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世纪高教·经济学英文版教材

Law & Economics

Sixth Edition

法和经济学

·第6版·

[美] 罗伯特·考特
Robert Cooter

托马斯·尤伦
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Preface

This sixth edition of *Law and Economics* arrives as the field celebrates its (roughly) 30th birthday. What began as a scholarly niche has grown into one of the most widely used tools of legal analysis. The subject has spread from the United States to many other countries. As scholarship deepens, the concepts in the core of law and economics become clearer and more stable, and new applications develop from the core like biological species evolving through specialization. With each new edition, we continue to refine the explanation of the analytical core and to incorporate new applications selectively as space permits. This edition expands previous discussions of empirical legal studies and behavioral law and economics. As we incorporate new material and respond to the suggestions that so many people have sent us, the book feels more like a symphony and less like a duet. We hope that you enjoy reading this book as much as we enjoyed writing it.

The book continues to cover the economic analysis of the law of property, torts, contracts, the legal process and crimes. Instructors and students who have used previous editions will notice that we have reversed the order in which we treat torts and contracts, and we have divided the material on legal process into two chapters—one on theory and one on topics—in parallel with our treatment of all the other substantive areas of the law. Below we describe what is new in this edition, followed by an account of the book's website.

New to This Edition

The Sixth Edition has been revised and updated to reflect the latest developments in law and economics. Major changes to the text are as follows:

- Tables and graphs have been updated.
- New boxes and suggested readings have been added throughout the text.
- Web Notes have been updated and added.
- Chapter 6 contains additional information on liability and customs in trade.
- Chapter 8 improves the explanation of contractual commitments through a better representation of the principal-agent problem.

- Chapter 9 now includes new material on lapses, vicarious liability, incomprehensible harms, punitive damages, mass torts, medical malpractice, and some behavioral aspects of contract remedies.
- Chapter 10 contains a new treatment of decision making by potential litigants and their lawyers, and new figures and decision trees.
- Chapter 11, a new chapter, combines new material on the legal process and an updated empirical assessment of various aspects of legal disputes.
- Chapter 12 now contains the theoretical material on crime and punishment, updated and clarified.
- Chapter 13 applies the theoretical insights of the previous chapter to wide-ranging policy issues in criminal justice and updates data and information from previous editions.

Online Resources

The Companion Website presents a wealth of supplementary materials to help in teaching and learning law and economics. “Web Notes” throughout the book indicate the points at which there is additional material on the Companion Website at www.pearsonhighered.com/cooter_ulen. These notes extend the text presentations, provide guides and links to new articles and books, and contain excerpts from cases. We also include some examples of examinations and problem sets.

An updated *Instructor’s Manual*, reflective of changes to the new edition, will be available for instructors’ reference. The *Instructor’s Manual* is available for download on the Instructor’s Resource center at www.pearsonhighered.com/irc.

Acknowledgments

We continue to be extremely grateful to our colleagues at Boalt Hall of the University of California, Berkeley, and at the University of Illinois College of Law for the superb scholarly environments in which we work. Our colleagues have been extremely generous with their time in helping us to understand the law better. And in one of the great, ongoing miracles of the academic enterprise, we continue to learn much from the students whom we have the pleasure to teach at Berkeley, Illinois, and elsewhere.

We should also thank the many colleagues and students at other universities who have used our book in their classes and sent us many helpful suggestions about how to improve the book. We particularly thank Joe Kennedy of Georgetown, who has given us remarkably thorough and singularly helpful comments on improvements in the text.

We’d like to thank the following reviewers for their thoughtful commentary on the fifth edition: Howard Bodenhorn, J. Lon Carlson, Joseph M. Jadow, and Mark E. McBride.

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Nuno Garoupa, John Lopatka, Richard McAdams, Andy Morriss, Tom Nonnenmacher, Noel Netusil, Dan Vander Ploeg, and David Wishart.

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ROBERT D. COOTER
Berkeley, CA

THOMAS S. ULEN
Champaign, IL

November, 2010

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1

An Introduction to Law and Economics

For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. . . . We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.

Oliver Wendell Holmes.
THE PATH OF THE LAW, 10 HARV. L. REV. 457, 469, 474 (1897)¹

To me the most interesting aspect of the law and economics movement has been its aspiration to place the study of law on a scientific basis, with coherent theory, precise hypotheses deduced from the theory, and empirical tests of the hypotheses. Law is a social institution of enormous antiquity and importance, and I can see no reason why it should not be amenable to scientific study. Economics is the most advanced of the social sciences, and the legal system contains many parallels to and overlaps with the systems that economists have studied successfully.

Judge Richard A. Posner, in MICHAEL FAURE & ROGER VAN DEN BERGH, EDs., *ESSAYS IN LAW AND ECONOMICS* (1989)

UNTIL RECENTLY, LAW confined the use of economics to antitrust law, regulated industries, tax, and some special topics like determining monetary damages. In these areas, law needed economics to answer such questions as “What is the defendant’s share of the market?”; “Will price controls on automobile insurance reduce its availability?”; “Who really bears the burden of the capital gains tax?”; and “How much future income did the children lose because of their mother’s death?”

Beginning in the early 1960s, this limited interaction changed dramatically when the economic analysis of law expanded into the more traditional areas of the law, such as property, contracts, torts, criminal law and procedure, and constitutional law.² This

¹ Our citation style is a variant of the legal citation style most commonly used in the United States. Here is what the citation means: the author of the article from which the quotation was taken is Oliver Wendell Holmes; the title of the article is “The Path of the Law”; and the article may be found in volume 10 of the *Harvard Law Review*, which was published in 1897, beginning on page 457. The quoted material comes from pages 469 and 474 of that article.

² The modern field is said to have begun with the publication of two landmark articles—Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960) and Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

new use of economics in the law asked such questions as, “Will private ownership of the electromagnetic spectrum encourage its efficient use?”; “What remedy for breach of contract will cause efficient reliance on promises?”; “Do businesses take too much or too little precaution when the law holds them strictly liable for injuries to consumers?”; and “Will harsher punishments deter violent crime?”

Economics has changed the nature of legal scholarship, the common understanding of legal rules and institutions, and even the practice of law. As proof, consider these indicators of the impact of economics on law. By 1990 at least one economist was on the faculty of each of the top law schools in North America and some in Western Europe. Joint degree programs (a Ph.D. in economics and a J.D. in law) exist at many prominent universities. Law reviews publish many articles using the economic approach, and there are several journals devoted exclusively to the field.³ An exhaustive study found that articles using the economic approach are cited in the major American law journals more than articles using any other approach.⁴ Many law school courses in America now include at least a brief summary of the economic analysis of law in question. Many substantive law areas, such as corporation law, are often taught from a law-and-economics perspective.⁵ By the late 1990s, there were professional organizations in law and economics in Asia, Europe, Canada, the United States, Latin America, Australia, and elsewhere. The field received the highest level of recognition in 1991 and 1992 when consecutive Nobel Prizes in Economics⁶ were awarded to economists who helped to found the economic analysis of law—Ronald Coase and Gary Becker. Summing this up, Professor Bruce Ackerman of the Yale Law School described the economic approach to law as “the most important development in legal scholarship of the twentieth century.”

The new field’s impact extends beyond the universities to the practice of law and the implementation of public policy. Economics provided the intellectual foundations for the deregulation movement in the 1970s, which resulted in such dramatic changes in America as the dissolution of regulatory bodies that set prices and routes for airlines, trucks, and railroads. Economics also served as the intellectual force behind the revolution in antitrust law in the United States in the 1970s and 1980s. In another policy area, a commission created by Congress in 1984 to reform criminal sentencing in the federal courts explicitly used the findings of law and economics to reach some of its results. Furthermore, several prominent law-and-economics scholars have become federal judges and use economic analysis in their opinions—Associate Justice Stephen Breyer of the U.S. Supreme Court; Judge Richard A. Posner and Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit; Judge Guido Calabresi of the U.S.

³ For example, the *Journal of Law and Economics* began in 1958; the *Journal of Legal Studies* in 1972; *Research in Law and Economics*, the *International Review of Law and Economics*, and the *Journal of Law, Economics, and Organization* in the 1980s; and the *Journal of Empirical Legal Studies* in 2004.

⁴ William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 *J. L. & Econ.* 385 (1993).

⁵ See, e.g., STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* (2002).

⁶ The full name of the Nobel Prize in Economics is the Bank of Sweden Prize in the Economic Sciences in Memory of Alfred Nobel. See our book’s website for a full list of those who have won the Nobel Prize and brief descriptions of their work.

Court of Appeals for the Second Circuit; Judge Douglas Ginsburg, and former Judge Robert Bork of the U.S. Court of Appeals for the D.C. Circuit; and Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit.

I. What Is the Economic Analysis of Law?

Why has the economic analysis of law succeeded so spectacularly, especially in the United States but increasingly also in other countries?⁷ Like the rabbit in Australia, economics found a vacant niche in the “intellectual ecology” of the law and rapidly filled it. To explain the niche, consider this classical definition of some kinds of laws: “A law is an obligation backed by a state sanction.”

Lawmakers often ask, “How will a sanction affect behavior?” For example, if punitive damages are imposed upon the maker of a defective product, what will happen to the safety and price of the product in the future? Or will the amount of crime decrease if third-time offenders are automatically imprisoned? Lawyers answered such questions in 1960 in much the same way as they had 2000 years earlier—by consulting intuition and any available facts.

Economics provided a scientific theory to predict the effects of legal sanctions on behavior. To economists, sanctions look like prices, and presumably, people respond to these sanctions much as they respond to prices. People respond to higher prices by consuming less of the more expensive good; presumably, people also respond to more severe legal sanctions by doing less of the sanctioned activity. Economics has mathematically precise theories (price theory and game theory) and empirically sound methods (statistics and econometrics) for analyzing the effects of the implicit prices that laws attach to behavior.

Consider a legal example. Suppose that a manufacturer knows that his product will sometimes injure consumers. How safe will he make the product? For a profit-maximizing firm, the answer depends upon three costs: First, the cost of making the product safer, which depends on its design and manufacture; second, the manufacturer’s legal liability for injuries to consumers; and third, the extent to which injuries discourage consumers from buying the product. The profit-maximizing firm will adjust safety until the cost of additional safety equals the benefit from reduced liability and higher consumer demand for the good.

Economics generally provides a behavioral theory to predict how people respond to laws. This theory surpasses intuition just as science surpasses common sense. The response of people is always relevant to making, revising, repealing, and interpreting laws. A famous essay in law and economics describes the law as a cathedral—a large, ancient, complex, beautiful, mysterious, and sacred building.⁸ Behavioral science resembles the mortar between the cathedral’s stones, which support the structure everywhere.

⁷ See Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States*, 59 ALA. L. REV. 1555 (2008).

⁸ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

A prediction can be neutral or loaded with respect to social values. A study finds that higher fines for speeding on the highway will presumably cause less of it. Is this good or bad on balance? The finding does not suggest an answer. In contrast, suppose that a study proves that the additional cost of collecting higher fines exceeds the resulting benefit from fewer accidents, so a higher fine is “inefficient.” This finding suggests that a higher fine would be bad. Efficiency is always relevant to policymaking, because public officials never advocate wasting money. As this example shows, besides neutral predictions, economics makes loaded predictions. Judges and other officials need a method for evaluating laws’ effects on important social values. Economics provides such a method for efficiency.

Besides efficiency, economics predicts the effects of laws on another important value: the distribution of income. Among the earliest applications of economics to public policy was its use to predict who really bears the burden of alternative taxes. More than other social scientists, economists understand how laws affect the distribution of income across classes and groups. While almost all economists favor changes that increase efficiency, some economists take sides in disputes about distribution and others do not take sides.

Instead of efficiency or distribution, people in business mostly talk about profits. Much of the work of lawyers aims to increase the profits of businesses, especially by helping businesses to make deals, avoid litigation, and obey regulations. These three activities correspond to three areas of legal practice in large law firms: transactions, litigation, and regulation. Efficiency and profitability are so closely related that lawyers can use the efficiency principles in this book to help businesses make more money. Economic efficiency is a comprehensive measure of public benefits that include the profits of firms, the well-being of consumers, and the wages of workers. The logic of maximizing the comprehensive measure (efficiency) is very similar to the logic of maximizing one of its components (profits). A good legal system keeps the profitability of business and the welfare of people aligned, so that the pursuit of profits also benefits the public.

II. Some Examples

To give you a better idea of what law and economics is about, we turn to some examples based upon classics in the subject. First, we try to identify the implicit price that the legal rule attaches to behavior in each example. Second, we predict the consequences of variations in that implicit price. Finally, we evaluate the effects in terms of efficiency and, where possible, distribution.

Example 1: A commission on reforming criminal law has identified certain white-collar crimes (such as embezzling money from one’s employer) that are typically committed after rational consideration of the potential gain and the risk of getting caught and punished. After taking extensive testimony, much of it from economists, the commission decides that a monetary fine is the appropriate punishment for these offenses, not imprisonment. The commission wants to know, “How high should the fine be?”

The economists who testified before the commission have a framework for answering this question. The commission focused on rational crimes that seldom occur unless the expected gain to the criminal exceeds the expected cost. The expected cost