

medical treatment you require . . . Suppose, though, that you would prefer to suffer through your illness, but see Mount Kilimanjaro before [the] illness claims you . . . Nonetheless, we do not hesitate to treat your desire for the trip as simply your desire, which has no substantial moral claim on us. (p. 276)

So he says, and I suppose I agree. But what is the basis for this conclusion; more generally, what process will be used to make such general determinations? What if the trek is not to Kilimanjaro but to Mecca and is part of a deeply felt religious obligation? Here, as elsewhere, it is unclear whether this case is given as a mere illustration of what an otherwise plausible view might include, or as a substantive claim around which such a plausible view should be built.

My recurrent theme in this review has been that while Ripstein's political account of responsibility powerfully presents an alternative to the subjective and metaphysical approaches to that notion that dot the landscape of legal theory, hard questions concerning what such a model will eventually say and, more importantly, what the process should be to determine what that is, is left for further work. What remains, however, is an expansive and engaging application of a powerful model of responsibility to a wide range of cases and conundrums. Ripstein's claims must be taken seriously indeed, and one only hopes that he builds on them to answer some of the pressing questions that their very power opens up.

John Christman

Pennsylvania State University

Law and Market Economy: Reinterpreting the Values of Law and Economics,
ROBIN PAUL MALLOY. Cambridge University Press, 2000, x + 179 pages.

This book attempts to launch a 'new jurisprudence' that builds on law and economics, converting it into what the author, Robin Paul Malloy, calls 'law and market economy'. Law and market economy incorporates the insights of law and economics, but adds a theory of interpretation, which is based on Charles Sanders Peirce's semiotics. Semiotics is necessary, Malloy argues, because law and economics neglect important aspects of law, the economy, and society.

Semiotics is a large and complex field, defying easy summary. It studies the relationship between 'signs' – words but also things or actions through which meanings are expressed – and society, with

emphasis on how signs maintain their meanings through their relationships with each other, and on their construction through social interaction or, as Malloy emphasizes, exchange. A familiar practitioner of semiotics was Roland Barthes, who wrote about how people interpret the signs used in some social practice – the gesticulations of wrestlers is one of his famous examples – in an effort to explain the role of such interpretation in our sense of reality. In legal scholarship, the field of semiotics has been invoked by scholars interested in the formulaic aspects of legal argument, the fact that certain rhetorical forms – ‘do not elevate form over substance’, for example, or its opposite, ‘rules are needed for the sake of predictability’ – are repeated over and over, though in different guises and to justify inconsistent goals (J. M. Balkin, 1991. ‘The promise of legal semiotics’. *Texas Law Review*, 1831 p. 69).

In modern legal scholarship many disciplines vie for influence, and legal scholars are not likely to be carried off by semiotics unless they are shown that there is a payoff. Malloy fails to carry this burden, though the problem is not that he has nothing of interest to say. The problem with the book is that the discussions of semiotics and of the central theory – law and market economy – amount to redescriptions of well known criticisms of law and economics, plus a lot of methodological aspirationism, a cotton candy of promises of better things to come in the future, but little for us to sink our teeth into now. Malloy’s beef with law and economics is easy to understand, but his claims for law and market economy are not substantiated.

Let me begin with a point of agreement. Malloy thinks that law and economics cannot explain everything about the law, and cannot make definite recommendations. Positive law and economics simplifies the world too much, assuming as it does, that individuals are fully rational and autonomous beings. Normative law and economics waivers between various definitions of efficiency, none of them satisfactory, and either ignores or distorts justice, fairness, and other values. As a result, there are gaps between what law and economics predicts, and how the world turns out; and between what law and economics recommends, and what is desirable. Scholars within law and economics differ among themselves about the significance of these gaps, but (though one does not learn this from Malloy) few deny their existence.

The question, then, is what to do next. Some scholars reject law and economics because they believe that the gaps are too great, and that some other approach to law provides superior positive or normative insights. Other scholars prefer to stick to the rational actor paradigm, and argue that pragmatic muddling through is what is needed to move from economic insights to the world. Still other scholars accept economics as the central paradigm of law, or fields within the law, such as private law, and look to other disciplines – cognitive psychology, for

example, for help in crossing the gaps. Here is where Malloy steps in. He argues that semiotics is the bridge from law and economics to the world.

Malloy describes his theory of law and market economy by explaining how it differs from law and economics. The main methodological difference is that law and market economy draws on semiotics, the study of signs. Semiotics, according to Malloy, turns our attention to the role of exchange in the market, and in particular, to how meanings are constantly created through the process of exchange. This parallels the linguistic phenomena usually studied by semiotics. When we talk, we use words, and the meanings of these words change as we use them. Malloy thinks that when we exchange goods, something similar happens to our valuations of them, with complex consequences for how we act and think about our moral obligations.

According to Malloy, this methodological innovation – the application of semiotics to law and economics – leads to other methodological and substantive differences between law and market economy, and law and economics. First, law and market economy emphasizes the importance of uncertainty and creativity in the market. Second, law and market economy eschews traditional conceptions of efficiency in favor of something with the distressing name of ‘proactive wealth maximization’, which refers to the creation of ‘new value relationships’ within the market. Third, law and market economy focuses on ‘networks and patterns of exchange’ rather than dyadic buyer–seller relationships or the market as a whole. Finally, law and market economy contains an ‘ethic of social responsibility’, involving humility, diversity, and reciprocity.

It is not always easy to understand what Malloy means, for semiotics seems to serve more as the inspiration for his claims about law and market economy, than as a theoretical basis from which these claims are derived. But his dissatisfaction with law and economics is not unreasonable, and resonates with influential criticisms of economics. Malloy’s plausible argument that economics does not quite capture the meaning of uncertainty has a precedent in Frank Knight. Malloy’s ruminations about market exchange resemble Hayek’s arguments about the diffusion of knowledge and spontaneous order, and indeed Malloy invokes Hayek. Malloy’s criticism of law and economics for ignoring the role of ‘creative discovery’ in economic growth reminds one of Schumpeter’s less sunny ‘creative destruction’, though Schumpeter is nowhere mentioned. And Malloy’s insistence that normative law and economics neglects important values follows a distinguished tradition of criticism of welfare economics and utilitarianism. But law and market economy turns out to be defined negatively as exactly those things at which law and economics fails. The invocation of semiotics does not enable Malloy to back a theory into the space on which his criticisms and observations rest.

For brevity I will discuss just one example in detail. I choose this example because Malloy discusses it extensively, and it illustrates the ambitions and defects of his approach.

In *Peevyhouse v. Garland*, the Peevyhouses leased their farm to a mining company named Garland, which strip-mined the land and then breached a clause in the lease that required it to restore the land to its original condition. The Peevyhouses sought damages of \$29,000 – the cost of repairing the land – but the court awarded only \$300, which was the difference between the value of the land and the value it would have had if it had been repaired.

According to Malloy, the ‘traditional’ law and economics view holds that *Peevyhouse* was correctly decided. This is, in fact, not true. Law and economics does not have a firm view about expectation damages: the latter do permit efficient breach but they also provide poor incentives along other margins, such as the incentive to invest. Many scholars within law and economics prefer specific performance to expectation damages, in which case the Peevyhouses would either get their repair or a large settlement. And among those who favor expectation damages, some would argue that the Peevyhouses ought to receive the cost of performance of \$29,000 if they valued the land for more than its ability to grow crops.

Malloy gives two reasons why he rejects the ‘traditional’ view of law and economics – which, by the way, he seems to equate with the ‘theory of efficient breach’, though this theory is only a small part of the modern economics of contract law. First, is the ‘recognition that contract exchanges involve meanings and values of social as well as personal consequence’ (p. 145). He goes on to say that the *Peevyhouse–Garland* lease was embedded in a community. But he does not explain why these observations make a difference to the analysis of the case.

Second, is that ‘dollar-based assessments of value unfairly exclude consideration of social values and objectives that are not easily quantifiable’ (p. 145). This objection has more definite content: Malloy believes that it is possible for the Peevyhouses to value repairs at more than \$300. But, as noted above, this idea is already incorporated in ‘traditional’ law and economics. This is why economists believe that specific performance or cost of performance damages are justified when performance of the contract has sufficient personal value.

The *Peevyhouse* discussion is supposed to show that law and economics misunderstands the concept of value, but it is hobbled by a misunderstanding of law and economics, and the only distinctive aspect of the discussion is the claim that community matters. No effort is made to explain how it matters, or how its mattering should affect the analysis of the case; whether, for example, the case should come out differently depending on the nature of the community, how a judge ought to take

community into account, and so forth. A few more quick examples will show that this is characteristic of Malloy's method.

In a discussion of the problem with methodological individualism:

[I]t artificially abstracts exchange from the community reference points that make it understandable – capable of interpretation . . . In tort law, for example, we think not only in terms of injury or loss to an individual involved in an accident, we also think of the pain, suffering, and loss to those closely connected to the victim or the event. We judge the degree of one's negligence not by an isolated review of conduct, but with reference to a community standard and expectation of care. (p. 61)

But Malloy does not discuss how our thinking about these things should affect our analysis of tort law; he does not, for example, discuss the large economic literature on punitive damages and the use of damages to compensate pain and suffering, or the literature on negligence, which, as far as I know, does not assert that judgments about negligence depend on an 'isolated review of conduct', whatever that means.

With respect to prostitution, Malloy says that it is not simply a question of whether a sex contract maximizes the welfare of the two parties. Instead:

[W]e need to focus our attention on the dynamic nature of the networks and patterns of exchange that are being observed. We need to develop a better understanding, for example, of the way in which men, women, families, and communities interact. We need to transform our point of reference from one of concern for calculating economic efficiency to one that investigates the nature, scope, dynamics, and consequences of particular exchange relationships. We need, in other words, to inquire as to the manner in which prostitution affects the social/market exchange *process* and not merely as to the efficiency of making it legal. (p. 141, emphasis in original)

But Malloy does not explain what our examination of these phenomena is supposed to reveal, and how it will help our analysis of prostitution. Although we ought to look at everything relevant to a problem, we need a theory that tells what is relevant and what is not, and Malloy does not show how law and market economy does this.

Regarding public choice theory,

From the point of view of law and market economy the above example [of Condorcet cycling] illustrates an important concept. It informs us of the difficulty in assessing the extent to which a legislative rule has anything to do with efficiency. (p. 103)

But Malloy does not explain the relationship between cycling and efficiency, and why Arrow's theorem – a challenge to understanding

democracy – has anything to do with evaluating the efficiency of a statute.

Regarding automobile leasing, which seems unobjectionable from an economic perspective, Malloy says:

... leasing has resulted in the production of vehicles that have a greater negative impact on the environment and which pose a greater safety risk ... The point of this example is that this simple legal innovation of automobile leasing ... has changed a number of exchange relationships ... [P]eople begin to think differently, new meanings and values emerge, and the potential for further creative discovery continues. These discoveries represent a breaking through of the semiotic space separating the conventionalized market idea from the real dynamic world to which it refers ... (p. 81)

Putting aside the absence of empirical documentation for the claim that cheaper financing is behind the increase in the size and quantity of cars on the road, Malloy does not explain how law and market economy helps one understand the emergence of new meanings, if that has in fact happened, from shifts in the demand for automobiles.

Stripped of the jargon, Malloy's argument is that the world is complex in ways that law and economics neglects, and as a result simple legal innovations that seem to be supported by economic analysis turn out to have complicated and often unpredictable consequences. We can all agree on this, but when we turn to the pressing methodological question of what we should do to improve our analysis, Malloy becomes abstract and evasive. We should think about change, meanings, norms, communities, society, the environment, men and women, discovery, exchange, and so forth. No one doubts that, but the reader is entitled to know whether semiotics offers distinctive insights into the relationship between these phenomena and the law, and can cabin usefully the infinite domain of the potentially relevant. Malloy does not carry this methodological burden. Rather than providing insights, law and market economy ends up redescribing well understood problems or urging us on to a better world.

That is too bad. Semiotics is an interesting field, one that has, as Malloy notes, attracted the attention of a number of legal scholars. A clear exposition of it, with examples of how it clarifies specific legal problems, might have made for an engaging book.

Eric A. Posner

University of Chicago