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FOUNDATIONS OF The Economic Approach to Law

【影印本】

法律的经济分析基础

Avery Wiener Katz
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序

苏　力

法律出版社决定影印出版《法律的经济分析基础》，要我给写个序，我感到诚惶诚恐。诚惶诚恐不是因为法律出版社的压力，而是因为对法律经济学的敬畏。我其实仅仅是对法律经济学有所了解，对其进路、方法相当欣赏，也阅读了一些相关的“大路货”的著作，但要为这样一本书作序，实在是不敢当。

但我还是写了这些文字，并不是因为挡不住法律出版社编辑的一再敦促，最重要的是我看了这本书，我喜欢。我觉得这本书于其他的法律经济学著作不同，有特点。

此书的最大优点和特点是，作者汇集了法律经济学的一些经典论文，按照不同的专题分编，因此，喜好法律经济学的年轻学子可以从研读经典中获得从一般的法律经济学教科书中难以获得的体会，了解法律经济学发展的来龙去脉，特别是思想学术理论发展的脉络；因此，也可以了解法律经济学关注的基本理论问题；最后，研读这些论文，我相信读者会获得撰写学术论文的训练，而这是中国法学界目前还比较缺乏的。如果中国法学在这三个方面有所提高，我相信，中国法学的明天一定会有很大的提升和改观。

而且，对法律或社会问题感兴趣的经济学家、社会学家、政治学家和人类学家也会喜欢这本书的。

我推荐这本书，但最终的选择者是读者。

苏力

2004 年 7 月 15 日

北大法学院

前　言[1]

本书没有像以往法律经济学著作那样，以分析某法律领域为重。编者收录的论文主要探讨了法律经济学的基本理论。本书着重论述了经济学作为一种思考方式，其特色是什么、它与传统的法律思维方式有何异同。编者以为，多数法律职业者研习法律经济学时，并没有参透这一基本问题。众多教材只关心如何应用法律经济学，极少涉足经济学方法论。于是学生也罢，行外人也罢，没人能够清楚经济学的功用是什么，而当他们能够装模作样地熟练摆弄经济学时，却无力运用它做法理研究，也无力坚守这一阵地。

正如本书标题所指明，本书重在使读者了解法律经济学的基础。开篇第一章介绍经济分析之根基：理性选择模型、效率理论和实证主义理论。其中理性选择模型涵盖人类行为的经济学理论；效率理论将提到效率的首要评判标准；实证主义理论将指明实用主义者将事物的本身与价值区分开来的目的何在，并将解释建构社会简化模型之功用。随后的章节是对经济学两大门派——即世人戏称的“芝加哥学派”和“非芝加哥学派”——之学说的介绍和比较。两派对自由交易与政府监管的理论效力所做的理论假设迥然对立，从而他们建构的法律经济学模型也是截然不同。

打好理论基础之后，编者转向实际分析。涉及这些章节的内容也不是按照传统法律领域分割，而是按照经济学分析的不同方式划分的。当然，对分析具体法律领域感兴趣的读者也能从中获益。如“基本应用纵览”一章，集中探讨了诱因问题——涉及外在性、威慑和集体行动等，而这些理论要点散见于传统的法学院一年级课程之中，如侵权行为法、合同法、财产法、刑法、程序法等。学生在以往的课程中对这些问题比较熟悉，而编者这样安排正好可以帮助他们跨学科理解诱因问题的实际联系。

随后四章引进了更为深刻的理论，以帮助人们在本质上理解众多法律难题。第四章探讨了策略行为；第五章介绍了风险、不确定性和保险等经济学概念；第

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1. 译者没有翻译完整的前言，而是省却了其中对教师的指导部分、参考书目部分和致谢部分。有兴趣的读者可以查阅随后原文。——编者

六章讨论了不完全信息;第七章分析如何防止不完全的理性行为。这样安排是为了证明,通过学习经济学,法律职业者可以将他们原本认为很简单和很容易处理的社会问题细化,并直达本质。当然我们只是在教学方法上将问题复杂化而已(因为只有理解了简单模型才能理解复杂模型)。编者这样编排体例,另外还想让法学学人接受运用社会科学的模型之方法,以及让他们认识到重要的法律课程可以通过了解各种复杂的理论学习。与第三章一样,为强调经济学问题之间的实际联系,这几章论文也没有按照法律学科来编排。但是编者在每章的后面一节都安排了经济分析在某个法律部门的实际运用,如环境法、破产法、产品责任法等。

第八章列出了对法律经济学的批评。编者曾计划根据各作者视角的不同将所选文章分类,但各视角相迭,编者也无法一一划分各自范围。尽管人人均有批评的自由,但对于经济学将社会利益看作一个整体考虑,从而造成的对个体利益的忽视和伤害这一点,编者仍然无法认同。编者曾呼吁那些家长式的批评家反思一下:人是自己利益的最好法官这个假设到底正确不正确?但马上有社会学批评家跳出来诘问:人是首先考虑自己呢,还是首先考虑整个社会?激进的批评家认为法律经济学十分虚伪,似乎痛恨社会不公,然后摆出理论,仿佛自己能充当调停社会利益纷争的中间人,而实际上世上根本不可能有这种理论的存在。另有信仰共产主义的批评家质疑说,由于经济学忽视了个人欲望和偏好由社会决定,反而将它们看作对社会的贡献,因此依靠法律经济学不可能建设美好的社会。法律现实主义批评家认为社会现象太复杂了,包括经济学在内的任何形式主义理论都是无法抓住其本质的,而将法律分析的方式硬塞入别的条条框框里面只会使事物分析的结果发生扭曲。

第九章选编了三篇文章,这三篇都是论述法律经济学在家庭法上的应用,其中包含了兰德斯与波斯纳合作的一篇关于收养的市场分析的论文。第八章中的批评文章大多生涩艰深,其中一些疏于社会科学研究的文章尤其抽象,但这篇探讨收养问题的论文却言之有物、鲜亮逼人。本章结合前面章节探讨的经济学所有分析方式,"试水"具体法律领域,让学生有机会领略其在学术前沿的运用。不管怎么说,法律经济学本身在前不久还处在前沿呢。

PREFACE

In putting together this reader, I have followed a somewhat different approach than most previous editors in the field, in that I have not seen my primary task as trying to survey economic analyses of the major fields of law. Instead, this book is organized around basic methodological concepts. It focuses on what is distinctive about economics as a way of thinking and on how economic analysis compares and contrasts with more traditional methods of legal reasoning. In my view, most lawyers exposed to law and economics do not acquire a solid grounding in these basics. Most major casebooks and textbooks in the field are concerned primarily with applications and deal with economic methodology only briefly or tangentially. As a result, both students and nonspecialists often lack a clear idea of what normative, descriptive, and interpretative positions the use of economics really commits them to; and while they may learn to use economics adequately or even expertly, they are less well equipped either to critique or to defend its use.

For this reason, as its title suggests, this book stresses the foundations. It begins with an introductory chapter on the building blocks of economic analysis: the model of rational choice, which provides economics with its descriptive theory of human behavior; the concept of efficiency, which provides its primary normative criterion; and the idea of positivist social science, which provides the underlying pragmatic justification for distinguishing between fact and value and for constructing simplified models of the world. The succeeding chapter introduces and compares the two main "schools" of law and economics—often caricatured as "Chicago" and "non-Chicago"—which I present as alternative economic models of legal relations, based on differing assumptions about the relative institutional efficacy of private exchange and governmental regulation.

With these fundamentals established, I turn to applications. The applications are organized not by field of law, however, but by analytical concepts of economics that cut across traditional doctrinal divisions. Still, those interested in doctrinal topics will find much here to read and discuss. The chapter entitled "A Survey of Basic Applications," for instance, focuses on standard problems of incentives—externalities, deterrence, collective action, and the like—in the context of the traditional first-year curriculum: tort, contract, property, criminal law, and procedure. The motive behind this chapter is that students are likely to be familiar with these problems from previous courses and that such a presentation will help them see the functional connections among incentive problems across different fields of law.

The next four chapters refine this basic approach by introducing a series of more advanced concepts that are central to understanding many legal institutions. Chapter 4 discusses the problem of strategic behavior; chapter 5 introduces the economics of risk, uncertainty, and insurance; chapter 6, the issue of incomplete or imperfect information; and chapter 7, the difficulties stemming from imperfectly rational behavior. The point of this organization is to demonstrate to a legal audience how studying economics can help them progress from simpler and more tractable representations of the world to more complex and realistic ones. The purpose is partly pedagogical (since the simpler models are a prerequisite to understanding more complex ones), but I also mean to help lawyers appreciate the methodology of using social science models generally—and to help them see that important lessons can be learned at all levels of complexity. As before, the presentation cuts across different fields of law to highlight the connections among functionally similar economic problems. In these later chapters I also draw examples from upper-level courses of study such as environmental law, bankruptcy, and products liability.

Chapter 8 surveys a variety of critiques of the economic approach. I have tried in this chapter to classify the critiques according to the perspectives they reflect, but I should make clear what I have in mind by this classification, since the perspectives overlap to some extent. By the liberal critique, I mean the objection that economics, by viewing the social interest as an aggregate, fails to do justice to individual persons or to respect their rights. What I call the paternalist critique calls into question the assumption that individuals are the best judges of their own interests; and the sociological critique questions whether individuals are motivated primarily by self-interest, narrowly defined, or by social relations more generally. The radical critique argues that law and economics is a deceptive apology for the status quo, in that it purports to offer a neutral mediating institution to resolve conflict among competing social interests where no such institution is possible. The communitarian critique argues that economics, by taking individual wants and preferences as givens, ignores the extent to which they are socially determined, and so disparages the possibility that legal institutions can help to work toward a better society. Finally, the Legal Realist critique argues that social reality is too complex to be adequately captured by formalistic approaches such as economics and that attempting to force legal analysis into any single framework will distort and impair its conclusions.

The final chapter presents three readings on the application of economics to family law, including Landes and Posner's controversial article analyzing adoption as a market for children. The critiques presented in chapter 8 can seem abstract, especially for those not well versed in social theory, and the adoption issue—along with the larger questions addressed by the economics of the family—raises them in a vivid and concrete fashion. Because the earlier chapters are organized around economic concepts, furthermore, this is the reader's first opportunity to look at a

legal field on its own terms. It provides a good opportunity for the reader to synthesize the economic concepts that have been learned in previous chapters and exposes students to at least some applications that are on the frontier of the discipline. After all, it was not so long ago that law and economics itself was on the frontier.

A Note for Teachers

This reader is designed to serve as a primary text for a one-semester law school course in the economic analysis of law, and I have used it for that purpose myself. Alternatively, it could serve as a supplement to a casebook or textbook in such a course. Because of its focus on jurisprudential issues, it is less well suited for an audience of economics undergraduates, though economics graduate students curious about the methodological foundations of their discipline will find much here of interest. There is a lot of material here, however, so individual teachers using it may wish to pick and choose according to their interests; those using this book as a course supplement will need to be especially selective. Accordingly, each of the chapters is relatively self-contained and can be omitted without loss of continuity, with the exception of chapters 2 and 3. Additionally, some of the notes and questions to chapter 9 presuppose familiarity with the material covered in chapter 8.

I recognize that many teachers of law and economics are accustomed to organizing their courses around substantive law topics such as tort, contract, and property and that the structure of this book may make it more complicated to present sustained analyses of individual fields. Chapter 9 on family law is intended in part to address this concern. In my view, however, the traditional doctrinal organization obscures the economic approach's main contribution, which is to offer a new set of categories that cut across traditionally defined fields, allowing lawyers to recognize—and use—functional analogies and distinctions they had not previously appreciated. When an externality argument is used to analyze one legal doctrine, a risk-allocation argument another, a Coasian argument still another, and it is never made explicit why one argument is used here and another there, this larger lesson is lost. Students taught in this manner too often come to regard economics as an ad hoc tool, useful for reaching whatever results might seem appropriate on ulterior grounds, rather than as a systematic approach for explaining human behavior and clarifying normative choices. I hope, therefore, that even teachers who continue to organize their course along doctrinal lines will find some benefits in this reader's conceptual presentation.

Some teachers may prefer to defer the material in chapter 1, which deals with the underpinnings of the economic approach, until later in the course. There is room for a difference of opinion here. In my view, it is both better pedagogy and more intellectually honest to present economics' main positive and normative assumptions up front. I have found that

when teaching good students who have no prior background in the subject, a policy of full disclosure helps to avoid the repeated detours and tangents that inevitably arise as the students discover and raise such questions on their own. Some students, however, may find this relatively theoretical material more accessible after having studied a number of more concrete applications in the fields of contract, tort, and property. Teachers who follow the latter approach may wish to place chapter 1's material either before or after chapter 7.

Additionally, when teaching the material in this reader, I have found it useful to provide students with some major legal cases that illustrate or provide opportunities to apply the ideas put forth by the individual readings. Different teachers may wish to use different cases as illustrations, depending on their backgrounds and interests, but I have found the following to offer good springboards for discussion:

Chapter 2: *Sturges v. Bridgman*, 11 Ch. 852 (1879); *Orchard View Farms v. Martin Marietta Aluminum*, 500 F.Supp. 984 (D. Or. 1980).

Chapter 3: *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970); *Spur Industries v. Del E. Webb Development Co.*, 494 P.2d 700 (Ariz., 1972); *U.S. v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); *The T. J. Hooper*, 60 F.2d 737 (2d Cir. 1932); *Peevyhouse v. Garland Coal Co.*, 382 P.2d 109 (Okla., 1962).

Chapter 4: *Austin Instrument v. Loral Corp.*, 29 N.Y.2d 124, 272 N.E.2d 533 (1971); *Batsakis v. Demotsis*, 226 S.W.2d 673 (Tex. Ct. Civ. App., 1949); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir., 1965).

Chapter 5: *Taylor v. Caldwell*, 3 Best & S. 826 (Q.B., 1863); *Escola v. Coca-Cola Bottling Co.* 24 Cal. 2d 453, 150 P.2d 436 (1944); *Alcoa v. Essex*, 499 F. Supp. 53 (W.D. Pa. 1980).

Chapter 6: *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178 (1817); *Hadley v. Baxendale*, 9 Exch. 341 (1854); *EVRA Corp. v. Swiss Bank Corp.*, 673 F.2d 951 (7th Cir. 1982).

Chapter 7: *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960); *Helling v. Carey*, 519 P.2d 981 (Wash. 1974).

Chapter 9: *In the Matter of Baby M*, 109 N.J. 396, 537 A.2d 1227 (N.J., 1988).

Bibliographical Note

The citations in the notes at the end of each chapter are intended to be representative rather than exhaustive. Readers wishing a more systematic bibliography may wish to consult Boudewijn Bouckaert and Gerrit De Geest, *Bibliography of Law and Economics* (Dordrecht: Kluwer Academic Publishers, 1992). Two separate multivolume encyclopedias of law and economics, both comprising individual articles contributed by leading researchers in the field, have recently been completed: the *Ency-*

clopedia of Law and Economics, edited by Professors Bouckaert and De Geest and forthcoming from Edward Elgar Press (and now available on the Internet at http://encyclo.findlaw.com), and the *New Palgrave Dictionary of Economics and the Law* (London: Macmillan Press, 1998), edited by Peter Newman. Those seeking a one-volume survey of legal applications of economics can do no better than to consult Richard Posner's classic text *Economic Analysis of Law* (New York: Aspen Law and Business, 5th ed. 1998). Robert Cooter and Thomas Ulen's *Law and Economics* (Reading, MA: Addison-Wesley, 3d ed. 1999) offers a survey of technical models suitable for advanced undergraduates in economics, and A. Mitchell Polinsky's *An Introduction to Law and Economics* (New York: Aspen Law and Business, 2d. ed. 1989) provides a brief and exceptionally clear introduction to the issues raised in this reader. Readers in search of a basic introduction to the tools and principles of microeconomics should consult either Steven Crafton and Margaret Brinig, *Quantitative Methods for Lawyers* (Durham, N.C.: Carolina Academic Press, 1994), or for a more comprehensive treatment, Robert Pindyck and Daniel Rubinfeld, *Microeconomics* (Englewood Cliffs, N.J.: Prentice Hall, 1995).

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*

CONTENTS

1

Methodology of the Economic Approach

This chapter introduces the basic methods and tools of the economic approach. It focuses on the question, how does economics differ from other ways of thinking about social life and legal institutions? As the sequence of readings suggests, economics is distinctive in at least three ways. First, it offers a particular descriptive theory of human behavior, which it uses to explain past events and predict future ones. This theory forms the basis of what is often called *positive economics.* Second, economics proceeds from a particular set of moral and ethical principles, which it uses to evaluate existing institutions and to recommend reforms. This endeavor is usually called *normative economics.* Third, and more subtly, economics follows a particular methodological program in pursuing its aims—one grounded in the separation of positive and normative issues and focused on the construction of abstract models of empirical reality. All three aspects of the economic approach differ from traditional legal methodology in important respects.

The first reading in this chapter, by Gary Becker, lays out the essential assumptions of positive economics—what we will call the *model of rational choice.* Becker was awarded the Nobel Prize in Economics in 1992 for his work extending the domain of economic analysis to a wide range of human behavior and interactions that had been traditionally considered outside the boundaries of the discipline. The excerpt reprinted here is adapted from the introduction to his book *The Economics of Human Behavior,* in which he presents economic analyses of such

diverse social phenomena as crime, racial discrimination, marriage and divorce, and the rearing of children. In Becker's view, the usefulness of economics is not restricted to markets; rather, any aspect of human behavior that arises from the deliberate pursuit of ends is amenable to economic methods. In particular, he argues, all intentional behavior can be understood as *constrained maximization*—people pursuing their goals as best they can subject to the constraints of the external world. Accordingly, the tools that economists have developed to study maximization in the market setting are equally useful outside markets. According to Becker, just three conditions are necessary to make the economic approach relevant: individual maximization, market equilibrium, and stable preferences.

The readings by Jules Coleman and Thomas Schelling outline the basic framework of normative economics: the related concepts of *Pareto efficiency, Pareto superiority,* and *potential Pareto superiority* (also called the *Kaldor–Hicks criterion*). These concepts form the basis for virtually all policy recommendations in law and economics, and underlie the practice of cost-benefit analysis. Coleman, a professional philosopher, analyzes the ethical underpinnings of these concepts, paying particular attention to their relationship to *classical utilitarianism,* the philosophy that one is morally obligated to try to maximize the total amount of happiness in the world. He concludes that although efficiency (and hence cost-benefit analysis) cannot be justified on utilitarian grounds, it might be justifiable on grounds of consent or liberty. Schelling, a professional economist, offers a pragmatic argument in favor of the efficiency criterion. He argues that if a situation is inefficient, then there necessarily exists some potential arrangement, perhaps involving side payments among the parties, that would make everyone concerned better off. Tolerating the inefficient situation, therefore, leaves money on the table.

Finally, the selections by Mark Blaug and Milton Friedman present economics' approach to scientific method, focusing on the field's central methodological distinction: the difference between positive and normative analysis. Blaug explains this distinction and then, drawing on ideas from the philosophy of science, argues that descriptive and ethical issues cannot in principle be separated. In his view, people necessarily accept or reject positive descriptions on grounds that are themselves social conventions. This results in an inevitable interplay between fact and value, as people interpret empirical evidence in light of their ethical values while at the same time revising those values in order to accommodate the practical conditions of the world. Nonetheless, he regards the positive/normative distinction as a useful and healthy methodological approach because, in his words, "our ordinary methods for settling disputes about facts are less divisive than those for settling disputes about values."