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Book Review [Law's Order: What Economics Has to Do with Law and Why It Matters]

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BOOK REVIEW

Law's Order: What Economics Has to Do with Law and Why It Matters. By David D. Friedman. Princeton, New Jersey: Princeton University Press, 2000. Pp. 312. Hardcover. \$29.95.

Reviewed by **Thomas S. Ulen***

I. INTRODUCTION

It is commonplace in the legal academy today that law and economics (or the economic analysis of law) is the default style of legal scholarship. Indeed, as a good friend of mine—a law professor at a prominent law school—told me recently, “We have won.” There are, in fact, objective measures of this success.¹ Although this success is evident to those of us who teach in law schools, it is perhaps not as clear to non-lawyers within the academy, to lawyers and judges outside the legal academy, or to the general, well-informed public. Even among those who are not aware of the rise of law and economics in the academy, there is a sense that the legal profession is in a transition phase. And within the legal profession there have been, it is true, concerns that what goes on in the law schools is becoming increasingly less related to what practitioners need. That is, the profession and the scholars appear to be moving in opposite directions.²

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1. See William Landes & Richard Posner, *The Influence of Economics on Law: A Quantitative Study*, 26 J.L. & ECON. 385 (1993); Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517 (2000).

2. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); see also Symposium, *Legal Education*, 91 MICH. L. REV. 1921 (1993); Harry T. Edwards, *The Grow-*

These developments in the style of legal scholarship and the concerns they have raised in the profession have given rise to a desire to describe the state of affairs, to explain why it has happened, and to bridge the gap somehow.³ Whether that is possible or even desirable is beyond the scope of this review. Nonetheless, as I say, there is a desire to describe and explain the changes in legal scholarship. There are now a significant number of texts in law and economics,⁴ but their number is no longer growing. That stasis in the number of textual treatments should not be taken as an indication that law and economics has reached or even passed its high-tide mark and will now begin to recede, as have other legal scholarly innovations before it. Quite to the contrary, the fact that there are no or few new textual treatments of the field appearing should, I believe, be taken as a sign of how profound the success of law and economics in the academy has been. The reason that I make this claim is that I believe that law and economics has become so central to legal scholarship and education that it is being incorporated into the textual treatment of individual subjects within law and disappearing as a separate field of study. For instance, fifteen years ago one could have written a monograph on the economic treatment of tort liability and have confidently expected that monograph to

ing Disjunction Between Legal Education and the Legal Profession: A Postscript, 91 MICH. L. REV. 2191 (1993); Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921 (1993).

3. See DEAN ANTHONY KRONMAN'S, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) was an eloquent attempt to point out how and why the gap between the academy and the profession had arisen. Dean Kronman lays a great deal of the blame on the rise of law and economics in the academy. I have argued elsewhere that I think that this perception of law and economics is mistaken (see Thomas S. Ulen, *The Prudence of Law and Economics: Why More Economics Is Better*, 26 CUMB. L. REV. 773 (1996)) in that it misperceives law and economics as antithetical to what Dean Kronman characterizes as the practical wisdom that characterized the legal profession decades ago. My take, for what it is worth, is that law and economics fosters, rather than undermines, that practical wisdom.

4. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998); ROBERT D. COOTER & THOMAS S. ULEN, *LAW AND ECONOMICS* (3d ed. 1999); THOMAS J. MICELI, *ECONOMICS OF THE LAW: TORTS, CONTRACTS, PROPERTY, LITIGATION* (1997). A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (2d ed. 1989) is, perhaps, the most accessible of the textual treatments and is, truly, an introduction and not a comprehensive treatment.

have been read by only a handful of torts scholars, by almost no other law professors, and by no law students.⁵ Today nearly every law student in the United States picks up the economic analysis of torts as a matter of course during her introductory course in that subject. Similarly, law students who study contract law today begin with the notion of "efficient breach" and find that notions of risk allocation, principal-agent relationships, and the least-cost-avoider are central to the study of contractual law. In brief, law and economics has now become so much a part of the core teaching in the central subjects of the law that the need for a separate course in the economic analysis of law is less compelling than it was, say, ten years ago.

I do not want to oversell my contention that, as my friend says, law and economics has "won" to the exclusion of other styles of legal scholarship. We are not at the legal equivalent of the "end of history" in which everyone agrees that law and economics is *the* method of legal analysis. Doctrinal analysis as a method of scholarship and the case method as a style of teaching are still vigorously alive in many law schools. And there are still significant areas of the law that have escaped infection by the law-and-economics virus (such as constitutional law); there are still issues of disagreement between conventional legal scholars and law-and-economics scholars about important theoretical matters; there are even disagreements among law-and-economics proponents about core issues in law and economics;⁶ and there is still much work to

5. Indeed, three prominent law-and-economics scholars did just that: WILLIAM LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987) and STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987).

6. For example, some law-and-economics scholars, such as Posner *per se* and Posner *files*, believe that the rational choice theory of human decisionmaking, taken as a whole and without modification from microeconomic theory, is the best theory from which to undertake the economic analysis of law. Others believe that rational choice theory needs to import significantly more constraints on human decisionmaking, at least in the context of legal decisionmaking. These additional constraints, the critics allege, arise from the perception that there are widespread cognitive imperfections that make rational choice theory, without modification to take account of these imperfections, a sometimes-misleading guide to legal decisionmaking. See e.g. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assump-*

be done in law and economics to make it better and more acceptable.⁷ Still, law and economics is on a high plateau in its history.

Into this state of affairs comes Professor David Friedman's *Law's Order: What Economics Has To Do With the Law and Why It Matters*. I have gone into the current state of affairs in the legal academy vis-à-vis law and economics because a great deal of what I have to say about Professor Friedman's book must be seen against this background. Although I have a great affection and admiration for the work, such critical things as I shall have to say will arise largely from my concerns about where the book fits into the history, present, and future of law and economics. For example, in view of where law and economics stands in the legal academy and the profession today, I shall wonder about the audience that Professor Friedman might be addressing or ought to address. To speculate on that, however, will first require me to describe the book and its qualities, a task to which I turn in the next section.

II. THE STRUCTURE OF *LAW'S ORDER*

David Friedman, Professor of Law and of Economics at Santa Clara University, has written a sprightly introduction to the field of law and economics.⁸ The book is, in essence, divided into three sections. The first 100 pages or so are an introduction to some central concepts of economics, with application to legal topics. The next 100 pages focus on the economic analysis of private law issues—property, contracts,

tion from Law and Economics, 88 CAL. L. REV. 1051 (2000).

7. I believe that the two most important issues that law and economics will face in the near future are (1) the empirical and experimental testing of its many hypotheses about the law, and (2) the elaboration of a more broad-gauge theory of human decisionmaking.

8. Professor Friedman has a Ph.D. in physics from the University of Chicago and an undergraduate degree in chemistry and physics from Harvard. But he is apparently an economist by dint of genes and upbringing in that he is the son of Nobel Laureate Milton Friedman. Professor Friedman is also the author of *Hidden Order: The Economics of Everyday Life* (1996), a wonderful introduction to intermediate microeconomic (or price) theory. A much earlier book of his, *The Machinery of Freedom: A Guide to Radical Capitalism* (1981), is a classic libertarian tract.

and torts. The final 100 pages treat the public law areas of antitrust and criminal law. And within each of these areas Professor Friedman's aim is not to give an economic treatment of the entire area of that area but rather to give a selective treatment that shows the economic analysis of that area in the best possible light.

A. *The Organization of the Work*

The introductory material on economics is no substitute for a serious study of price theory, but it is a helpful survey of selected tools. There are, for instance, discussions of how, why, and when to perform cost-benefit analysis and of the creation of value through mutually beneficial exchange, one of the most central issues in an understanding of price theory but one of the hardest for non-economists to grasp. Chapter 2 treats efficiency as a legal norm—once a very controversial topic—and does so in a very even-handed manner. Professor Friedman tells the reader the limitations of the notion of efficiency—for instance, that it is a consequentialist idea (one valued for the consequences of accepting it) and not a fundamental idea (as is the notion of the “right” or the “good”). Another shortcoming of the standard of efficiency, he writes, is that to be operational it must rely on the willingness to pay as its measure of consumer value. He correctly, in my opinion, relies on Marshallian notions of efficiency— notions that may be better known as “Kaldor-Hicks” or “potential Pareto” efficiency.⁹ He introduces the more conventional economic

9. Kaldor-Hicks efficiency stands in contrast to Pareto efficiency, which is the more fundamental economic concept of efficiency. An allocation of goods and services is “Pareto efficient” if it is impossible to reallocate the current holdings among the current holders so as to make one or more people better off (in their own estimation) without making someone else worse off (again in his or her own estimation). That is, under Pareto, efficiency reallocations must be consensual—the losers must be compensated by the winners so that there is a clear net gain from any reallocation. An allocation that cannot be consensually altered is said to be “Pareto efficient” or “Pareto optimal.” “Kaldor-Hicks efficiency” is an easier standard under which to reallocate goods and services. Under the Kaldor-Hicks criterion a reallocation is superior if the winners could have compensated the losers, but they do not have to do so. In essence, this criterion recommends changes on the basis of a cost-benefit analysis: if the benefits of a reallocation exceed the costs, then the reallocation is Kaldor-Hicks efficient. See COOTER & ULEN, *supra* note 4, at 12, 43-44.

standard—Pareto efficiency—late in the chapter, and, again correctly, I believe, does not make much of it.¹⁰

Chapters 3 and 4 strike a delightful note of lightheartedness that is, pleasingly, maintained throughout the book. Professor Friedman entitled those chapters "What's Wrong with the World, Parts 1 and 2" and, in Chapter 4, one of the sections has the whimsical title—"Nothing Works, Everything Works, It All Depends." Chapter 4 has a nice exposition of the Coase Theorem, one of the great intellectual achievements of the twentieth century and a crucial concept in all of law and economics. For my taste, there is far too little of the examples that Coase himself used and that have become such a bedrock part of the law-and-economics literature—such as the farmer-rancher example.¹¹ There is, however, extensive later use made of the railroad-farmer example.¹²

The material on property rules *versus* liability rules is, I think, strange. The issue of remedies arises in Chapter 5 ("Defining and Enforcing Rights: Property, Liability, and Spaghetti"), where the injuries that the sparks from a passing railroad train could inflict on a neighboring farm are the subject of inquiry. The various methods of minimizing the costs arising from these potentially conflicting interests—the farmer's planting fewer crops or planting them farther away from the tracks; the railroad's installing a spark arrester; the farmer switching to a fire-resistant crop—are examined in an almost incomprehensible diagram on page forty-nine. The

10. See *id.* (discussing Pareto efficiency and how it contrasts with Kaldor-Hicks efficiency).

11. The situation is one in which a rancher runs cattle and his neighbor grows crops. The cattle might stray onto the neighboring crops, causing damage to the farmer. Professor Coase asked whether the efficient use of resources by the rancher and the farmer would be affected by the legal regime that defined the legal relationships between the neighboring property owners. His answer was that if transaction costs between the potentially conflicting property owners are zero, an efficient use of resources will prevail, regardless of the legal regime. See Ronald A. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

12. The situation is that a railroad passing through farm territory emits sparks that might damage the crops growing beside the tracks. Again, Professor Coase asked if the legal regime for defining liability for crop damage from passing railroad sparks would affect the efficient use of railroad and farm property. As in the rancher-farmer example (and, incidentally, in every other legal example), the answer, known as the Coase Theorem, is that the legal regime will have no effect on efficient resource use when transaction costs are zero.

dimensions of the problems that the diagram creates for the reader are to be imagined from the title of the figure: "Spaghetti diagram." I cannot think that any student would be willing to pour over that diagram in search of legal enlightenment.

The treatment of property rules *versus* liability rules illustrates what I believe to be a problem with *Law's Order*. The economic analysis of legal and equitable remedies is one of the most important topics in all of law and economics, falling just below the Coase Theorem in order of importance. And yet there is no mention of the famous article that gave rise to that analysis.¹³ It is not only true and important but also comforting to know that we in the academy are building on the work of others. We have, therefore, a duty to teach not only the substance of the ideas in our field but also to tell our readers and students whence these wonderful ideas come. To do so instructs readers and students of the continuity in the intellectual endeavor—itsself an important idea—and the need to rely on the great work of one's predecessors and contemporaries. As Isaac Newton said, "If I have been able to see further, it is because I stood on the shoulders of giants."¹⁴ One must also instruct readers and students into the literature that every learned person in the profession needs to know. Just as every student of English literature ought to know Shakespeare and to have read his work and every philosophy student ought to know Aristotle and what he wrote, every student of law and economics should know Ronald Coase and his "The Problem of Social Cost" and Calabresi and Melamed and their "One View of the Cathedral." I emphatically do not mean that Professor Friedman is unaware of the articles that created the field; I am merely chiding him for not having mentioned them explicitly.¹⁵

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

14. See generally ROBERT K. MERTON ET AL., ON THE SHOULDERS OF GIANTS: A SHANDEAN POSTSCRIPT (1965) (tracing the origins of this metaphor in a letter from Isaac Newton to Robert Hooke).

15. See *infra* Part II.B (returning to this issue with a discussion of the text-Internet link).

Professor Friedman organizes some of the material in the introductory third of the book not by conventional economic or legal topic but around a single problem. For example, Chapter 6 ("Of Burning Houses and Exploding Coke Bottles") deals with insurance. The familiar topics are here—attitudes towards risk, moral hazard, adverse selection—and they are presented with clarity and sprightliness.

Similarly, Chapter 7 ("Coin Flips and Car Crashes: *Ex Post* versus *Ex Ante*") treats some issues that Professor Friedman finds particularly compelling and that was the basis of one of his many scholarly articles.¹⁶ That article and this chapter make some important points, but these points are likely to be of interest to the specialist in law and economics and not to the most likely audience for this book. That criticism having been made, I cannot resist adding that although I think the material in this chapter is somewhat out of place, I found his discussion of impossible attempts to be wonderfully entertaining and instructive.¹⁷ The issue, a familiar one to those first wrestling with the concepts of criminal law, is whether the law should punish an attempt to achieve an illegal result when the method being used cannot possibly achieve that result. For instance, suppose that I, furious with someone for some wrong she has done me, seek to harm her by putting pins into a voodoo doll meant to represent her. Clearly, the method of injuring that I have chosen will not avail. Nonetheless, I have an intention to do an injury and that is one of the bedrock requirements of a crime. Professor Friedman asks, quite sensibly, "Why pay the cost of catching people and locking them up in order to deter behavior that we have no reason to deter?"¹⁸

Chapter 8 introduces what is another important tool in modern law and economics—game theory. Professor Friedman takes as one of his examples of the importance of game theory the famous prisoner's dilemma and, having laid out

16. See David D. Friedman, *Impossibility, Subjective Probability, and Punishment for Attempts*, 20 J. LEGAL STUD. 179 (1991).

17. See DAVID D. FRIEDMAN, LAW'S ORDER 81-83 (2000).

18. The answer is that we punish impossible attempts because they deter effective methods of inflicting injury by people who do not know which methods are possible and which are impossible. See *id.* at 82.

the fundamentals of that game, uses it to develop an excellent legal example.¹⁹ The other principal example that he uses is that of bilateral monopoly. I find this to be a curious choice. The idea of bilateral monopoly is both dated and, I believe, not terribly helpful in legal analysis. Far better to take some other conventional game—such as the battle of the sexes or the hawk-dove game—to illustrate the central point for which he brought in bilateral monopoly—namely, that some games do not have unique solutions or any stable equilibria at all. The law-and-economics literature is rife with examples of the uses of game theory in legal analysis that go far beyond those limned in this chapter.²⁰ Another criticism that I would raise of the material in this chapter is that the tools developed here do not really figure later in the book.

Chapter 9 (“As Much as Your Life Is Worth”) is yet another curious placement. This is a short walk through the issues of the valuation of human life. But again one wonders why that material is treated here. It is an important issue, no doubt, but it only arises in the legal context of tortious injury or in the determination of administrative agency regulatory standards and might, therefore, have been more instructively placed in those chapters.

These chapters conclude the introduction to the tools of economic analysis that will then be applied to legal topics. But before we turn to the law, there is an “intermezzo” in which Professor Friedman gives a description of “The American Legal System in Brief.” I found the coverage in this chapter to be odd. Who is this chapter for? It is far too brief to be helpful to someone who knows nothing about the law and not at all useful for someone who understands the American legal system well. I suspect that the principal audiences are general readers and legal readers unfamiliar with the law and economics. For the general audience, who can be expected to know relatively little about the structure of the legal system, Professor Friedman might have included material on such issues as how litigation commences, proceeds, and ends; the

19. See *id.* at 91-92.

20. For an overview see DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* (1994).

role of courts, legislatures, administrative agencies, and the executive branch in creating and enforcing law; how courts, in resolving private disputes, make law in our system; how our system generally differs from the other legal systems of the world; and so on. Moreover, Professor Friedman might have helped those readers new to the law by laying out a general framework of the topics he intended to pursue. That is, he might have explained the selection of property, contracts, torts, antitrust, and crime. A brief discussion of the distinction between private and public law would have been extremely useful.

When he finally gets to the substantive areas of the law—in Chapter 10 (“Mine, Thine, and Ours: The Economics of Property Law”), Professor Friedman is more than 100 pages into the book. There is much that is very clever and instructive here. For example, the discussion of whether we should extend intellectual property rights to cover the English language is a wonderful issue and a really good teaching device that I intend to use (with attribution).²¹ And the discussion of the economics of unitization of oil and gas fields is a welcome deviation from the view that only private property rights are efficiency-serving.

There are two topics that I found missing here. First, how should property rights be assigned initially? Teachers in this field frequently invoke the Coase Theorem to answer this question: the assignment of property interests does not matter in circumstances in which transaction costs are zero because the interest will come to rest in the hands of the person who values it the most. Second, there was no discussion of a meta-principle for property law. I think that the literature recognizes one—namely, that property law should seek to foster the efficient use of society’s scarce resources. Stating such a goal would allow one to organize the topics around that central theme, approaching each topic with regard to whether the law in that area furthers or hinders the overall goal. Thus, the issue of bundling rights²² would be easier to discuss if one had that meta-principle at hand. The economic treat-

21. See FRIEDMAN, *supra* note 17, at 115-16.

22. See *id.* at 112-14.

ment of the "touch and concern" doctrine is new and extremely interesting.

The decision to include a chapter on intellectual property is very sound. As everyone near or in the law knows, that is one of the hottest areas of the law, and so its inclusion is likely to make the book seem more current than if the topic were excluded. There are some wonderful insights here—such as this gem about the difference between patent and copyright law:

Copyright protection against literal copying creates a form of property that is easy to define, cheap to enforce, relatively easy to transact over, and subject to no rent-seeking problem. Hence we give copyright easily and for a long term. Patent protection creates a form of property that is hard to define, hard to enforce, costly to transact over, and contains a potential inefficiency due to patent races leading to duplication and inefficiently early inventions. Hence, we give patents grudgingly and for a short term.²³

However, there are some problems. There are two small factual errors. Professor Friedman says that current copyrights last the "life of the author plus fifty years."²⁴ Actually, it is now the author's life plus seventy years. Also, Professor Friedman says that "current patents (with some exceptions) are for seventeen years,"²⁵ when they are, in fact, for twenty years from the date of filing. This is the sort of thing that drives lawyers crazy. In this instance, it may cause otherwise interested readers to close the book for good.

Chapter 12 deals with the economics of contract law. If there is a wholly conventional chapter in the book, this is it. Up to this point we have had sprightly and puckish titles. But now there is a no-nonsense title—"The Economics of Contract." And the treatment of the topic is more comprehensive and more conventional than anything we have had heretofore—what defines a contract, what can go wrong in the formation or the performance of a contractual promise, and what remedies are available for a disappointed contractual party. There are some cutting-across-the-corners in the discussion of

23. *Id.* at 135-36.

24. *Id.* at 131.

25. *Id.* at 133.

contract remedies, as in the discussion of expectation and reliance damages.²⁶ The issue of reliance damages is notoriously difficult, so much so that when I teach the economics of contract remedies I wave my hands in the air and tell the students that they ought not venture there: madness awaits those who delve too deeply into the economics of reliance damages. It is puzzling that the issue of liquidated damages does not figure in the discussion. That is such a marvelous topic because the economic analysis of this area is so starkly at odds with the settled legal analysis.

Chapter 13 is a step back into the world of oddities—"Marriage, Sex, and Babies." I found the discussion here both annoying and incomplete. The discussion of why societies tend to outlaw prostitution even though there are no obvious victims²⁷ is the sort of thing that gives economists a bad name. The answer is that: "[l]aws making sex outside of marriage illegal improve the bargaining position of women who want to get married, or stay married, or to maintain a strong bargaining position within marriage. Hence it is rational for such women to support such laws."²⁸

My wife is rational, and so, I trust, am I. Part of my being rational alerts me not to suggest to her that her current (and long-standing) opposition to legalizing prostitution rests on her desire to improve her chances in the marriage market. My wife already affects a low opinion of my ability to grasp the real work. If I were to ask her whether this theory made sense to her, she would file that question away as further reason to doubt my good sense. This chapter has some interesting tidbits, such as an account of Professor Margaret Brinig's wonderful story of the origin of wedding rings. But it sometimes raises issues that it cannot resolve, such as the reasons for the disturbing rise in out-of-wedlock births, or issues, such as the reasons for the illegality of prostitution, that seem more than merely whimsical. However, the story of the Friedman family's trip to the Humane Society to adopt a cat is worth the price of the book.²⁹

26. See *id.* at 166.

27. See FRIEDMAN, *supra* note 17, at 177-78.

28. *Id.* at 177.

29. See *id.* at 184-85.

Chapter 14 is another no-nonsense, plain vanilla treatment ("Tort Law"). Again there is no meta-principle that Professor Friedman uses to organize the material. That is unfortunate because the literature has provided one: tort liability should seek to minimize the social costs of accidents. Moreover, there is something to be said about why tort law exists—transaction costs prevent parties from bargaining before an accident occurs, and it may be better to have one party rather than both take precaution—but that was not mentioned in the chapter. Nonetheless, this is the most comprehensive and the most solid, in terms of coverage of the standard literature, of the chapters in the text. The bilateral and unilateral precautions that distinguish strict liability and negligence are here. Professor Friedman discusses the activity level effect in a clear and novel way, showing how negligence may not appropriately induce precaution in that regard but strict liability will. I am here, as before, troubled by the fact that there are no citations to the scholarly literature that generated these findings. The chapter contains a long section on punitive damages³⁰ in the course of which Professor Friedman makes some very interesting points about when and how, in theory, punitive damages should be awarded:

[P]unitive damages are awarded for torts in relatively elastic supply, ordinary damages for torts in relatively inelastic supply, and doing so is at least roughly efficient. Ordinary damages undercompensate, because they contain no probability multiplier—and they should undercompensate, since the optimal punishment, allowing for the cost of imposing it, is less than damage done if the supply of offenses is sufficiently elastic. Punitive damages overcompensate, and should, since, the optimal punishment is more than the damage done if the supply of offenses is sufficiently elastic.³¹

But I believe that he is wrong to suggest that punitive damages have become more common recently.³² Most lawyers to whom I have spoken cannot recall an award of punitive damages in their jurisdiction, and, more importantly, there is

30. *See id.* at 206-11.

31. *Id.* at 209-10.

32. *See id.* at 207.

objective evidence that shows the rarity and relative modesty of punitive damages awards.³³

The final seventy-five pages of the book covers the issues of antitrust and crime. I found this selection half-puzzling. The unpuzzling part is the coverage of the economic analysis of crime. That is one of the great triumphs of law and economics, and Professor Friedman's treatment of the Becker model and its extensions is excellent. There are some very interesting moments in these pages—for example, the discussions of crime in the Icelandic sagas³⁴ and of eighteenth century criminal prosecutions in England.³⁵ The puzzling part is the decision to cover antitrust law. Modern law and economics distinguishes itself, in part, by moving beyond the more obvious connections between the two fields, such areas as antitrust law, government regulation, taxation, and the computation of damages. I would have thought that someone would include something on antitrust only if they meant to use the *Microsoft* case as a device for talking about network externalities, path dependencies, and other novel methods of monopolization. But the coverage in *Law's Order* is really just a quick (and able) summary of standard antitrust material—vertical integration and tie-in sales.

I would have been more content if Professor Friedman had concluded his work with some writing on current developments in law and economics and some sensible speculation about the future. There are hot topics in law and economics—such as the importance of empirical work, the interaction between law and social norms,³⁶ and behavioral law and economics.³⁷ Unfortunately, there is almost nothing about these

33. See COOTER & ULEN, *supra* note 4, at 356. Punitive damages may be thought to be far more common and far larger than they, in fact, are because of the availability heuristic: when a court awards a large sum in punitive damages, that fact tends to be reported, but when punitives are not awarded or are very modest in size, they are not reported. *See id.*

34. See FRIEDMAN, *supra* note 17, at 263-67.

35. *See id.* at 267-74.

36. There is some material about norms, principally about Ellickson's study of Shasta County practices, in Friedman, Chapter 17, at 274-77. *See* Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986); *see also* ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

37. *See* Korobkin & Ulen, *supra* note 6; BEHAVIORAL LAW AND ECONOMICS

or any other recent developments in the field.

B. *The Text-Internet Link*

One of the fascinating innovations of this work is its links to a website (<http://www.best.com/~ddfr/>). Most significantly, the text of the entire book is available at that website and is so arranged that it looks exactly like the book. It is a little awkward to read a book on a computer screen, but if one feels inclined to do so, it is comforting and useful that the pagination of the text and of the on-line versions is identical.³⁸

This innovation works as follows. The margins of *Law's Order* contain five different icons that direct the reader to specific points on his website. The icons, as explained in an introductory chapter, indicate a website reference to additional commentary on the text material, citations to books and articles discussed in the text, citations to cases, mathematical elaborations of the textual material, and links to a webbed book or article.

This innovation is, I think, exciting, and because I am a great proponent of using the Internet as an educational tool, I had great hopes for the combination of text and web. So, I am sorry to report that the innovation doesn't work very well. There are four problems. First, I had difficulty remembering what each of the icons meant. They do not occur frequently enough that even an attentive reader is likely to remember what each icon means—a case?, an article?, a webbed book? In point of fact, I came to recognize that even though I couldn't remember exactly what each icon meant, all I needed to recall was that a symbol in the margin meant that there was something on the website to consult. A second problem was that to make the most of the iconic references to material on the website, one has to read the book while in front of a computer connected to the Internet or read the on-line version of the book, which I do not find an attractive option. I

(Cass R. Sunstein ed., 2000).

38. One can imagine the convenience of having the web version readily available if one is away from home and wanted to consult the text through an Internet Service Provider or if one wanted to consult some aspect of the book while working at the office, where the Friedman website would be available through a high-speed connection.

read the vast majority of the book while I was not in front of a computer. This necessitated my noting which pages had symbolic references to material on the website so that I could consult the material when next I was at a computer. This is only a second-best solution, for when I did get to a computer, I frequently could not recall the text material for which the website reference was to be further enlightening. But from the website I could, of course, flip over to the webbed version of the book to refresh my memory. Third, some web material is nothing more than the appropriate citations to the articles that Professor Friedman is discussing in the text. In point of fact, the majority of that material should simply have been put in footnotes in the text.³⁹ Fourth, and finally, some of the iconic categories were hardly used at all and might have been absorbed into a broader category. For example, one of the icons is for mathematical elaborations. It was a good idea to relegate those elaborations to somewhere other than the text because many readers would find mathematics as welcome as long textual passages in Hungarian. But the first mathematical icon did not appear until page 159, and there are only five mathematical icons in the entire book.

C. *The Audience*

Earlier I spoke of the state of law and economics within the legal academy and the disjunction between the legal academy and the legal profession. I raised those issues because I believe that they are relevant to an issue that troubled me as I read this book: to whom is this book addressed? I have touched on this matter lightly above and now want to explore it further.

39. Non-lawyers frequently criticize lawyers for the vast number of footnotes they use. I do not want to take a stand on the issue of whether there are too many, too few, or just the right number of footnotes in the typical law review article, book, or case. But I do think that Professor Friedman's book has too few footnotes—namely, zero. Whatever other virtues there may be to the innovative link between the text and the web that Professor Friedman attempts in *Law's Order*, there is still much to be said for retaining the footnote if for no other purpose than to cite sources. Note that I used this footnote—fittingly, I hope—for a purpose other than citing to literature. But perhaps I can make my point by urging interested readers to see ANTHONY GRAFTON, *THE FOOTNOTE: A CURIOUS HISTORY* (1999).

My instinct is that the audiences for whom this book is likely to be of most interest are economists and the general reader. General readers—those unfamiliar both with economics and with the law—are, I suspect, the ideal audience. This is because the text is non-technical; it is well written; it treats an important topic and does so in a sprightly fashion. Economists might constitute another plausible audience: they tend not to know about the revolution that law and economics has effected within legal scholarship (and, to a lesser degree, within the practice of law) but to be interested in these general developments.

To address the audience issue in the negative, I do not think that *Law's Order* is the book to put in the hands of practicing lawyers, law professors, and law students who express an interest in learning about law and economics. More precisely, if one were to recommend this book to that group, I would do so selectively, recommending some but not all of the chapters, in line with my comments in Part II.A. I am also skeptical of whether this book would be an entirely successful text for an introductory course in law and economics. For instance, the citations to the literature would be more important in a course than for the general reader, and their absence would limit the utility of the book as a text.

III. CONCLUSION

Law's Order is a wonderful introduction to the most important innovation in legal scholarship of the last century, law and economics. There have been some remarkable other introductions—most notably, Judge Posner's magisterial work—but not only is there room for more, there is a place for Professor Friedman's contribution. He speaks in a distinctive voice, with a slightly new perspective, and with a puckish and infectious good humor.
