

# LAW AND ECONOMICS



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*An Introductory Toolkit for Lawyers*

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Cover Photo of Veryl Goodnight's *The Day The Wall Came Down* (located on the grounds outside the George H.W. Bush Presidential Library at Texas A&M University), taken by Robin Paul Malloy. I selected this perspective for the photo because I thought it captured the dynamic energy, competition, and potential opportunity of a free market.

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*For Gina & Giovanni*



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## ACKNOWLEDGMENTS

In preparing this book, I have integrated materials from some of my prior publications. These materials have been updated, edited, and revised. The materials have been integrated with new material to produce this ‘toolkit.’

In using prior materials for this book, I omitted footnotes, but interested readers may go to the original publications to view detailed footnotes.

All materials are used with permission. I wish to thank and acknowledge the publishers of my prior works for granting permission for reproducing prior published materials in this book. I reference chapters in the sources below. No complete chapters were borrowed for this book. Rather, limited and select paragraphs and pages from the identified chapters were used. I have listed the approximate page numbers with each source for easier reference. I also thank James C. Smith, my co-author on the *Real Estate Transactions* book listed below, for granting permission to use the identified materials.

Robin Paul Malloy, *LAND USE LAW AND DISABILITY: PLANNING AND ZONING FOR ACCESSIBLE COMMUNITIES* (Cambridge University Press, 2015); chapter two (32–40).

Robin Paul Malloy, *LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING* (Cambridge University Press, 2004); chapter four and chapter five (124–28, 131–32, 144–150, 165–77, 194–201).

Robin Paul Malloy, *LAW AND MARKET ECONOMY: REINTERPRETING THE VALUES OF LAW AND ECONOMICS* (Cambridge University Press, 2000); chapter four and chapter five (99–105, 144–46).

Robin Paul Malloy, *LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE* (West Publishing, 1990); chapter one and the glossary (20–33, 38–42, 161–63).

Robin Paul Malloy and James C. Smith, *REAL ESTATE TRANSACTIONS* (WOLTERS KLUWER, 5th ed. 2017); chapter one (6–17).

# PREFACE

Over the last fifty years, economic ideas have become fully integrated into conversations about law. Lawyers use economic concepts in practice, and judges are influenced by economic ideas in shaping their opinions. Consequently, for over thirty-five years as a law professor, I have been introducing law students to basic economic concepts in teaching my courses. I have found that almost every subject area of law involves basic economic considerations and requires some knowledge of economic terms and ideas. At the same time, my experience has shown me that very few law students have an introductory knowledge of economics. These students are missing out on many useful insights provided by economics. Moreover, they are underprepared to engage with other lawyers who are making economic analysis a part of their legal arguments.

In response, this book offers a basic and easy to follow introduction to some of the most commonly referenced core concepts of economics used in law. The book assumes no prior study or knowledge of economics. The goals of the book are to provide a foundation for further inquiry and to assist the reader in acquiring a good introductory toolkit for understanding the subject area known as *law and economics*. For readers with no prior study of economics, this book will introduce concepts and vocabulary needed to begin to understand the business and economic aspects of law and legal practice. For readers with some prior knowledge of economics, and for those taking a class with an instructor integrating economic and business concepts into the course, these materials will provide a helpful guide to advanced understanding. For readers who are not law students or lawyers, the book introduces the subject from a legal perspective; in a legal

context. As such, it is helpful to any reader looking for an introduction to core economic concepts used in law.

This book is unlike other books on law and economics because it is organized by Core Concepts rather than by legal subject area. Most law and economics books attempt to introduce economics as an economics student would study it, and then proceed to apply the economic method to various legal subject areas. Thus, they might have an introductory chapter on economic methods and then follow it with chapters on contract, property, tort, and criminal law. I have used these books when working with students, and I have found none of them to be satisfactory when used as a supplement to a transactions, commercial, or regulatory law course. Students often find even these introductory books confusing, especially if they are not directly engaged in a course specifically on law and economics. In addition, students often find much of the material unrelated to the work they are doing. For instance, if students are taking a contracts class, they do not want to purchase a book that only has one chapter on contracts and then ten chapters on unrelated topic areas. This book is different. It focuses on Core Concepts and on building a vocabulary that can be useful in a variety of contexts with applicability to multiple legal subjects.

This book does not address law students as if they were economics students. Many law and economics textbooks are written from the perspective of an economist—this perspective examines law using the discipline of economics to evaluate such things as the efficiency of a legal rule. In my experience, not many law students think like economists because most law students have not studied economics. Law students are not used to thinking in terms of efficiency and in terms of costs and benefits. Law students typically concern themselves with fairness, justice, and reasonable expectations. Lawyers tend to study issues in terms of narrative explanations and examples rather than in ways that employ calculus. Consequently, I believe that law students and lawyers need an introduction to law and economics written from a narrative perspective and focused on core concepts rather than equations and calculations. Such a perspective focuses on appreciating economic concepts and ideas as tools that are potentially useful to a lawyer's understanding of a case and to the development of a better legal argument for a client.

Moreover, a lawyer is not acting as an economist and should therefore be concerned with determining whether applying economic analysis advances a fair and just outcome in a given case, rather than if a legal rule is economically efficient. From this perspective, lawyers do not actually need to know if a legal rule is efficient in economic terms, but they do need to know what it means for a legal argument when a party suggests that a legal rule is either efficient or not. Likewise, lawyers need to know how economic concepts can help bring new facts and considerations into the framework of a legal problem. For example, if we were to argue about efficiency in a given case, would we look at different facts or additional information that might reshape our understanding of the case? For lawyers, economics provides a toolkit of concepts and insights that might prove useful in given situations when seeking to solve a legal problem. A lawyer needs to be able to select appropriate tools for a given situation, and to employ these tools in the pursuit of justice. The first step in the process involves developing a basic vocabulary and an inventory of useful core concepts. The materials in this book provide the reader with these tools.

This book is a helpful supplement to a variety of courses and can be assigned as such by instructors. Whether it is a course on law and economics, or a course in which the instructor takes an economic and business approach to the material, this book will facilitate the reader's understanding. Courses that readily incorporate economic considerations include: traditional first year law school courses (e.g., contracts, torts, property, and criminal law), and upper level law classes such as transactional law courses, administrative law courses (including zoning and environmental law), commercial law courses, and regulatory law courses. In these courses, a concept-based approach is highly useful. The book is also useful as an introduction and supplement to a course on law and economics. In fact, while this book offers an accessible introduction to law and economics, there are enough elements in this toolkit to form the core of a course or seminar. This may be accomplished by using this book along with additional assigned readings that explore core concepts in more detail. I use the book in teaching a one-credit mini-course in law and economics, and I use it as a supplement to my courses on real estate transactions and land use law. In addition, I have previously used materials from the book in teaching property, commercial, and regulatory law classes.

The motivation to write this book arose from my frustration in trying to find useful materials to supplement my own courses. In teaching real estate transactions, commercial law, and other courses, there was no short book that I could assign to students to facilitate their learning of basic concepts such as risk, value, transaction costs, externalities, efficiency, cost and benefit analysis, and a variety of other concepts. Many of my colleagues have expressed concern about the same issue. We all felt students needed an accessible, short, and concept-oriented book that introduced them to important economic concepts that would help them develop a better understanding of the law. After years of trying to fill this gap with lectures and short handouts, I decided to write this book. This book fills a need in the market that is not covered by most of the law and economics books currently available.

In organizing the book, I decided to present the material in terms of twelve Core Concepts. Within the discussion of each Core Concept, I present important Ancillary Concepts identified by subheadings. The book may be read from front to back, or the reader may jump around and focus on particular Core and Ancillary concepts as fits the reader's particular needs. Core Concepts one through six address fundamental ideas and definitions, Core Concepts seven through eleven present new ideas that integrate a number of concepts and terms addressed earlier in the material and help to reinforce understanding. Core Concept twelve presents a simple economic model of supply and demand.

My experience, in over thirty-five years of teaching law students, indicates that most law students and lawyers do not really need to study a specialized course in the economic analysis of law; as much as they need, instead, to understand basic economic concepts and develop a basic economics vocabulary so that they can function as more informed lawyers. This book serves to address this need in an easy to use format.

For those readers with advanced knowledge of economics, keep in mind that this book does not go into the nuances and complexities of economics. It is an introductory text that makes simplifying assumptions and avoids complexity in favor of developing the reader's appreciation for basic core concepts. It assumes that readers seek an accessible and basic introduction to the core concepts and vocabulary of economics so that they can begin to appreciate some of the connections between law and economics.



The book is organized and developed based on my many years of teaching these concepts to students in various commercial, property, and administrative law courses, as well as in teaching and writing about law and market economy. While there are other ways to organize the material and many layers of complexity that one can examine in specialized topic areas, I have found that students can readily understand key concepts and develop an introductory vocabulary by using these materials. This is especially true when an instructor actively integrates these concepts into the study of a particular subject area.

To enhance understanding, I have integrated examples throughout the book. While more examples could have been included, a major goal of the book is brevity. With the explanations and examples provided, readers will be prepared to apply the knowledge acquired from reading this book to additional situations that they come across on their own.

In developing these materials, I benefited from feedback on an early draft. For this input, I thank Luca Arnaudo, Jerry Evensky, Shubha Ghosh, Julie Lawton, and James C. Smith. In putting the materials together, I also benefited from the research assistance of Christopher Baiamonte, Emily Keable, Parker Mincy, and Maria Zumpano.

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