegReg courses should reach out to other disciplines within their university to gain support from a wider audience.

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<sup>16</sup> [CRE Letter](#)

<sup>17</sup> [Journal of Legal Education](#)

- (3) Regional conferences such as that sponsored by the Southeastern Association for Law Schools should be duplicated in other regions and they should issue periodic updates on progress being made to expand law school curricula in their particular region.
- (4) Think tanks should be urged to follow the example of the *Federalist Society* to conduct webinars on the subject.
- (5) Law Schools should request graduating students to emphasize on their resumes that they took the subject matter courses discussed herein.
- (6) Endorsements of *LegReg Plus* should be solicited from leading employers of law students; pilot projects to initiate such endorsements should begin immediately in key employment centers. CRE plans to initiate such a program using this paper as the marketing mechanism.
- (7) When releasing employment statistics the message material related to an expanded legal curriculum should be highlighted.
- (8) Case studies delineating the enhanced work experience of attorneys profiting from an expanded legal curriculum should be conducted and published subsequent to their graduation.
- (9) Student writing contests should be expanded to address the merits of an expanded legal curriculum.
- (10) A task force, and an attendant website, should be established to maintain a repository of actions taken to expand law school curriculum, to document lessons learned and to provide a mechanism for accepting comments from interested stakeholders. The website should be marketed widely to law firms, federal agencies, think tanks, trade associations, Fortune 500 firms, relevant Congressional Committees and the press.

N. B. See the proposed [Letter](#) to US News and World Report.