

4-20-2009

Law and Economics: Is there a Higher Law?

Kenneth G. Elzinga

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Jurisprudence Commons](#), and the [Law and Economics Commons](#)

Recommended Citation

Kenneth G. Elzinga *Law and Economics: Is there a Higher Law?*, 36 Pepp. L. Rev. Iss. 5 (2009)
Available at: <https://digitalcommons.pepperdine.edu/plr/vol36/iss5/5>

This Symposium is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Law and Economics: Is there a Higher Law?

Kenneth G. Elzinga*

In his book, *Law's Quandary*, Steven D. Smith describes how difficult it would be to explain to a visitor from another planet what "the law" is like.¹ There is no simple person or document to point to and say, "This is the law," the way one might point to an elephant and say, "This is an elephant."² As an economist, I can relate to this problem. Just as "the law" is hard to describe, so too is what economists call "the market."

If I wanted to demonstrate the economic concept of the market to someone from outer space, I could take the visitor to the 7th and Hill Street area of Los Angeles where there is a famous market for diamonds. I could call the stores "supply," the shoppers "demand," and the buying and selling "the market." However, the visitor would not know the role that wages of diamond cutters in Amsterdam or political instability in South Africa play in this localized market. Or we could go to the Cargill headquarters outside Minneapolis and observe the trading floor where thousands of bushels of grain are bought and sold each hour by people sitting at computer terminals who themselves never grow grain, never mill grain, and indeed never see any of the product they buy and sell. But the visitor would have no idea how ethanol subsidies and precipitation levels affect this cyberspace market. Or I could do what economists do and simply draw demand and supply curves on a blackboard and say, "Assume this represents a market," leaving the visitor even more baffled.

Just as with "the market," a simple explanation of "the law" robs the listener of an understanding of the deeper, often hidden, forces that make it a truly complex system.

* Robert C. Taylor Professor of Economics, University of Virginia; Visiting Professor of Economics, Pepperdine University. I would like to thank the following people for comments on this draft: Robert F. Cochran, Jr., Robert W. Loftin, Djordje Petkoski, and William J. Stuntz.

1. STEVEN D. SMITH, *LAW'S QUANDARY* 41 (2004) [hereinafter SMITH, *LAW'S QUANDARY*].

2. *Id.* at 44–45 ("There are the sort of things that you showed your visitor on the tour—the lawyers, judges, and clerk . . . the legal briefs and oral arguments . . . Then there is . . . that independent, more ethereal (and perhaps merely imaginary) entity that your visitor wants you to show her: 'the law.'").

In his book, Smith documents how our legal system was once thought to be founded on a “higher law.”³ One definition of higher law is that of “natural law” in the pre-Enlightenment sense of the term, referring to the supernatural and authoritative moral code that was passed down to Moses by the God of Abraham, Isaac, and Jacob.⁴ Smith’s book shows what most of you would know from your law school experience—that the concept of a higher law in the form of an invisible, law-giving God, is incredible, if not repugnant, in today’s academic and professional circles.⁵ As an economist, I can relate to this.

Years before Steven Smith wrote his book, another Smith raised a parallel question about markets: Adam Smith asked whether an invisible hand, not an invisible god, was the foundation of economic activity.⁶ He argued that the self-interested behavior of buyers and sellers creates economic prosperity, as if by an invisible hand.⁷

The invisible hand, too, seems incredible, if not repugnant, to many people. Can individual self-interest, which looks a lot like selfishness and greed, turn into social good? Adam Smith thought so, and the subject of economics has been absorbed ever since with understanding the conditions under which markets have this characteristic.⁸

Adam Smith never directly raised for economics the question that Steven Smith raises about law: is there a higher law in economics? The mainstream discipline of economics would say no. Not that economics lacks laws. For example, we have laws of demand and of diminishing marginal utility.⁹ We think these laws are elegant; we think they are rarely broken. But we do not contend that they are divine or “higher.”¹⁰

3. *Id.* at 45–48 (discussing how law is dictated by a higher being resulting in a set basis of eternal law).

4. *Id.* at 47–48 (“‘This law of nature,’ he explained, ‘being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other . . . [N]o human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and . . . authority . . . from this original.’”).

5. *Id.* at 48–50.

6. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 456 (1976).

7. *Id.*

8. Adam Smith described the market system as the “obvious and simple system of natural liberty.” *Id.* at 687. After teaching principles of economics to over 35,000 students, I can testify that many do not find the system “obvious and simple.”

9. Other economic laws include the law of diminishing marginal returns; the law of one price; the law of comparative advantage; the law of diminishing marginal rate of substitution; and the law of increasing opportunity cost. Economics also has a theorem, the Coase Theorem. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). No theorem has more profoundly affected legal scholarship and the teaching of law than Coase’s.

10. A person violates the law of demand if, when the price of shoes goes up, and nothing else changes, he or she chooses to buy more shoes in response. A person violates the law of diminishing marginal utility if, after having two dishes of chocolate ice cream, and then still another, that person

Moreover, economists sparingly use the term “law.” Textbooks in economics are not titled “Laws of Economics.” They generally are called “Principles of Economics.” Doing economics usually involves applying principles, such as alternative opportunity cost or specialization and division of labor, or theories, such as the quantity theory of money or the theory of comparative advantage.

Where the two disciplines of law and economics intersect is in the field of “law and economics.” It is not an intersection of equals. The field of law has had little influence on the study of economics. But economics has had an enormous influence on the study of law. Very few economics departments have faculty trained in law. But today, every top tier law school has faculty with advanced degrees in economics.

The law and economics movement has further undermined the notion of a higher law. Let me summarize why.

First, the primary concern of economics is efficiency, not justice.¹¹ Higher law (or natural law) is more concerned with justice than efficiency.¹² A biblical concordance lists 140 entries for justice; zero for efficiency.¹³ One hundred forty to zero is a lop-sided score. The prophet Micah writes, “[W]hat does the LORD require of you?” and the response is “[t]o act justly and to love mercy and to walk humbly with your God.”¹⁴ Micah does not add, “Oh, and strive for Pareto-optimality in the process.”

This is not to say that efficiency and justice are always at odds. Being good stewards of society’s scarce resources—that is, using resources efficiently—often may be the *just* use of these resources.¹⁵ But still, the

enjoys the third serving more than the second. I feel safe in asserting that no one hearing or reading these words has violated these two laws of economics.

11. ROBERT H. NELSON, *ECONOMICS AS RELIGION: FROM SAMUELSON TO CHICAGO AND BEYOND* 37 (2001) (describing economics as the “gospel of efficiency”).

12. See SMITH, *LAW’S QUANDARY*, *supra* note 1, at 59 (“Aquinas’s very definition of law [is] ‘an ordinance of reason for the common good, made by him who has the care of the community.’”).

13. JAMES STRONG, *THE EXHAUSTIVE CONCORDANCE OF THE BIBLE* (1890) (For example, “Justice”: 28 entries; “Injustice”: 1 entry; “Just”: 91 entries; “Unjust”: 15 entries; “Justly”: 3 entries; “Unjustly”: 2 entries).

14. *Micah* 6:8 (New Int’l Version). This passage from *Micah* clues us into another serious oversight of the law and economics movement: mercy is absent. In an efficiency-oriented legal system, every injurer must internalize the total cost to the injured. But in reality, the total costs imposed upon one another in society are too great to account for entirely, and our legal systems collapse under this enormous burden (for example: our tort system). I am grateful to William J. Stuntz on this point.

15. I have argued elsewhere that the antitrust prohibition of cartels is both moral and efficient. See Kenneth G. Elzinga, *Are Antitrust Laws Immoral? A Response to Jeffrey Tucker*, 1 *J. MARKETS & MORALITY* 83 (1998).

word “justice” does not often make its way into economic discourse. Efficiency, optimality, and equilibrium are the terms of the trade.¹⁶

One illustration of this is the Coase theorem. Coase’s article, *The Problem of Social Cost*, is the most important and most frequently cited contribution to the field of law and economics.¹⁷ In it, Coase applies an efficiency standard to tort and contract problems.¹⁸ This can be unsettling to students who think that law is concerned with rights and wrongs. Watch the reaction of students when they learn that, as a matter of economics, in a world of zero transaction costs, the placement of liability in tort does not matter.¹⁹

Second, the geographic taproot of the law and economics movement is the University of Chicago.²⁰ Anyone who knows intellectual history understands that economics at Chicago is relentlessly secular.²¹ Professor Frank Knight, one of the founders of the Chicago school, was no friend of organized religion and made that clear to his students.²² Nothing has changed since.

Now here’s an interesting historical footnote: hostility to religion was not supposed to be in the DNA of the University of Chicago. When the University was being founded, the Board of Trustees wrote that it was to be “a Christian institution” committed to “inviting to its halls the largest possible number of students from every class of the community that it may

16. But the God of the Bible is, over and again, described as having the characteristics of justice, mercy, and compassion—not efficiency. The woman who poured perfume over the feet of Jesus was commended by the Lord, not rebuked for how inefficient it was.

17. See generally Coase, *supra* note 9.

18. See *id.*

19. Posner writes:

Economic analysis of law is a formalist edifice erected on a realist base, so one is not surprised to find that it has been criticized as formalist by antiformalists and as realist by antirealists. And to the extent that the economic analyst seeks to shape law to conform to economic norms, economic analysis of law has a natural law flavor.

RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 24 (1990) [hereinafter POSNER, *PROBLEMS OF JURISPRUDENCE*]. But the natural law to which Posner refers is not a higher law.

20. I am, in some ways, a product of this movement, having spent time at Chicago as a Fellow in Law & Economics. It was the most intense time of my academic life. But the Coase theorem came out of my institution, when Coase was at the University of Virginia before going to Chicago.

21. For an excellent treatment of the secularizing influence of the Chicago school, see NELSON, *supra* note 11, at 166–207.

22. See Ross B. Emmett, *Frank Knight: Economics vs. Religion in ECONOMICS AND RELIGION: ARE THEY DISTINCT?* 103–20 (H. Geoffrey Brennan & A.M.C. Waterman eds., 1994). Knight argued that the liberal revolution was a rejection of the notion of a “higher law.” If democracy is “government by discussion” then any effort to appeal to such a higher law was simply a power ploy to end discussion: the substitution of authoritarianism for democracy. A democratic society could not grant any religious moral authority because that would undermine the notion of democracy itself. I am grateful to Ross Emmett on this point. For a treatment of Knight and his work, see WILLIAM BREIT & ROGER L. RANSOM, *THE ACADEMIC SCRIBBLERS: AMERICAN ECONOMISTS IN COLLISION* (1971).

give to them a true Christian culture.”²³ But endorsing Christianity has not been part of the Chicago School of Economics.²⁴

The influential school of economics that Knight and others began at Chicago later transformed the field of law and economics. The driving force has been Richard Posner.²⁵ To be sure, others at Chicago besides Posner were both influential and important. But Posner brought to the intellectual table the double-barreled force of his ideas and his prodigious output. No one can keep up with him.²⁶

While scholarship is a marketplace of ideas, the prominence of many ideas also is a function of the personalities behind them. And law and economics has had powerful personalities, notably Posner but others as well.²⁷

Posner did not learn his economics at Harvard, where he was a student, but from economist colleagues at Chicago like Becker, Coase, Landes, and Stigler.²⁸ His original conversion to economics began at Stanford, under the influence of Aaron Director, who was at Chicago before.²⁹

But in law itself, Posner found his hero in New England: in the jurisprudence of Oliver Wendell Holmes. Holmes, more than any other figure, endeavored to knock law off of a metaphysical or divine pillar.³⁰

23. THOMAS WAKEFIELD GOODSPEED, *A HISTORY OF THE UNIVERSITY OF CHICAGO: THE FIRST QUARTER-CENTURY* 91 (1972).

24. Oliver Wendell Holmes was a precursor of the law and economics movement. He advised lawyers to study economics, where “[w]e learn that for everything [we want] 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, 474 (1897).

25. Aaron Director, however, was the taproot of law and economics at Chicago. But his influence was more through his students (of whom Posner, indirectly, was one) than his writing. See Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163 (1983).

26. Posner, as a person and as a polymath, is described in Larissa MacFarquhar’s *The Bench Burner*, THE NEW YORKER, Dec. 10, 2001, at 78.

27. I would also single out Gary Becker at Chicago, who, while not in the law school, pushed economics prominently into places it had never been before: racial discrimination, marriage, and education. See GARY S. BECKER, *A TREATISE ON THE FAMILY* (1981). His research is so imperialistic that scholars in multiple disciplines, including law, have had to reckon with his work. When I first heard the Beckerian term “marriage market,” I thought it bordered on sacrilegious; then I thought it was clever; now, I hear it as part of the professional vocabulary of my discipline. See *id.* at 38. Watching economists clinically discuss the marriage market reminds one of Tina Turner’s song, “What’s love got to do with it?” TINA TURNER, *WHAT’S LOVE GOT TO DO WITH IT?* (Virgin Records 1993).

28. See, e.g., BECKER, *supra* note 27.

29. He was also Milton Friedman’s father-in-law.

30. SMITH, *LAW’S QUANDARY*, *supra* note 1, at 2.

In *The Problems of Jurisprudence*, Posner, following Holmes, writes that law is the activity of judges and is not a “body of concepts (rules, principles, whatever). . . In the end the law is what the judges do with your case.”³¹ Later, Posner underscores this Holmesian point, describing the lawyer as one who “must predict how the judges, who decide when the state’s coercive power may be applied to a person, will act if his client engages in the proposed course of action and is sued. Law is thus simply a prediction of how state power will be deployed in particular circumstances.”³²

In his *Economic Analysis of Law*, Posner’s rejection of a higher law is illustrated in his explanation of criminal law.³³ Anyone who supports the idea of a higher or natural or scripture-based law would presumably not question the propriety of laws against rape, murder, and theft; such laws would be seen as obvious derivatives of a natural law that promotes justice and the sanctity of human life. So how does one legitimize these laws in the absence of a higher law? Posner calls the criminal acts of rape, murder, and larceny not unjust or inhumane or immoral or contrary to a higher natural law. He labels these activities “inefficient” because they bypass the market.³⁴ According to Posner, such conduct “violates the principle. . . that, where market transaction costs are low, transactors should be required to use the market.”³⁵

This efficiency-oriented conception of the law is 180 degrees from what students encounter when they enter the University of Virginia’s School of Law. On the wall, students read: “[T]hose alone may be servants of the law who labor with learning, courage, and devotion to preserve liberty and promote justice.”³⁶

Posner’s view of law is 180 degrees from the law as given to Moses, which teaches that a higher or natural law can reveal our shortcomings and show us how to live lives closer to God’s purposes. The mainstream of law and economics has no truck with this language. In *The Problems of Jurisprudence*, Posner concludes that “the term ‘natural law’ is an anachronism [because t]he majority of educated Americans believe that nature is the amoral scene of Darwinian struggle.”³⁷

31. POSNER, PROBLEMS OF JURISPRUDENCE, *supra* note 19, at 21.

32. *Id.* at 223.

33. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 215–46 (6th ed. 2003) [hereinafter POSNER, ECONOMIC ANALYSIS OF LAW].

34. *Id.* at 216.

35. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 121 (2d ed. 1977).

36. Leslie H. Buckler, Professor of Law at the University of Virginia, 1929–1956, Virginia Law: The Layout, available at http://www.law.virginia.edu/html/insider/life_layout.htm (last visited Feb. 24, 2009).

37. POSNER, PROBLEMS OF JURISPRUDENCE, *supra* note 19, at 235. There are clusters of economists in the United States who try to connect religious faith and economics. They include the

As a follower of Jesus and as someone who has been at the University of Chicago (as a Fellow in Law & Economics), I have asked myself: is there *any* connection between Jesus and law and economics? There is one area of commonality. And it revolves around the concept of astonishment. When people first encountered Jesus, they were astonished. The Pharisees were astonished by the teachings of Jesus and his lifestyle. Jesus' disciples were astonished by what He told them. What Jesus said about the law was astonishing. Jesus astonishes.

And that's what the Chicago school also does—it continually astonishes. The Coase theorem is astonishing.³⁸ Posner on crime is astonishing.³⁹ Becker on discrimination and marriage is astonishing.⁴⁰ Stigler on regulation is astonishing.⁴¹ Director on antitrust is astonishing.⁴² Friedman on permanent income is astonishing.⁴³ A recent study showing that childproof caps on medicine increase the poisoning of children astonishes my students—but to those of us who have spent time at Chicago, or have been tutored by the Chicago School, the response is: well, what would you expect from a government regulation?

But the entire Chicago Project is shorn of any dependence on, or acknowledgement of, a higher law. As a professor of economics, and as someone who became a Christian in graduate school, I find this sad. I would be even sadder if I were a lawyer or a professor of law.

If one starts with the presupposition that law is nothing more than “the amoral scene of Darwinian struggle,”⁴⁴ then the One who gave higher laws to Moses on Mount Sinai is not going to be a player in legal discourse. But

Association of Christian Economists and its journal, *Faith & Economics*; the Association for Social Economics and its journal, *Review of Social Economy*; the Center for the Economic Study of Religion and the Association for the Study of Religion, Economics and Culture; and the Acton Institute and its publication, *Journal of Markets and Morality*. But these are not in the mainstream of economic scholarship.

38. See, e.g., POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 33, at 7; RONALD H. COASE, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

39. See, e.g., POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 33, at 215–47; RICHARD A. POSNER, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

40. See *supra* note 29.

41. See, e.g., SAM PELTZMAN, *Toward a More General Theory of Regulation*, in CHICAGO STUDIES IN POLITICAL ECONOMY at 234 (George Joseph Stigler ed., 1988) (noting that “George Stigler’s work on the theory of regulation is one of those rare contributions . . . which force a fundamental change in the way important problems are analyzed.”).

42. See, e.g., Douglas Martin, *Aaron Director, Economist, Dies at 102*, N.Y. TIMES, Sept. 16, 2004, at B10 (“Aaron Director . . . profoundly influenced approaches to antitrust law.”).

43. See, e.g., MILTON FRIEDMAN, *A THEORY OF THE CONSUMPTION FUNCTION: A STUDY BY THE NATIONAL BUREAU OF ECONOMIC RESEARCH* (1957).

44. See *supra* note 39 and accompanying text.

if one starts with the most famous first line in all of literature, "In the beginning, God created the heavens and the earth," and if one believes that this creating-God is a law-giving God, then law is divine in origin and one must consider whether civil law should be congruent if not derived from natural law.⁴⁵

If there is a higher law, and if it is given by a God who claims to have created man in His own image, then one approaches law with an understanding that its purpose is to enhance and not to diminish the image of God in men and women.

If there is a God-given law, then the study of law becomes, in part, the study of what is meant by justice and liberty in the mind of the Creator of the higher law.⁴⁶

45. I do not use the term higher law (or natural law) in its Enlightenment sense, in which the law is based solely on human reason. In *The Abolition of Man*, C.S. Lewis refers to natural law as the "Tao." See C.S. Lewis, *The Abolition of Man*, in THE COMPLETE C.S. LEWIS SIGNATURE CLASSICS 701 (Harper Collins 2002) (1944). He claims that all people have a similar moral compass regarding right and wrong that is God-given. See C.S. Lewis, *Mere Christianity*, in THE COMPLETE C.S. LEWIS SIGNATURE CLASSICS 22 (Harper Collins 2002) (1952). From a Christian perspective, this squares with Paul's teaching in Romans 2:14. But Paul also makes clear that people can suppress the "Tao" that God has placed within them. *Romans* 1:18-30 (New Int'l Version).

46. Even the concept of silence or indifference to the question, "Is There a Higher Law?" matters. The most damaging influence upon the spiritual life of college and university students is not that of the professor who denounces the existence of God or claims that life is but the "amoral scene of Darwinian struggle" but rather the professor who teaches and does research as though the God of Abraham, Isaac, and Jacob does not exist.