

案例教程影印系列
CASEBOOK
SERIES

第六版 Sixth Edition

法律的经济分析

ECONOMIC ANALYSIS OF LAW

[美] 理查德·A·波斯纳 (Richard A. Posner) / 著



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法律的经济分析

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总 序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出：“为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%—10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。”

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

伊曼纽尔法律精要 (Emanuel Law Outlines) 美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

案例与解析 (Examples and Explanations) 由美国最权威、最富有经验的教授所著，这套丛书历

经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

案例教程系列 (Casebook Series) 覆盖了美国法学校院的主流课程，是学习美国法律的代表性图书，美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

案例举要 (Casenote Legal Briefs) 美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

ECONOMIC ANALYSIS OF LAW

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PREFACE

This is the sixth edition of a textbook-treatise first published in 1973. Its subject is economic analysis of legal rules and institutions, or, as it is more commonly called, “law and economics.” It is the foremost interdisciplinary field of legal studies. The dean of the Yale Law School, a critic of the law and economics movement, nevertheless calls it “an enormous enlivening force in American legal thought” and says that it “continues and remains the single most influential jurisprudential school in this country.”¹

This book differs from other textbooks on the subject (there is still no other treatise²) in the breadth of its coverage (*almost* the whole legal system) and in the emphasis placed on the legal regulation of nonmarket behavior—not only familiar examples such as crimes and accidents and lawsuits, but also less familiar (to economists) examples such as drug addiction, thefts of art, sexual acts, surrogate motherhood, rescues at sea, flag desecration, public international law, presidential pardons, democratic theory, and religious observances. It also differs in the principle of organization, being organized around legal rather than economic concepts. This approach enables the law to be seen, grasped, and studied as a system—a system that economic analysis can illuminate, reveal as coherent, and in places improve. By the same token, the approach enables economics to be seen as a tool for understanding and reforming social practices, rather than merely as a formal system of daunting mathematical complexity. The explication of economics in this book stresses the unity, simplicity, and power, but also the subtlety, of economic principles. The presentation is informal, and no prior acquaintance with economics, or mathematical competence, on the part of the reader is assumed.

You cannot learn economics from any one book—not this book, not any other. A feel for, skill in, and comfort with economics grows gradually, just as with law. This book slights the formal, systematic side of economic theory in favor of the applications side and is thus a complement to, rather than a substitute for, a more conventional economics textbook. It covers more ground than an ordinary microeconomics or price-theory text because its scope is defined by the law rather than by some predetermined field of economics, and thus it includes topics more often studied in courses in welfare economics, labor economics, the theory of finance, public finance, demography and family economics, public choice, game theory, public economics, and industrial organization, as well as the standard topics in price theory. This breadth is purchased at the expense of depth in many of these areas.

Preface 1. Anthony T. Kronman, Remarks at the Second Driker Forum for Excellence in the Law, 42 Wayne L. Rev. 115, 160 (1995).

2. There are, however, two encyclopedias of economic analysis of law: The New Palgrave Dictionary of Economics and the Law (Peter Newman ed. 1998) (3 vols.); Encyclopedia of Law and Economics (Boudewijn Bouckaert & Gerrit De Geest eds. 2000) (5 vols.).

Even in the central areas of economic analysis of law—property rights, contracts, torts, and the corporation—the march of research has been so rapid³ in recent years that in many places I have found it possible only to skim the surface. The references in the footnotes and at the end of the chapters are illustrative rather than exhaustive, but they will guide the reader who wishes to pursue any of the topics further into the scholarly literature.

The continued rapid growth of economic analysis of law since July 1997, when the previous edition went to press, is reflected in a large number of changes. These are mostly additions, reflecting new research by economic analysts of law, both the author and others. The principal additions are an expanded treatment of both antitrust and intellectual property; a chapter on the law of evidence; an expanded discussion of the significance of possession in the law of property; a revised chapter on taxation; and new sections on legal modernization, presidential pardons, mediation, public international law, the normativity of economics, judicial law clerks, and the economic theory of democracy. Much else is new besides. All the chapters of the book that are carried over from the previous edition (which is to say all but the chapter on evidence) have been revised for this edition, some extensively.

I thank Adam Hirsch, Eric Kades, Katharine Silbaugh, and David Weisbach for many helpful comments and suggestions and William Baude, Brian Grill, Carolyn Chong, and David Kitchen for excellent research assistance.

Richard A. Posner

November 2002

3. Falsifying the prediction of the well-known Harvard legal historian, Morton Horwitz, who wrote in 1980: "I have the strong feeling that the economic analysis of law has 'peaked out' as the latest fad in legal scholarship." Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 *Hofstra L. Rev.* 905 (1980). Nine years later, another well-known legal scholar, Owen Fiss, ventured more cautiously, but still erroneously: "law and economics . . . seems to have peaked." Owen M. Fiss, *The Law Regained*, 74 *Cornell L. Rev.* 245 (1989). Here is a more sober assessment by another outsider to the movement: "Law and economics represents the one example of a social science that has successfully found a place at the core of the legal arguments made in courts, administrative agencies, and other legal settings." Bryant G. Garth, *Strategic Research in Law and Society*, 18 *Fla. State U. L. Rev.* 57, 59 (1990). On the continued growth of economic analysis of law, see William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 *J. Law & Econ.* 385 (1993). The number of changes (especially additions) in this sixth edition attest to the growth in the scholarly literature in just the last five years.

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