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REVIEW

A LAW AND ECONOMICS PRAXIS

PAUL H. BRIETZKE*

Law and Economics: A Comparative Approach to Theory and Practice, by Robin Paul Malloy. St. Paul: West Publishing Co., 1990. Pp. x + 163, \$12.95.

This excellent book usefully covers many relevant issues in just a few pages. Professor Malloy is among the first¹ to describe a law and economics *praxis*, if that good Greek word can now be reclaimed from the Marxists. His *praxis* has ideologies mediating between a high-level philosophizing and the practical uses to which the economists' "tool box" gets put. Most readers should find this approach more interesting and informative than those in other introductions to law and economics.² Malloy attains the simplicity while avoiding the narrowness and the superficiality of Chicago School attempts to account for all of law and other behavior through economics.³

The practice part of Malloy's *praxis* can be described briefly because he does it so well. The economics ideas of scarcity and rationality, and the nuts and bolts of cost-benefit and efficiency analyses, are quickly but effectively discussed with a view toward resolving definitional issues. Economics comes across as the making of predictions, which are certainly based on the manipulation of variables like laws and customs but which even more centrally

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1. Perhaps the first comprehensive attempt to describe the effects of political philosophies on modern law and economics analyses is C. VELJANOVSKI, *THE NEW LAW AND ECONOMICS: A RESEARCH REVIEW* (1982). This excellent study is for those who are already familiar with the field. R. DWORKIN, *LAW'S EMPIRE* (1986), compares law and economics with jurisprudence (the Empire) so as to prove the superiority of the latter. See Brietzke, *Dworkin Today*, (Book Review) 21 VAL. U.L. REV. 321, 335 (1987). Neither Dworkin nor Veljanovski treat ideologies explicitly, and Dworkin devotes little attention to the practice of law and economics.

2. E.g., P. BURROWS & C. VELJANOVSKI, *THE ECONOMIC APPROACH TO LAW* (1981); W. HIRSCH, *LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS* (1979); A. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (2d ed. 1989).

3. See G. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976); R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986).

depend on the assumptions the analyst chooses to make.⁴ In only eleven pages, the Coase Theorem, Pareto efficiency, the Kaldor-Hicks Theory, and Arrow's Impossibility Theorem are given clear and effective explanations. These important neoclassical economics tools receive fearsomely complex and technical treatments from many other authors.⁵ A brief yet authoritative Glossary supplements Malloy's efforts.⁶

At the end of the book, the applicability *and* the inapplicability of economics tools to five leading cases is examined. The cases concern unconscionability, the implied warranty of habitability, prisoners' rights to counsel, comparable worth in employment, and products liability. This "leading case" strategy permits fairly detailed economics discussions of familiar legal topics within a brief space, and the cases have been carefully chosen to be highly suggestive of the (in)applicability of law and economics analyses to other areas of the law.⁷ The final Chapter, "Improving Lawyering Skills," reinforces these lessons by encouraging the reader to practice "recharacterizing" legal problems among alternative economic approaches. In terms more familiar to lawyers, this is the means by which a "contracts" problem can become a "landlord and tenant" problem, in the plaintiff's pursuit of more favorable doctrines and remedies.⁸

Descriptions of the practice of law and economics are what we would

4. R. MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE 3, 10, 14-17 (1990). Malloy properly stresses the effects of assumptions on outcomes, since many mainstream economists – Malloy's "conservative" economists – play down these effects. *See infra* note 10. Under their assumptions, Malloy finds that the "market does not care about the issue of fairness or justice." *Id.* at 31-32. This kind of personification – the market presumably lacks the means to "care" about anything – is indicative of the fondness mainstream economists have for markets. Their faith is also lavished on status quo distributions of wealth and power. *Id.* at 33, 55. The mainstream assumption that, like other resources, people are fully mobile serves to dehumanize experience. *Id.* at 55.

5. *Id.* at 34-45.

6. *Id.* at 161-63.

7. *See id.* at 104-54. Malloy's five cases make out a useful contrast between the judicial mimicry of market outcomes, which is a by-and-large fairness based on buyers' and sellers' cumulative judgments, and the judge's rejection of marketplace metaphors in favor of fairness in the particular (contextualized, disaggregated) case. But judges seldom tell us why they reject the market metaphor: the judge may be ignorant of economics; the market may be thought to have failed in some respect, as when certain goods or apartments are not available competitively; or the market may be deemed an irrelevant metaphor for the behavior being considered. *See id.* at 111, 143. For example and despite the disagreement of many mainstream economists, the inequality of bargaining power seen in unconscionability and some landlord and tenant cases might well be "inefficient." But a judge who attempts to redress this inequality may be less interested in making economic predictions than in implementing an egalitarian philosophy (or ideology – *see infra* note 19) which horrifies most mainstream economists.

8. R. MALLOY, *supra* note 4, at 156-60.

expect from a book of this sort, but we get much more: the deep theories which underlie alternate economic approaches. The "Comparative" in the subtitle to Malloy's book refers to a comparative political and legal philosophy. Although many economists refuse to discuss their philosophical "roots," Malloy makes these explicit in ways which reduce the monolithic autonomy of the economics enterprise.

Legal philosophy has faced an unremitting attack for more than a decade; law and economics from the Right, and Critical Legal Studies from the Left, have used bellicose and ideologically-charged language to attack the methods and culture of jurisprudence. The surface (at least) polish of economics graphs and formulae enabled the economists initially to gain much ground on the philosophers, but it now looks as if the jurists will hold their own by devising rigorous responses to criticisms. Malloy usefully documents the points of contact between these rivals, in ways which will interest philosophers in economic analysis and which show how philosophy affects an economist's values and principles. Analytical outcomes will obviously differ if the economist pursues a philosophy of, for example, "morality, individual liberty and human dignity" rather than an "altruistic communitarianism."⁹ Malloy's philosophical analyses also enable the reader to evaluate his or her own ideology, by pondering how this ideology is shaped by our intellectual culture and how it influences one's use and understanding of law.

Oversimplifying a bit, presumably in the interests of brevity, Malloy divides economists into five philosophical schools. These schools describe contemporary jurists as well: conservative, (contemporary) liberal, Left communitarian and neo-Marxist, libertarian, and classical liberal. The chapter devoted to each school is quite brief and selective, although each chapter concludes with a thoughtful bibliography for further reading. The conservatives¹⁰ are the mainstream or Chicago School economists typified by Seventh Circuit Judge Richard Posner. Among these conservatives, rights and

9. *Id.* at 5. *See id.* at 2, 4, 8-9.

10. *Id.* at 60-68. In what may be a semantic quibble, I prefer "neo-conservative" as the name for this school. A "conservative" in the literal, Burkean sense merely wishes to conserve the old and the established within the status quo, while mainstream law and economics wants to turn the clock back to a 1920s business civilization, to annul egalitarian and participatory New Deal and post-New Deal reforms. This is a "reactionary" orientation, the opposite of the "progressivism" that nicely describes contemporary liberals. *See infra* note 12 and text accompanying. But "neoconservative" is the politer term, one which properly makes Chicago School goals consistent with the New Right's agenda. R. MALLOY, *supra* note 4, at 89 (discussing Chicagoan Richard Epstein's view that everything since the New Deal is unconstitutional, but classifying Epstein as a libertarian — *see infra* notes 15, 24 and accompanying text); McConnell, *The Counter-Revolution in Legal Thought*, 41 POL. REV. 18 (1987).

obligations get reduced to numerical calculations because morality is thought to be hopelessly subjective. This tactic has the effect, if not the purpose, of justifying many actions the general public cannot accept, so that conservatives can advance the *de facto* morality of "protecting the market model and promoting efficient (wealth maximizing) outcomes."¹¹

Contemporary liberals reject the broad property rights advocated by mainstream economists, rights which can be used to undo social reforms and to otherwise curb a governmental activism under law and economics techniques akin to a substantive due process. An excellent brief summary of Bruce Ackerman's *Social Justice in the Liberal State*¹² is used to typify the liberal approach shared by John Rawls and Ronald Dworkin. A book and two articles¹³ are taken to represent the diverse Left communitarian and neo-Marxist school, the orientations of which are neatly summarized by a quote from Mark Kelman: "Rules are the opiate of the masses"¹⁴ through which mainstream economists legitimate hierarchy and inequality in America. Libertarians are seen as the only school which advocates natural rights, rights which are sources of private power, an inevitable inequality, and an anti-statist philosophy. The ideas of Robert Nozick and Richard Epstein are ably summarized.¹⁵

11. R. MALLOY, *supra* note 4, at 64.

12. See R. MALLOY, *supra* note 4, at 70-73. Using Ackerman to typify liberals is a useful tactic in the interests of brevity. But, like the other schools Malloy surveys, the liberals are a diverse lot. A very different liberalism emerges from Dworkin, for example: see R. DWORKIN, *supra* note 1; Brietzke, *supra* note 1. Further, none of the liberals (or the Left communitarians — see *infra* notes 13-14 and accompanying text) Malloy cites are centrally concerned with the issues addressed by mainstream law and economics; they are critics-in-passing, preoccupied with establishing their own philosophical theories where economic analyses are tangential. The fullest account of a contemporary economics liberalism would thus include the "welfare" economists who are admittedly more influential in Europe than in the U.S. See, e.g., C. ROWLEY & A. PEACOCK, *WELFARE ECONOMICS: A LIBERAL RESTATEMENT* (1975); H. VAN DEN DOEL, *DEMOCRACY AND WELFARE ECONOMICS* (1979). Needless to say, such inclusions would force Malloy to abandon the brevity that readers cherish.

13. M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Turley, *Introduction: The Hitchhiker's Guide to CLS, Unger, and Deep Thought*, 81 NW. U.L. REV. 593 (1987). A more representative summary of this school is thus given than for liberals. See R. MALLOY, *supra* note 4, at 76-85.

14. R. MALLOY, *supra* note 4, at 81 (quoting M. KELMAN, *supra* note 13, at 63).

15. *Id.* at 86-92, discussing R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) and R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). Other libertarian "classics" which are not discussed or cited in the Chapter Bibliography are D. FRIEDMAN, *THE MACHINERY OF FREEDOM* (1973) and B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980). There is also a Left-libertarianism (anarchism or anarcho-syndicalism) that gets reflected in the more anti-statist branch of the Left communitarian school, *supra* note 13 and accompanying text.

Classical liberalism differs from libertarianism in seeking to preserve liberty through a private and public *balance*. The neoclassical economics model is used as a metaphor for this balance, but classical liberals differ from conservatives in holding that the market is merely a means to the end of liberty; efficiency concerns are "distinctly secondary" for classical liberals.¹⁶ Although Malloy's analyses are evenhanded, the reader senses that this school is where Malloy's sympathies lie, especially as his landmark analysis of Adam Smith is summarized along with the ideas of Milton Friedman and Friedrich Hayek.¹⁷ Philosophy, economics, law, political science, and history were all facets of the unified "political economy" known to the original classical liberals: Smith, Bentham, and Mill. A reintegration of their, and our, insights is long overdue.¹⁸ Malloy is just the person to accomplish this task, having made a fine beginning in his book.

A major purpose of Malloy's discussions of philosophical schools, discussions summarized too briefly here to do them justice, is to demonstrate the expansive roles that ideology and ideological contradictions play in economic analyses. The role of ideology is too often ignored by mainstream (positivist) economists, who sometimes relegate ideology to the role of accounting for things which economics cannot explain satisfactorily. Thus "ideology" becomes the reason why some citizens and legislators vote against their short-term economic self-interest -- a use of ideology which conservatives hope will preserve their theory's predictive powers. Malloy shows how ideological "visions" of the just society are reflected in current social arrangements, so that the reader can determine whether particular legal rules are consistent with, for example, a free market capitalism.¹⁹

There are serious divergences among the views of Marx, Keynes, and the Chicago School, especially in their assumptions about people, markets, societal consensus, and right and wrong. These divergences show that, like law,

16. R. MALLOY, *supra* note 4, at 11, 95. *See id.* at 93-101.

17. M. FRIEDMAN, *CAPITALISM AND FREEDOM* (1962); F. HAYEK, *LAW, LEGISLATION AND LIBERTY* (3d ed. 1979); Malloy, *Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner and the Philosophy of Law and Economics*, 36 U. KAN. L. REV. 209 (1988). The latter article punctures many of the pretensions in conservative claims to have inherited the classical liberals' mantle.

18. Brietzke, *Another Law and Economics*, 9 RES. IN L. & ECON. 57, 75 (1986). *See also* R. MALLOY, *supra* note 4, at 2.

19. R. MALLOY, *supra* note 4, at 5. A clearer demarcation of the roles of philosophy and of ideology would obviously be useful, but such a deeply-contentious matter could not be disposed of briefly. As an old saw puts it, I have a philosophy, you have some good ideas, and they have ideologies. While mainstream law and economics often reduces law and politics to matters of economics, Malloy comes close to proving that economics is merely a means to ideological ends. Such arguments could be used by others to reduce economics and law to mere matters of politics, but the real world is presumably too complex to be captured by such a determination.

economics cannot be neutral, objective, and predetermined. The contingency and complexity of the real world makes ideologically-colored interpretations possible, of whether a particular market has failed for example. The indeterminacy of economics, which (like law once again) is highly value driven and which often uses the weak logic of metaphors and arguments by analogy, is both a cause and an effect of ideological manipulation. As in the forecasting of economic trends, the outcomes in law and economics "are dependent upon and limited to the variables considered and the weight given to each variable."²⁰ Lawyers should presumably learn the different ideological "tones" which can be used in different cases and on behalf of different kinds of clients: conservative and libertarian arguments usually work for wealthy clients, while the poor and powerless may need contemporary liberal or Left communitarian arguments.

Three of Malloy's many examples about the relation between economic indeterminacy and ideological manipulation will convey the flavor of his arguments. First, prostitution may be Pareto superior and Kaldor-Hicks efficient because it apparently provides buyers and sellers with what they want. Yet prostitution may be inefficient if we also analyze its impact on street crime, family life,²¹ and the status of women -- factors which can easily be made into "externalities" of a neoclassical economics analysis. So, our views on whether prostitution should be legal will likely turn on whether we "like" it for non-economics reasons.

Second, Malloy discusses a leading products liability case brought against the Ford Pinto.²² The Ford executives' cost-benefit analysis showed (before the fact) that it would be cheaper to compensate injured litigants than to redesign the Pinto. Malloy argues that conservatives and libertarians would rubberstamp such an analysis: Ford's was a socially-responsible decision because its only moral duty is to maximize profits as best it can, through the most efficient use of society's scarce resources. Classical liberals would, on the other hand, see the need for a moral dialogue since human life cannot be quantified like the value of a dishwasher, while Left communitarians would see Ford attempting to legitimate the inequality that exploits consumers by denying them access to safety information. Particular case facts can thus serve as a kind of Rorschach Test, an ambiguous figure which acquires meaning when the observer projects ideological values into it.

20. *Id.* at 66. See *id.* at 10, 51-52, 55, 64, 156. See also *supra* notes 2, 4, 7, 9, 11 and accompanying text.

21. R. MALLOY, *supra* note 4, at 65.

22. *Id.* at 148-53 (discussing *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981)).

A third example from Malloy concerns the City of Indianapolis. While City leaders regularly voice such 'down home' values as hard work, rugged individualism, entrepreneurship, free enterprise, and private property, they actually practice a "state capitalism" or an "urban socialism" of commercial real estate owned or subsidized by government and administered by central planning boards.²³ For Malloy, an understanding of such ideological contradictions can be used to expand the range of choice in law reform. But these contradictions also make it very difficult to pigeonhole theories and theorists in a brief book, and Malloy admits that the "broader audience" does not break down neatly into ideological schools.²⁴

Judge Posner, Malloy's quintessential conservative, has claimed classically liberal credentials in the past, and he now asserts his libertarianism. The souls of revered classical liberals like Milton Friedman and Friedrich Hayek are claimed by many of their conservative and libertarian colleagues. The ever-more-influential Virginia School, which is not discussed by Malloy and which has formed up around Nobel Laureate James Buchanan, plausibly claims to be *simultaneously* classically liberal, neoclassically conservative, and libertarian in utopian and contractarian ways. Like the one in Indianapolis, these apparent contradictions suggest that America's is a hybrid ideology, a synthesis of the schools Malloy discusses that is based on the cardinal virtue of "what works." It is not that Americans are stupid or unideological; it is that they have a high tolerance for dissimulation in pursuit of what they want. Consider the popularity of President Reagan, who was chronically mischaracterized as the "Great Communicator."

The pragmatism of "what works" is said to be America's distinctive contribution to philosophy, and the contemporary salience of this pragmatism is easily seen in daily business and political life. Yet pragmatism plays almost no role in law and economics or in contemporary jurisprudence, for what seems to be an academic legion of True Believers. They prize theoretical consistency for its own sake, and they disdain the messy compromises (bounded rationality, satisficing, and theories of the second best in economics) that are inevitable in our diverse society and mixed economy. The Left communarians may well be right: the central purpose of all of this ideologizing by conservatives and libertarians, and probably by contemporary and classical liberals as well, is to legitimate the status quo. Each school would define this status quo differently and subject it to different reforms, but they all reify a market system which could not function if the allocation of wealth and the ownership of resources were widely contested.²⁵

23. *Id.* at 7-8.

24. *Id.* at 157.

25. R. MALLOY, *supra* note 4, at 48, 53-54, 64, 80.

If, as Malloy suggests, classical liberals hope to hold the balance among these fractious schools,²⁶ classical liberals would have to rebuild the political middle pragmatically. They would have to protect the equality dear to Left communitarians and to contemporary liberals, as well as the liberties cherished by themselves, conservatives, and libertarians. If this is not done, mainstream efficiency analyses may, by default, continue to narrow the range of permissible normative arguments. The poor would likely continue to "sell" (to the police, social workers, etc.) and the rich to "buy" (e.g., private guards for their foyers) privacy and the many other alienable rights.

It would be unjust and probably inefficient to reprove Malloy for the book he did not write, especially as the book he did write is a very good introduction indeed. But, perhaps as volume two, he could go on to a moderate and pragmatic reintegration of political economy. There is no agreement over what to do about disagreement in economics (or in philosophy), so someone like Malloy could come up with choice of economics rules which are akin to the choice of law rules explored in a Conflicts course. The benefits of such an analysis done well and in an ideologically-compelling fashion would be many.²⁷ We might even be able to derive what George Stigler calls a new logic of public life,²⁸ once we purge mainstream (neoclassical) law and economics of its more obvious reductionisms, ideological manipulations, and analytical double standards and false dichotomies. Analysts would then be less likely to get lost at the (dis)junctures of theory and practice; it would become more difficult to change the definition of efficiency to suit the ideological context; the political and moral significance of the drive to equality could be adequately recognized in economics; and economists would have to abandon analyses conducted purely in terms of near-perfect private markets versus fatally-flawed governments, and in terms of arbitrarily private interests which cannot be generalized into a public interest.

This is obviously a tall order, but it represents my "night thoughts" on reading Malloy. Your reading of Malloy would likely be very different, a reading according to your own interests and, dare I add, your ideology. But read Malloy you should; he is one of the few law and economics scholars capable of commanding a consensus.

26. *See id.* at 93.

27. Steven Macedo treats such an analysis as an exercise in legitimation. A principled moderation is required, one which respects the goodness of good reasons and which accepts reasonable disagreements and a divergence in moral perspectives. Macedo, *The Politics of Justification*, 18 POL. THEORY 280, 281-82, 284, 296 (1990). In particular, a principled resolution of disagreements over the purposes and effects of property rights is required.

28. Stigler, *The Theory of Economic Regulation*, 2 BELL, J. OF ECON. & MGMT. SCI. 3, 17-18 (1971).