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ON STOPPING AND RESTARTING THE RACE: A RESPONSE TO MALLOY'S LAW AND ECONOMICS

David Ray Papke†

I. INTRODUCTION

As a former resident of Indianapolis, Professor Robin Paul Malloy will recall that every spring this conventional city of good burghers gets a little wacky. People begin to drive more aggressively, dress like high-tone auto mechanics, and speak reverently of "the race." On Memorial Day weekend, several hundred thousand people descend on an oval in the adjacent town of "Speedway" and in a swirling mass watch thirty-three motorized vehicles attempt to negotiate five-hundred miles at untoward speeds. The major source of symbolic sanity in this spectacle is the chief starter, an official perched on a platform over the track who waves flags of different colors to indicate changes in the state of the race.

Were he to return to Indianapolis and take up the role of chief starter, Malloy would display strengths and weaknesses. Most admirable would be his waving of the yellow flag, the signifier for caution. Less appealing would be his work with the green flag. Despite great animation in his work, Malloy would restart the race after an accident in only a cautious and partial way. Put more prosaically, Malloy in the preceding article is insightful and forceful in his critique of Richard Posner's "economic analysis of law," but Malloy's self-consciously ambitious alternative model is merely one genre in a more diversified discourse.

II. MALLOY'S YELLOW FLAG

While unique and especially important, Malloy's critique of Posner's "economic analysis of law" hardly initiated the scholarly attack on Posner's work. Almost as soon as Posner's *Economic Analysis of*

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Law appeared in its first edition in 1973,[1] lengthy essays aggressively criticizing the book appeared in major journals.[2] Perhaps the most read was the late Arthur Allen Leff's "Economic Analysis of Law: Some Realism About Nominalism."[3] A nasty writer when he put his mind to it, Leff characterized Posner's relentless application of his theory to all areas of law as "the literary equivalent of dropping a hundred metals successively into the same acid to see what happens."[4] In Leff's opinion, Posner had deceptively substituted definitions for normative and empirical positions.

In the years since the publication of Leff's biting article, Posner has continued to write and unsympathetic scholars have continued to criticize his work.[5] Not even a federal judgeship has slowed Posner's truly remarkable scholarly productivity, and indeed, he has even ventured from his law and economics base to jurisprudence[6] and to the promising field of law and literature.[7] Posner critics have much to discuss, and a new literature has begun to emerge dealing with Posner's opinions on the Seventh Circuit Court of Appeals.[8] If Posner struts about like the star of contemporary legal academics, the critics seem sometimes like so many paparazzi pursuing the great one in hopes of capturing him in an unflattering moment.

Malloy, at least, is no silly shutterbug, and his work is distinctive in the body of Posner criticism because Malloy himself has a right-of-center political alignment and is enamored with a law and economics framework. When Malloy in his early work so vigorously invoked the

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1. R. POSNER, ECONOMIC ANALYSIS OF LAW (1973).

2. Two particularly thoughtful review essays concerning Posner's text are Krier, Book Review, 122 U. PA. L. REV. 1664 (1973) and Hermann, Book Review, 1974 WASH. U.L.Q. 354.

3. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).

4. *Id.* at 452.

5. The critical response to Posner's work is immense, but especially important articles include Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975); Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1980); and West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

6. R. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990).

7. R. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988). My thoughts on the preceding are expressed in Papke, *Problems with an Uninvited Guest: Richard A. Posner and the Law and Literature Movement*, 69 B.U.L. REV. 1067 (1989).

8. Shapiro, *Richard Posner's Praxis*, 48 OHIO ST. L.J. 1077 (1989); Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter*, 40 U. MIAMI L. REV. 1171 (1986).

economist Milton Friedman,[9] Malloy's comparative disregard of Posner implied rejection. Malloy then made clear that he thought Posner's work was flawed.[10] When Malloy more recently compared Posner unfavorably to Adam Smith in the Kansas Law Review,[11] Posner felt obliged to respond,[12] and the two have even debated face-to-face at Valparaiso University.[13] Malloy's newly published text[14] promises to rival Posner's *Economic Analysis of Law* as a standard law and economics textbook, and articles have begun to appear suggesting the Malloy-Posner debate is central to the entire law and economics enterprise.[15]

Malloy's critique of Posner is both theoretical and metaphorical. The essence of the theoretical dispute is Posner's endorsement of neoclassical economics and of Kaldor-Hicks efficiency as the paramount values for society. This endorsement is so offensive to Malloy's own preference for individual liberty as a paramount value for society that Malloy angrily banishes Posner clear to the communitarian end of the political spectrum. There, starring Bruce Ackerman, the nefarious personification of liberalism, and assorted spokesmen for critical legal studies in the eye, poor Posner receives his just deserts. What the assorted progressives think of their new comrade, meanwhile, is another matter. Ackerman's scholarship, after all, has been previously subjected to blistering attack by Posner,[16] and Posner has also charac-

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9. Malloy & Hoeflich, *The Shattered Dream of American Housing Policy — The Need for Reform*, 26 B.C.L. REV. 655 (1985); Malloy, *The Economics of Rent Control — A Texas Perspective*, 17 TEX. TECH L. REV. 797 (1986).

10. Malloy, *Equating Human Rights and Property Rights — The Need for Moral Judgment in an Economic Analysis of Law and Social Policy*, 47 OHIO ST. L.J. 163 (1986).

11. 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).

12. Posner, *The Ethics of Wealth Maximization: Reply to Malloy*, 36 U. KAN. L. REV. 261 (1988). For other examples of Posner's sharp replies in writing to his scholarly critics, see Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431 (1986) and Posner, *On Theory and Practice: Reply to Richard Posner's Praxis*, 49 OHIO ST. L.J. 1077 (1989).

13. Malloy and Posner, *Debate: Is Law and Economics Moral?*, 24 VAL. U.L. REV. 147 (1990).

14. R. MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE (1990).

15. Braun, *Alternative Rhythms in Law and Economics: The Posner-Malloy Dialectic*, 15 LEGAL STUD. F. (1991).

16. In a review article concerning the works of Bruce Ackerman and Ronald Dworkin, Posner bemoaned the tendency of lawyers who write philosophical texts "to think that they can appropriate traditional concepts, change them beyond recognition, conjure with them rather than build a sustained and coherent argument, yet still be engaged in a

terized the writing of a leading critical legal studies scholar as "marred by stridency and turgidity, as well as by exaggeration and a patronizing tone."[17]

Putting squabbles over who has to roost with whom on the political spectrum aside, Malloy's metaphor of "two mirrors"[18] superbly captures the character and appeal of Posner's approach and gives pause to anyone inclined to use Posner's work as the guiding light in law and economics teaching and scholarship. Posner's work, Malloy suggests, involves holding the law — one mirror — before a second mirror — neoclassical economics. The presence of two mirrors reassures those who can no longer pretend that law is autonomous, but the model is also more traditional than it first appears. Reasoning remains homologous to traditional legal reasoning, and with reference to neoclassical economics one may still obtain "correct" answers. Neoclassical economics in itself is a simplistic and partisan variety of economic thought, more grounded in Posner's conservatism than in anything scientific. Posner's reductiveness and bias, when exposed by Malloy's metaphor, hardly inspires confidence or commitment.

One hopes Malloy's efforts will once and for all limit Posner's appeal in law and economics circles and in the legal academy as a whole. Posner deserves praise for a large body of provocative, well written work, and he is an especially interesting example of the "conceptualism" Grant Gilmore warned us was always tempting to Americans trained in the law.[19] One might even beneficially teach and study Posner's work as a reaction to the anxious uncertainty of postmodern intellectual life. However, Posner's theory represents

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professionally respectable activity. . . ." Posner, *Lawyers as Philosophers: Ackerman and Others*, 1981 AM. B. FOUND. RES. J. 231, 249 (1981).

17. Posner, *A Manifesto for Legal Renegades*, Chicago Daily L. Bull., Feb. 1, 1988, at 2, col. 4 (review of M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987)).

18. Malloy, *Toward A New Discourse of Law and Economics*, 42 SYRACUSE L. REV. 27, 39 (1991).

19. In a 1970 lecture which was later formally published, Gilmore said:

> We have witnessed the dismantling of the formal system of classical theorists. We have gone through our romantic agony — an experience peculiarly unsettling to people intellectually trained and conditioned as lawyers are. It may be that, in this centennial year, some new Langdell is already waiting in the wings of summon us back to the paths of righteousness, discipline, order, and well-articulated theory.

G. GILMORE, THE DEATH OF CONTRACT 103 (1974). Reflecting in 1977 on his early words, Gilmore suggested that Posner's work exemplified a "new conceptualism" in legal scholarship. G. GILMORE, THE AGES OF AMERICAN LAW 146 (1977).

only a narrowly partisan variety of economic thought, and his pretensions to scientific objectivity are disingenuous. Stationed on his platform high above the racing oval, Malloy serves us well by waving the yellow caution flag. Posnerian "economic analysis of law" has been an accident, and all drivers must slow down to avoid exceedingly dangerous track conditions.

III. MALLOY'S GREEN FLAG

Were Malloy to follow his occasional inclination to cast law and economics as a creative interdisciplinary discourse and leave it at that, one could fully commend him. However, he is not content to critique Posner and simply call for something more fluid and open-ended. In the preceding article he constructs an elaborate model of his own, one which, like Posner's "economic analysis of law," is unabashedly descriptive and normative. Malloy's model demonstrates both his learnedness and sensitivity to contemporary intellectual rhythms, but the model is ultimately unsatisfactory as a paradigm for the entire interdisciplinary study of law and economics.

One can credit Malloy with recognizing all shaped patterns of thought are aligned. Thinking primarily of literary text, the British critic Raymond Williams has written:

> Writing, like other practices, is in an important sense always aligned: that is to say, that it variously expresses, explicitly or implicitly, specifically selected experience from a specific point of view. There is of course room for argument about the precise nature of such a "point of view". It does not, for example, have to be detachable from a work, as in the older notion of a "message". It does not have to be specifically political, or even social in the narrowest sense. It does not, finally, have to be seen as in principle separable from any specific composition. . . . Alignment in this sense is not more than a recognition of specific men in specific (in Marxist terms class) relations to specific situations and experiences. Of course such a recognition is crucial, against the claims to "objectivity", "neutrality", "simple fidelity to the truth", which we must recognize as the ratifying formulas of those who offer their own senses and procedures as universal.[20]

Reflecting instead on legal and economic thought and eschewing any class analysis, Malloy is nevertheless in essential agreement. His

20. R. WILLIAMS, MARXISM AND LITERATURE 199 (1977).

"legal economic discourse" diagrammatically acknowledges that both law and economics are aligned in and of themselves and with reference to the dominant ideology of a given community.[21] Furthermore, the alignment of law or economics or of the dominant ideology generally is never fixed. Various alignments and ideologies compete, and especially in periods of significant socioeconomic restructuring radical realignments and ideological shifts can occur.[22] Apparently no fan of an Althusserian epistemological break,[23] Malloy posits instead a type of grand evolution through linear time, and he also manifests a pluralistic ethos eloquently calling for fair and open access to his discourse.

How could one quarrel with this admirably contingent, fluid and open discursive model? For starters, note how surprisingly conventional it is. "Legal economic discourse" will be a conversation concerned with the allocation of power and resources, and we will converse, Malloy says repeatedly, with reference to "individual, community and state." Are we also free to converse about race, class and gender? What about approaches to world order either eschewing or moving beyond the tired, war-causing nation state? Others could presumably add new concepts and perspectives to the discourse, but shorn of its semiotics sideburns, the visage of Malloy's model looks a lot like old-fashioned political economy,[24] albeit with a special emphasis on things legal.

The conventionality of Malloy's primary discursive concerns relates to his political preferences. Political economy, after all, was not only a corpus of eighteenth- and nineteenth-century work dealing with the accumulation and distribution of economic surplus but also a political call for an unhindered civil society independent of the state.[25]

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21. Malloy, *supra* note 18, at 45-53.

22. *Id.*

23. L. ALTHUSSER, FOR MARX 13 (1977). Malloy also fails to acknowledge or endorse the assertion of the non-Marxist historian of science Thomas Kuhn that once in a great while continua of thought are so significantly ruptured as to constitute scientific revolutions. *See generally* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 111-36 (1962).

24. The phrase "political economy" has acquired various connotations over the years, including but not limited to the general study of the interaction of political processes and market relations. More traditionally understood, "political economy" refers to certain writings and theories of Adam Smith, David Ricardo, Thomas Malthus, and James and J.S. Mill. Malloy writes in this tradition.

25. I. BRADLEY & M. HOWARD, CLASSICAL AND MARXIAN POLITICAL ECONOMY (1982).

Malloy himself is an avowed follower of Adam Smith.[26] In his insufficiently integrated discussion of communitarianism and individualism in the preceding article, Malloy detectably tilts the discussion toward the varieties of conservatism and libertarianism which he either calls his own or for the most part respects. Conversely, his token articulation of progressive legal ideologies is seriously flawed. Communitarianism, for example, is cast as statist. Yet Karl Marx himself projected a withering away of the state, and the contemporary transformation of communist states has renewed communitarian theorizing regarding alternatives to the state.[27] Malloy characterizes the contemporary critical legal studies movement as standing for Marxist determinism, but the movement has articulated legal indeterminacy as its most central thesis.

Given the politics which he wears so proudly on his sleeve, Malloy perhaps cannot be expected to master the large family of law-related progressive ideologies. He also can be granted the familiar propagandistic donnée of mischaracterizing the opposition. But remember that Malloy is not portraying himself as a propagandist but rather as the articulator of a model. Revelations of political imbalance limit our confidence in the model. When Malloy acknowledges that gaining power over the discourse can lead to control of the legal environment, he contributes further to our leeriness.

Beyond its conventional focus and political bias, Malloy's model suffers from a culture-bound perspective. In the warm glow of a war won, one perhaps need not apologize for western and, in particular, Anglo-American assumptions, but if Malloy is to provide a truly open law and economics model, he should struggle to move beyond his own deep cultural assumptions. His definition of key terms, selection of representative figures, and modified political spectrum all reveal a cultural monocentrism. Surely Malloy may enter the terms, heroes and schematic renderings of his culture into the discursive conversation, but his model should be more receptive to cultural diversity, particularly if it is to live up to Malloy's expansive hopes.

Contemplate in this regard something as fundamental as his conception of legal doctrine. Malloy writes of legal justifications and rules and gravitates quickly to images of judges using precedents to

26. In addition to Malloy, *supra* note 18, note in particular Malloy's use of Smith's theory to critique Posner's theory in Malloy, *supra* note 11.

27. Surin, *Marxism(s) and "The Withering Away of the State"*, 27 SOCIAL TEXT 35 (1991).

decide cases. However, if one ventured from this common law world across either the British Channel or the Rio Grande, one would encounter instead highly detailed legislative codes and judicial functionaries unable to invoke *stare decisis* or to make law. Venturing further afield, one would find codes in Asian cultures serving as mere veneers for tradition, faith and morality; and in Third World countries diverse combinations of customary law and western legal droppings. In the words of the comparative law scholar John Henry Merryman:

> The legal tradition is a part of the culture, a very old, deeply rooted, firmly held part. The relations between legal ideals and similarly profound social, economic and political attitudes is [sic] extremely close and extremely complex. The law both draws meaning from and supplies meaning to the rest of the culture, and is inseparable from it.[28]

Not only the laws themselves but also the fundamental understandings of law vary from culture to culture. Malloy should realize that as he proffers his model he, like all model builders, projects his cultural norms as much as he frames and directs a consideration of them.

In sum, Malloy's "legal economic discourse" is more of a genre within the law and economics discourse than it is the discourse itself.[29] As genre, Malloy's construct is commendable. Genre, after all, is a powerful explanatory and critical tool,[30] and, as noted earlier, Posner's genre has been unduly prominent. Yet still other genres are possible and welcome. Having taken up a crucially important position on race day, Malloy should be prepared to restart the race even more boldly. If he looks out on the entire track, he might imagine all that the race could truly be.

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28. J.H. MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 145 (1985).

29. For tentative commentaries on genre and discourse, see Harrell and Linkugel, *On Rhetorial Genre: An Organizing Perspective*, in METHODS OF RHETORICAL CRITICISM 404-19 (B. Brock & R.L. Scott eds. 1980) and Snedaker, *Storytelling in Opening Statements: Framing the Argumentation of the Trial*, in NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW 133-35 (D.R. Papke ed. 1991).

30. Standard commentaries on the importance of genre include A. FOWLER, KINDS OF LITERATURE: AN INTRODUCTION TO THE THEORY OF GENRES AND MODES (1982) and A. ROSMARIN, THE POWER OF GENRE (1985). An isolated but excellent application of genre theory to a legal topic is Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J. L. & HUMANITIES 201 (1990).