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OF LAW

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Law & Business

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ECONOMIC ANALYSIS OF LAW

SEVENTH EDITION

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PREFACE

This is the seventh 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 former dean of the Yale Law School, a critic of the law and economics movement, nevertheless has called 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 More recently we read that “there is no dispute that law and economics has long been, and continues to be, the dominant theoretical paradigm for understanding and assessing law and policy.”²

This book differs from other textbooks on the subject (there is still no other treatise³) in the breadth of its coverage (*almost* the whole legal system) and in its emphasis on the legal regulation of nonmarket behavior—not only familiar examples such as crimes and accidents and corporate conduct 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, terrorism, 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 a single book. 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

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

2. Jon Hanson & David Yosifson, The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture, 152 U. Pa. L. Rev. 129, 142 (2003). See also *id.* at 144.

3. 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.).

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. Even in the central areas of economic analysis of law—such as the economic analysis of property rights, contracts, torts, antitrust law, and corporate and tax law—the march of research has been so rapid⁴ 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 November 2002, when the sixth edition went to press, is reflected in a large number of changes. These include a reworking of the chapters on corporations and on finance, new sections on a number of topics including economic torts, global warming, and terrorism; an expanded treatment of intellectual property, contracts, judicial behavior and organization, and constitutional law, and the addition of insights from the developing field of organizational economics. All chapters have been updated, revised, corrected, and carefully edited for clarity and concision.

I thank Andrei Shleifer for his very helpful comments on a draft of the revised Chapter 15, and Heather Afra, Jonathan Falkler, Zachary Holmstead, Meghan Maloney, Sam Sellers, Sarah Vinson, and Michael Walsh for their excellent research assistance.

Richard A. Posner

December 2006

4. 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. St. 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 seventh edition attests to the growth in the scholarly literature in just the last four years. Of course, there are still plenty of skeptics. See, e.g., Ugo Mattei, *The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi*, 64 *Md. L. Rev.* 220 (2005).

ECONOMIC ANALYSIS OF LAW

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