

## EFFICIENCY INSTEAD OF JUSTICE?

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# EFFICIENCY INSTEAD OF JUSTICE?

## Searching for the Philosophical Foundations of the Economic Analysis of Law

By

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 Springer

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# Preface to the English Edition

Following its acceptance as a doctoral dissertation by the Faculty of Law at the University of Zurich in 2003 and publication in the ‘Schriften zur Rechtslehre’ series by the academic press Duncker and Humblot in Berlin, *Effizienz statt Gerechtigkeit?* (1st edn. 2004, 2nd edn. 2006) was received very favourably by a German-speaking readership. It therefore seemed worthwhile to produce an English version of the third, revised and expanded edition (2009) to make the text accessible to a wider audience.

The subject of this study is the economic analysis of law, which is examined from the perspective of philosophy of law, including a critical analysis of its philosophical foundations. The ideas with which Richard A. Posner has sought to justify the efficiency paradigm in the field of law are a central focus. Nevertheless, this scholarly appraisal of the economic analysis of law also attests to the reception of ‘Law and Economics’ in continental European law and culture.

First of all, I thank my excellent translator, Deborah Shannon of Norwich, UK, who has rendered the demanding German text into English with great care and accuracy. I also thank Prof. Dr. jur. h.c. Norbert Simon and Dr. Florian R. Simon, LL.M., the directors of Duncker and Humblot publishers, for their kind permission to publish an English translation.

Last but not least, I would like to express my deep gratitude to my highly esteemed doctoral supervisor Walter Ott, emeritus professor of the Faculty of Law of the University of Zurich, for having opened my eyes to the beauty of philosophy of law.

Lucerne, November 2008

Klaus Mathis

# Preface to the 3rd German Edition

Since the first edition of this book was published, ‘Law and Economics’ has taken its place in the canon of subjects taught to law students at a number of German-speaking universities, not least the University of Lucerne, where I gave the first lecture in ‘Rechtsökonomie’ (Economic Analysis of Law) in the autumn semester of 2007. During the same period, to my pleasant surprise, this groundwork text has been well received by students, which has given me sufficient encouragement to publish a third, revised and expanded edition.

For the present edition, the principal revisions and additions have been made to Chapters 4, 6, 7 and 9. In particular, the section on the economic analysis of liability and contract law now includes a discussion of the ‘bilateralism critique’ raised by Jules Coleman. Further, the chapter on utilitarianism has been expanded, and Chapter 7 now covers the later publications of John Rawls as well as Amartya Sen’s important critique of the concept of primary goods. A further addition to Chapter 9 is a critical appreciation of the argument on the relationship between efficiency and justice advanced by Louis Kaplow and Steven Shavell in their book ‘Fairness versus Welfare’. Finally, further examples relating specifically to ‘Behavioral Economics’ have been incorporated, and a closer analysis of environmental permits follows as a postscript to the Coase theorem. My assistant, Silvan Rüttimann, MLaw (Lucerne), has supported me tirelessly in this undertaking, and for that I thank him sincerely.

I also thank Prof. Dr. Paul Richli, the founding dean of the University of Lucerne, and our present dean, Prof. Dr. Regina E. Aebi-Müller, for supporting my research and teaching work. Very special thanks go to my doctoral supervisor, Walter Ott, emeritus professor of the University of Zurich, to whom I am indebted for my education in philosophy of law. Finally I am grateful to Prof. Dr. Norbert Simon and Dr. Florian Simon of Duncker & Humblot publishers for their renewed inclusion of the book in their ‘Schriften zur Rechtstheorie’ series, and to Ms. Birgit Müller for overseeing the printing process with her usual diligence.

Lucerne, October 2008

Klaus Mathis

# Preface to the 1st German Edition

In Switzerland there is currently a heated debate concerning Zurich airport, and whether incoming flights should approach Zurich primarily from the north, as they always have, or from the south as well in future. Let us suppose that a court were asked to rule on which district incoming flights should pass over, the north or the south? And suppose that this court had to base its decision solely on the criterion of economic efficiency, where efficiency would mean maximizing the wealth of society.

In the case to be ruled on, the district north of the airport is relatively underpopulated, whereas the district to the south is very densely settled. Based on comparative property values alone, the predictable result is that noise pollution from a southern flight path would be far more detrimental to social wealth than the current northern flight path passing over sparsely populated areas. If the only concern were to maximize social wealth, the court would have to rule in favour of the northern approach. Its decision would certainly be economically efficient, but would it also be just?

This example along with the agenda declared in the title hint at the provocative nature of the question tackled in this book: 'Efficiency instead of justice?' The work is rooted in the philosophy of law and engages with an interdisciplinary theme spanning jurisprudence and economics. The subject matter is the economic analysis of law, which is itself analysed to trace its philosophical foundations. A pivotal focus is Richard A. Posner's theory of wealth maximization, which is presented at length and critically appraised.

At this point I would like to thank all those who have contributed, with valuable guidance, to the completion of this paper. In particular, I must thank my doctoral supervisor Professor Walter Ott who made this dissertation possible. Special thanks are due also to my mother, and to my father who sadly died in the spring, for their moral support while I was writing up the work.

Zurich, August 2003

Klaus Mathis

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