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RICHARD A. POSNER

Judge, U.S. Court of Appeals for the Seventh Circuit

Senior Lecturer, University of Chicago Law School



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PREFACE

This is the eighth 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 The centrality of the field to the modern understanding of law is suggested by the number of specialized journals,³ amount of encyclopedic coverage,⁴ and number of sophisticated book-length treatments.⁵

Economic analysis of law has changed the way law is taught. The reason has to do with the extreme surface complexity of the law. The law is divided into numerous fields, each of which has a complex structure of rules. The fields are traditionally studied in isolation from one another, and within each field the rules tend also to be studied as separate, often self-enclosed

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. Journal of Law and Economics, Journal of Legal Studies, Journal of Law, Economics and Organization, European Journal of Law and Economics, International Review of Law and Economics, Review of Law and Economics, Research in Law and Economics, Economics of Legal Relationships. Harvard Law School’s new faculty-edited journal, the Journal of Legal Analysis, appears to be concentrating heavily on economic analysis of law, if we may judge from its first year’s contents. In addition, a great many articles applying economics to law appear in the conventional law journals. A recent example is Eric L. Talley, On Uncertainty, Ambiguity, and Contractual Conditions, 34 Delaware Journal of Corporate Law 755 (2009).

4. 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.).

5. See, for example, Steven Shavell, Foundations of Economic Analysis of Law (2004). Of particular value as a research tool is Handbook of Law and Economics (A. Mitchell Polinsky & Steven Shavell eds., 2007) (2 vols.).

bodies of thought. Yet it turns out that a relative handful of economic doctrines—such as decision under uncertainty, transaction costs, cost-benefit analysis, risk aversion, and positive and negative externalities—can, by repeated application across fields of law and legal rules, describe a great deal of the legal system and enable the student to develop a more coherent sense of the system—to grasp the relation of its parts and understand its essential unity.

This book differs from other books of economic analysis of law 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 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, industrial organization, and (new in this edition) business-cycle economics, 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 rapid⁶ in recent years that in many places I have found

6. Falsifying the prediction of 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 prominent legal scholar, Owen Fiss, ventured more

it possible only to skim the surface. EconLit, the online economics literature search program, lists hundreds of books and thousands of articles under the heading “law and economics,” published since 2006. 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 December 2006, when the seventh edition went to press, is reflected in a number of changes. Many of them reflect the economic crisis that began with the financial crash in September 2008 and at this writing is continuing. The crisis has led me to reexamine some of the economic principles expounded in previous editions of my book, and, indeed, to express a degree of skepticism, missing from my previous work, about them. These changes appear throughout the book, but are most extensive in chapters 1 (nature of economic reasoning) and 15 (financial markets); the latter chapter discusses the economics of the crisis. There are also a number of changes (mainly additions) in the chapters dealing with property, contracts, torts, regulation, taxation, and civil and criminal procedure. Chapter 19 reflects recent academic work by me and others on judicial behavior. And throughout there are lesser changes, corrections, and citations to books and articles published since the last edition.

I thank Elizabeth Chou, Gary DeTurck, Martin Kohan, Sonia Lahr-Pastor, Ruoke Liu, and Steven Weisman for excellent research assistance, and the following readers for pointing out errors in the preceding edition: Terry Bennett, Ron Garet, Daniel Klerman, Seok Min Moon, Richard Wright, and Ziran Zhang.

Richard A. Posner

November 2010

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 eighth 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).

SUMMARY OF CONTENTS

TABLE OF CONTENTS

ix

PREFACE

xxi

<i>PART I</i>	<i>LAW AND ECONOMICS: AN INTRODUCTION</i>	<i>1</i>
<i>CHAPTER 1</i>	<i>THE NATURE OF ECONOMIC REASONING</i>	<i>3</i>
<i>CHAPTER 2</i>	<i>THE ECONOMIC APPROACH TO LAW</i>	<i>29</i>
<i>PART II</i>	<i>THE COMMON LAW</i>	<i>37</i>
<i>CHAPTER 3</i>	<i>PROPERTY</i>	<i>39</i>
<i>CHAPTER 4</i>	<i>CONTRACT RIGHTS AND REMEDIES</i>	<i>115</i>
<i>CHAPTER 5</i>	<i>FAMILY LAW AND SEX LAW</i>	<i>183</i>
<i>CHAPTER 6</i>	<i>TORT LAW</i>	<i>213</i>
<i>CHAPTER 7</i>	<i>CRIMINAL LAW</i>	<i>273</i>
<i>CHAPTER 8</i>	<i>THE COMMON LAW, LEGAL HISTORY, AND JURISPRUDENCE</i>	<i>315</i>
<i>PART III</i>	<i>PUBLIC REGULATION OF THE MARKET</i>	<i>349</i>
<i>CHAPTER 9</i>	<i>THE THEORY OF MONOPOLY</i>	<i>351</i>
<i>CHAPTER 10</i>	<i>THE ANTITRUST LAWS</i>	<i>369</i>
<i>CHAPTER 11</i>	<i>THE REGULATION OF THE EMPLOYMENT RELATION</i>	<i>425</i>
<i>CHAPTER 12</i>	<i>PUBLIC UTILITY AND COMMON CARRIER REGULATION</i>	<i>459</i>
<i>CHAPTER 13</i>	<i>THE CHOICE BETWEEN REGULATION AND COMMON LAW</i>	<i>487</i>
<i>PART IV</i>	<i>THE LAW OF BUSINESS ORGANIZATIONS AND FINANCIAL MARKETS</i>	<i>527</i>
<i>CHAPTER 14</i>	<i>CORPORATIONS, SECURED AND UNSECURED FINANCING, BANKRUPTCY</i>	<i>529</i>
<i>CHAPTER 15</i>	<i>FINANCIAL MARKETS</i>	<i>587</i>

<i>PART V</i>	<i>LAW AND THE DISTRIBUTION OF INCOME AND WEALTH</i>	625
<i>CHAPTER 16</i>	<i>INCOME INEQUALITIES, DISTRIBUTIVE JUSTICE, AND POVERTY</i>	627
<i>CHAPTER 17</i>	<i>TAXATION</i>	653
<i>CHAPTER 18</i>	<i>THE TRANSMISSION OF WEALTH AT DEATH</i>	687
<i>PART VI</i>	<i>THE LEGAL PROCESS</i>	705
<i>CHAPTER 19</i>	<i>THE MARKET, THE ADVERSARY SYSTEM, AND THE LEGISLATIVE PROCESS AS METHODS OF RESOURCE ALLOCATION</i>	707
<i>CHAPTER 20</i>	<i>THE PROCESS OF LEGAL RULEMAKING</i>	743
<i>CHAPTER 21</i>	<i>CIVIL AND CRIMINAL PROCEDURE</i>	757
<i>CHAPTER 22</i>	<i>EVIDENCE</i>	819
<i>CHAPTER 23</i>	<i>LAW ENFORCEMENT AND THE ADMINISTRATIVE PROCESS</i>	841
<i>PART VII</i>	<i>THE CONSTITUTION AND THE FEDERAL SYSTEM</i>	865
<i>CHAPTER 24</i>	<i>THE NATURE AND FUNCTIONS OF THE CONSTITUTION</i>	867
<i>CHAPTER 25</i>	<i>ECONOMIC DUE PROCESS</i>	881
<i>CHAPTER 26</i>	<i>THE ECONOMICS OF FEDERALISM</i>	891
<i>CHAPTER 27</i>	<i>RACIAL DISCRIMINATION</i>	915
<i>CHAPTER 28</i>	<i>THE PROTECTION OF FREE MARKETS IN IDEAS AND RELIGION</i>	931
<i>CHAPTER 29</i>	<i>SEARCHES, SEIZURES, AND INTERROGATIONS</i>	953
<i>TABLE OF CASES</i>		963
<i>AUTHOR INDEX</i>		967
<i>SUBJECT INDEX</i>		979

TABLE OF CONTENTS

PREFACE

xxi

PART I LAW AND ECONOMICS: AN INTRODUCTION 1

CHAPTER 1 THE NATURE OF ECONOMIC REASONING 3

§1.1	Fundamental Concepts	3
§1.2	Value, Utility, Efficiency	15
§1.3	The Realism of the Economist's Assumptions	20
§1.4	Irrationality and Hyperrationality; Herein of Behavioral Economics and Game Theory	22
	Suggested Readings	26
	Problems	27

CHAPTER 2 THE ECONOMIC APPROACH TO LAW 29

§2.1	Its History	29
§2.2	Positive and Normative Economic Analysis of Law	31
§2.3	The Continental Approach	33
§2.4	Criticisms of the Economic Approach to Law	34
	Suggested Readings	35

PART II THE COMMON LAW 37

CHAPTER 3 PROPERTY 39

§3.1	The Economic Theory of Property Rights: Static and Dynamic Aspects	40
§3.2	Problems in the Creation and Enforcement of Property Rights	42
§3.3	Intellectual Property: Patents, Copyrights, Trademarks, Trade Secrets, and Privacy	48
§3.4	Property Rights in Law and in Economics: Broadcast Frequencies and Airwave Auctions	59

ix

§3.5	Rights to Future Use	61
§3.6	Incompatible Uses	63
§3.7	Trespass and Eminent Domain	70
§3.8	Pollution: Nuisance and Easement Approaches	77
§3.9	Other Solutions to the Problem of Incompatible Land Uses: Merger and Restrictive Covenants	81
§3.10	Injunctions Versus Damages as Methods of Protecting Property Rights	86
§3.11	Divided Ownership — Estates in Land	90
§3.12	Problems in the Transfer of Property Rights	95
§3.13	Possession	101
§3.14	The Distributive Effects of Property Right Assignments	105
§3.15	Public Lands	108
§3.16	The Open-Source Movement	109
	Suggested Readings	110
	Problems	111
 <i>CHAPTER 4 CONTRACT RIGHTS AND REMEDIES</i>		 115
§4.1	The Process of Exchange and the Economic Roles of Contract Law	115
§4.2	Consideration	123
§4.3	Problems of Formation; Herein of Mutual Assent and Unilateral Contracts	126
§4.4	Mutual Mistake	128
§4.5	Contracts as Insurance — Impossibility and Related Doctrines	130
§4.6	Insurance Contracts	134
§4.7	Fraud	138
§4.8	Agency Law	142
§4.9	Duress, Form Contracts, Bargaining Power, and Unconscionability	143
§4.10	Fundamental Principles of Contract Damages	149
§4.11	Consequential Damages	158
§4.12	Penalties, Liquidated Damages, Forfeitures, and No-Modification Rules	159
§4.13	Specific Performance	163
§4.14	Self-Help, Contract Conditions, and Substantial Performance	165
§4.15	Implied Contracts	168
§4.16	The Option Theory of Contract Law Versus the Moral Theory	170
§4.17	Treaties and Other International Agreements	174
	Suggested Readings	179
	Problems	180

<i>CHAPTER 5</i>	<i>FAMILY LAW AND SEX LAW</i>	<i>183</i>
§5.1	The Theory of Household Production	183
§5.2	Formation and Dissolution of Marriage	187
§5.3	Consequences of Dissolution	192
§5.4	The Legal Protection of Children	195
§5.5	Surrogate Motherhood	200
§5.6	Law and Population	202
§5.7	Why Regulate Sexual Behavior?	204
§5.8	Gay Marriage	208
	Suggested Readings	209
	Problems	210
<i>CHAPTER 6</i>	<i>TORT LAW</i>	<i>213</i>
§6.1	The Economics of Accidents and the Learned Hand	
	Formula of Liability for Negligence	213
§6.2	The Reasonable-Person Standard	218
§6.3	Custom as a Defense	218
§6.4	Victim Fault: Contributory and Comparative	
	Negligence, Assumption of Risk, and Duties	
	to Trespassers	219
§6.5	Strict Liability	226
§6.6	Products Liability	231
§6.7	Causation and Foreseeability	233
§6.8	Joint Torts, Contribution, Indemnity; Herein of	
	Respondeat Superior and Sexual Harassment	239
§6.9	Rescue: Liability Versus Restitution	242
§6.10	The Function of Tort Damages	243
§6.11	Damages for Loss of Earning Capacity	244
§6.12	Damages for Pain and Suffering, the Problem	
	of Valuing Human Life, and the Risk of	
	Overcompensation	249
§6.13	The Collateral Benefits (Collateral Source) Rule	253
§6.14	Negligence with Liability Insurance and Accident	
	Insurance, No-Fault Automobile Accident	
	Compensation, and Capping Medical-Malpractice	
	Judgments	254
§6.15	Intentional Torts	260
§6.16	Defamation	265
§6.17	Successor Liability	267
	Suggested Readings	268
	Problems	269

<i>CHAPTER 7</i>	<i>CRIMINAL LAW</i>	273
§7.1	The Economic Nature and Function of Criminal Law	273
§7.2	Optimal Criminal Sanctions	278
§7.3	Preventing Crime: Multiple-Offender Laws, Attempt and Conspiracy, Aiding and Abetting, Recidivism, Entrapment	287
§7.4	Pardons	293
§7.5	Criminal Intent	294
§7.6	Hate Crimes	297
§7.7	Recklessness, Negligence, and Strict Liability	299
§7.8	The Defense of Necessity (Compulsion)	301
§7.9	Precautions by Victims; Herein of Provocation and Gun Control	302
§7.10	The Economics of Organized Crime	304
§7.11	The War on Drugs	306
§7.12	Criminal Punishment of Terrorists	310
	Suggested Readings	311
	Problems	312
<i>CHAPTER 8</i>	<i>THE COMMON LAW, LEGAL HISTORY, AND JURISPRUDENCE</i>	315
§8.1	The Implicit Economic Logic of the Common Law	315
§8.2	Economic Torts	320
§8.3	The Common Law, Economic Growth, and Legal History	323
§8.4	Common Law as Custom: Hayek's Challenge to the Economic Analysis of the Common Law	328
§8.5	Primitive Law	329
§8.6	Law and Modernization	333
§8.7	The Rule of Law	336
§8.8	Law and Social Norms	339
§8.9	The Moral Content of the Common Law	342
	Suggested Readings	346
	Problems	347
<i>PART III</i>	<i>PUBLIC REGULATION OF THE MARKET</i>	349
<i>CHAPTER 9</i>	<i>THE THEORY OF MONOPOLY</i>	351
§9.1	The Monopolist's Price and Output	351
§9.2	Effect of Changes in Cost or Demand on the Monopoly Price	355
§9.3	Efficiency Consequences of Monopoly: Deadweight Loss and Rent-Seeking	357

§9.4	Other Economic Objections to Monopoly; Herein of Innovation and Cost Minimization	361
§9.5	Price Discrimination	365
§9.6	Two Impediments to Monopolizing (Besides Entry): Competition for the Market and Durability	366
	Suggested Readings	368
	Problems	368

CHAPTER 10 THE ANTITRUST LAWS 369

§10.1	Cartels and the Sherman Act	369
§10.2	Borderline Horizontal Agreements — Patent Agreements and the BMI-ASCAP Blanket Licenses	381
§10.3	Resale Price Maintenance	384
§10.4	Mergers That Create Monopolies or Oligopolies	387
§10.5	Market or Monopoly Power	389
§10.6	Market Definition and Market Shares	390
§10.7	Potential Competition	394
§10.8	Predation	395
§10.9	Dumping and the Free-Trade Question	401
§10.10	Foreclosure, Tie-Ins and Bundling, Barriers to Entry	404
§10.11	Antitrust and the “New Economy”	412
§10.12	Boycotts; Herein of Monopsony	415
§10.13	Benign Monopsony?	417
§10.14	Antitrust Damages	418
	Suggested Readings	422
	Problems	423

CHAPTER 11 THE REGULATION OF THE EMPLOYMENT RELATION 425

§11.1	The Special Treatment of Labor Cartels	425
§11.2	The Economic Logic of the National Labor Relations Act	429
§11.3	The Employee Free Choice Act	432
§11.4	Unions and Productivity	434
§11.5	Employment at Will	436
§11.6	Labor-Market Failure: The Case of Judicial Law Clerks	438
§11.7	Labor and Antitrust Law	440
§11.8	Minimum Wage and Related “Worker-Protective” Legislation	441
§11.9	Mandated Benefits	445
§11.10	Employment Discrimination on Grounds of Race, Sex, Age, and Disability	445
§11.11	Federal Pension Law	453
	Suggested Readings	456
	Problems	456

<i>CHAPTER 12</i>	<i>PUBLIC UTILITY AND COMMON CARRIER REGULATION</i>	<i>459</i>
§12.1	Natural Monopoly	459
§12.2	Control of Profits and the Problem of Reasonable Return	462
§12.3	Other Problems Caused by Attempting to Limit a Regulated Firm's Profits	465
§12.4	Incentive Regulation	468
§12.5	Regulation of Rate Structure and of Entry	469
§12.6	Pay Television	474
§12.7	Taxation by Regulation (Internal Subsidization or Cross-Subsidization)	475
§12.8	The Demand for Regulation	477
§12.9	The Deregulation Movement; Privatization	478
	Suggested Readings	483
	Problems	484
 <i>CHAPTER 13</i>	 <i>THE CHOICE BETWEEN REGULATION AND COMMON LAW</i>	 <i>487</i>
§13.1	Optimal Regulation	487
§13.2	Consumer Fraud Revisited	492
§13.3	Mandated Disclosure	494
§13.4	Alternatives to Disclosure: The Case of Trans Fats	498
§13.5	Safety and Health	499
§13.6	Direct Regulation of Pollution	501
§13.7	Traffic Congestion	507
§13.8	Mandatory Container Deposits	508
§13.9	Cost-Benefit Analysis as a Regulatory Tool	509
§13.10	The Limits of Cost-Benefit Analysis: The Case of Global Warming	512
§13.11	Cable Television: Problems of Copyright and Local Monopoly	517
§13.12	Selling Highways	521
	Suggested Readings	523
	Problems	524
 <i>PART IV</i>	 <i>THE LAW OF BUSINESS ORGANIZATIONS AND FINANCIAL MARKETS</i>	 <i>527</i>
 <i>CHAPTER 14</i>	 <i>CORPORATIONS, SECURED AND UNSECURED FINANCING, BANKRUPTCY</i>	 <i>529</i>
§14.1	The Nature of the Firm	529
§14.2	The Different Kinds of Firm	532
§14.3	The Corporation as a Standard Contract	535
§14.4	Corporate Debt and Secured Debt	539

§14.5	Corporate Bankruptcy	544
§14.6	Personal Bankruptcy	551
§14.7	Piercing the Corporate Veil	553
§14.8	The Separation of Ownership and Control	556
§14.9	The Transfer of Corporate Control	558
§14.10	Corporate Squeeze-Outs and the Competition in Laxity	562
§14.11	The Compensation Issue	563
§14.12	Insider Trading and the Problem of Entrepreneurial Reward	567
§14.13	Corporate Scandals	568
§14.14	Managerial Discretion and the Corporation's Social Responsibilities	572
§14.15	Corporate Criminality	577
§14.16	The Closely Held Corporation	579
§14.17	Public Utility Regulation Revisited	581
	Suggested Readings	581
	Problems	582

CHAPTER 15 FINANCIAL MARKETS 587

§15.1	Portfolio Design	587
§15.2	Diversification, Leverage, and the Debt-Equity Ratio	592
§15.3	Why Do Corporations Buy Insurance?	594
§15.4	Stock Picking and the Efficient-Market Hypothesis	595
§15.5	The Challenge of Behavioral Finance	597
§15.6	A Deeper Challenge	599
§15.7	Implications of Finance Theory for Regulated Monopoly	601
§15.8	ESOPs Revisited: The Problem of Underdiversification	602
§15.9	Trust Investment Law and Index Funds	603
§15.10	Social Investing by Trustees	607
§15.11	The Regulation of the Securities Markets	608
§15.12	Compensation Revisited: The Case of the Mutual Fund Fees	612
§15.13	Why Regulate Banks?	613
§15.14	The Crash of '08	616
	Suggested Readings	621
	Problems	622

PART V LAW AND THE DISTRIBUTION OF INCOME AND WEALTH 625

CHAPTER 16 INCOME INEQUALITIES, DISTRIBUTIVE JUSTICE, AND POVERTY 627

§16.1	The Measurement of Inequality	627
§16.2	Is Inequality Inefficient?	630