

Maurer School of Law: Indiana University

Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1991

Relaxing Traditional Economic Assumptions and Values: Toward a New Disciplinary Discourse on Law

Kenneth G. Dau-Schmidt

Indiana University Maurer School of Law, kdauschm@indiana.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/facpub>



Part of the [Economic Theory Commons](#), and the [Law and Economics Commons](#)

Recommended Citation

Dau-Schmidt, Kenneth G., "Relaxing Traditional Economic Assumptions and Values: Toward a New Disciplinary Discourse on Law" (1991). *Articles by Maurer Faculty*. 728.

<https://www.repository.law.indiana.edu/facpub/728>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

RELAXING TRADITIONAL ECONOMIC ASSUMPTIONS AND VALUES: TOWARD A NEW MULTIDISCIPLINARY DISCOURSE ON LAW

Kenneth G. Dau-Schmidt†

As a normative model of the world, neoclassical efficiency analysis is boring — some would even say tautological.¹ Assume away all the problems of the world. There are no transaction or information costs. There is no market power. There are no distributional questions worthy of investigation. All individuals' preferences are equally meritorious and immutable. Apply the perfect logic of optimization theory and general equilibrium theory and conclude that the world is marvelous and that everything is best left alone.

Professor Malloy has made it one of the principal objectives of his scholarly career to remind us that the consideration of normative questions need not, and indeed is not, so simple. In a series of articles and books² Professor Malloy has explored the normative values underlying neoclassical efficiency theory and compared them with the competing normative values of other schools of thought including Liberal, Classical Liberal, Libertarian and Communitarian. He has argued that these competing values can be represented in economic discourse in a fashion similar to that of the values underlying neoclas-

† Associate Professor of Law and Economics, University of Cincinnati College of Law; Ph.D in Economics, University of Michigan, 1984; J.D., University of Michigan Law School, 1981. I wish to thank my colleagues Beverly Moran, John Applegate, and Mike Solimine for useful comments on this paper.

1. Regan, *The Problem of Social Cost Revisited*, 15 J. LAW & ECON. 427 (1972). Not all agree with this assessment, however. For the classic defense of efficiency analysis as a normative basis for the law, see Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980).

2. See generally R. MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE (1990); R. MALLOY, PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT (1991); Malloy, *Is Law and Economics Moral? — Humanistic Economics and a Classical Liberal Critique of Posner's Economic Analysis*, 24 VAL. U.L. REV. 147 (1990); Malloy, *Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner, and the Philosophy of Law and Economics*, 36 KAN. L. REV. 234 (1988).

sical efficiency theory.³ In his current effort,⁴ Professor Malloy describes the economic discourse through which these normative values find representation in legal institutions. He then analogizes this discourse to the proverbial “marketplace of ideas” and argues that this discourse is the best method for the development and testing of normative values in our society. Professor Malloy then makes an appeal on behalf of his own school of normative values, Classical or Natural Rights Liberalism, and argues that the concept of natural rights provides an important roadblock in the economic discourse to protect individual rights and limit the power of the state.

I find much that is persuasive in Professor Malloy’s arguments. Certainly he is correct that the assumptions of neoclassical efficiency analysis contain many underlying normative values. Even neoclassical economists have recognized this and responded with the development of social welfare analysis.⁵ Still, it seems that sometimes even those who are well schooled in neoclassical economic theory need to be reminded of this fact and of course those who are not so well schooled need to be informed of the normative implications of efficiency analysis. I believe that Professor Malloy is also right that the underlying normative values of a society shape its legal institutions — although my right hemispheric tendencies lead me to think of this process more in terms of the logic of math than semiotic discourses. I also believe, however, that I can contribute further insights to Professor Malloy’s model, both with respect to the values underlying neoclassical efficiency analysis and their implications for his theory. In particular, after a brief discussion of the art of economic analysis, I will examine three critical assumptions of neoclassical efficiency analysis — the irrelevance of distributional questions, the adoption of the individual perspective on problems, and the sanctity of individual preferences — and discuss their relevance to Professor Malloy’s analysis. I will also argue that, by relaxing the assumptions of the neoclassical model and their associated normative values, it is possible to see not only that alternative values can be represented in an economic

3. R. MALLOY, *LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE* 2-13 (1990).

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

5. H. VARIAN, *INTERMEDIATE MICROECONOMICS* 529 (1987); H. VARIAN, *MICROECONOMIC ANALYSIS* (2d ed. 1984); J. QUIRK & R. SAPOSNIK, *INTRODUCTION TO GENERAL EQUILIBRIUM THEORY AND WELFARE ECONOMICS* 105 (1968).

discourse, but also that this discourse is related to the work of other disciplines including psychology, sociology, anthropology and political science. Thus I would argue that Professor Malloy's discourse is more properly characterized as multidisciplinary than economic.

I. ECONOMIC ANALYSIS AND THE NEW DISCOURSE IN LAW AND ECONOMICS

The genesis of Professor Malloy's work is recognition of the importance of assumptions to economic analysis and the realization that a host of normative value judgments are implicit in neoclassical efficiency analysis.⁶ Although Professor Malloy's discussion on these points is quite extensive, some further discussion on the conduct of economic analysis and several of the more important of the assumptions of neoclassical efficiency analysis seems warranted.

A. *Economic Analysis and Assumptions*

Economic analysis proceeds in predictable fashion. First, one makes simplifying assumptions about people's behavior and the state of the world. In traditional neoclassical analysis these assumptions include that: people select the best opportunity according to their individual preferences; firms seek to maximize profits; resources, and so the selection of opportunities, are limited; preferences are exogenous and rational; no individual or firm exercises market power; and information and transactions are costless.⁷ Second, one applies the logic of mathematics to derive predictions about people's behavior in response to various circumstances or policies. If the assumptions are tractable, as in the case of the neoclassical model,⁸ this step can take the form of equations, optimization theory, and general equilibrium theory complete with first and second order conditions for an optimum.⁹ If the assumptions are less tractable or the author or intended audience is not familiar with higher mathematics, this step can take the form of optimization arguments on the balancing of costs and benefits and the

6. Malloy, *supra* note 4, at 32.

7. H. VARIAN, INTERMEDIATE MICROECONOMICS 20-60 (1987); H. VARIAN, MICROECONOMIC ANALYSIS 111-15 (2d ed. 1984).

8. Indeed their mathematical tractability has undoubtedly contributed to the popularity of the neoclassical assumptions among economists.

9. See, e.g., A. CHAING, FUNDAMENTAL METHODS OF MATHEMATICAL ECONOMICS (3d ed. 1984); M. INTRILIGATOR, MATHEMATICAL OPTIMIZATION AND ECONOMIC THEORY (1971).

terms of voluntary exchange. Finally, one uses the predictions that are derived either to make a positive statement about the world that may be tested empirically, or to make a normative statement about how the world ought to be that can be judged by various economic criteria including Pareto optimality, Kaldor-Hicks efficiency and social welfare maximization.¹⁰

Although economics can be practiced in a rote fashion, blindly applying the neoclassical assumptions to every problem, the true art of economic analysis lies in understanding the assumptions of the model and their implications for the analysis. In positive analysis the trick is to intuit which simplifying assumptions can be made to facilitate the analysis while still accurately describing the problem or phenomenon. Although the neoclassical assumptions can be usefully employed to describe a wide range of phenomena it is often necessary to relax one or more of these assumptions to obtain an adequate depiction of a problem.¹¹ The usefulness of a positive model in describing and understanding a problem is the final arbiter of which among competing positive models is superior.¹² In normative analysis, as Professor Malloy has convincingly argued, it is important to a complete understanding of the bases for the normative conclusions that one understands the values that underlie the assumptions of the model, and the normative criterion that is applied. As Professor Malloy makes clear, adoption of the neoclassical assumptions and the

10. H. VARIAN, *INTERMEDIATE MICROECONOMICS* 484, 529 (1987); H. VARIAN, *MICROECONOMIC ANALYSIS* 198, 206-07 (2d ed. 1984); J. QUIRK & R. SAPOSNIK, *INTRODUCTION TO GENERAL EQUILIBRIUM THEORY AND WELFARE ECONOMICS* 105, 120-24 (1968). Sometimes in economic analysis the Pareto and Kaldor-Hicks criteria are applied in a "positive" sense with the author merely concluding that a certain practice or policy is efficient or inefficient without any strong normative statement that efficiency is to be pursued. However the implicit normative judgment in such analysis is obvious and in the law and economics literature efficiency has been actively advocated as a normative criterion. See, e.g., Posner, *The Ethical and Political Basis of Efficiency Norms in Common Law Adjudication*, 8 *HOFSTRA L. REV.* 487 (1980).

11. For example, if one were examining the problem of occupational health risks from long term exposure to chemicals, one would have to account for the probable asymmetry in information between employers and workers to accurately model the problem.

12. It is sometimes said that the sole criterion that should be used in evaluating the usefulness of a positive analysis is whether it fits the observed data better than alternative models. M. FRIEDMAN, *CAPITALISM AND FREEDOM* (2d ed. 1982). However, I would argue that the purpose of analysis is to explain, not merely to predict, and thus the model that leads to the best understanding of the phenomenon is superior. A predictive model without explanatory power would not be adaptable to changed conditions or extendable to further applications. A. ETZIONI, *THE MORAL DIMENSION: TOWARD A NEW ECONOMICS* 17 (1988).

Pareto or Kaldor-Hicks efficiency criteria embraces a host of normative values associated with each of the assumptions of the model and the efficiency criteria. Chief among the value-laden assumptions are the assumptions that there are no relevant distributional questions to address, there is no relevant societal perspective only alternate individual perspectives on examined questions, and that each individual's preferences are exogenous and equally valuable.¹³ It is these assumptions of neoclassical efficiency analysis that I will now address with respect to Professor Malloy's analysis.

B. *Distributional Questions*

As Malloy has argued, the adoption of either of the efficiency criteria as a normative criterion implicitly assumes away all distributional questions.¹⁴ This is because both the Pareto and Kaldor-Hicks criteria evaluate the benefits and costs of an activity on the basis of willingness to pay given the current distribution of resources.¹⁵ It is this radical assumption with respect to distributional questions, combined with the assumptions of competitive markets and exogenous preferences, that gives neoclassical efficiency analysis the determinative or "scientific" nature noted by Malloy.¹⁶ This assumption is also one of the fundamental elements that distinguishes the normative conclusions of traditional law and economics scholars from those of other schools of scholarly thought. For example, although both traditional law and economics scholars and critical legal studies scholars agree that the current distribution of wealth affects legal rules and how they are applied in cases, they dramatically diverge on the desirability of this state of affairs. Traditional law and economics scholars are satisfied with the current distribution of wealth and its impact on the law,

13. Malloy has argued that the other assumptions of neoclassical efficiency analysis are also associated with normative values. For example, the assumption of zero information and transaction costs is associated with a devaluing of the problems of those who have educational impediments or experience hardships in uprooting their families to move. Malloy, *Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner, and the Philosophy of Law and Economics*, 36 KAN. L. REV. 209, 243-44 (1988). One might argue that these are more properly characterized as potentially flawed factual assumptions rather than value assumptions, however the implication of his argument that these assumptions lead to an undervaluing of some people's costs would still stand. I will concern myself only with the three normative values expressed in the text which are largely associated with the adoption of the efficiency criteria as normative criteria.

14. Malloy, *supra* note 4, at 41, 43.

15. See sources cited *supra* note 10.

16. Malloy, *supra* note 4, at 40.

while critical legal studies scholars are redistributive and believe that wealth should not influence the law or how it is applied.¹⁷

Malloy notes that, like the results of neoclassical efficiency analysis, the practical implications of individualist philosophy are dependent on the existing distribution of resources.¹⁸ He argues however that both systems overcome this problem by focusing on their dynamic nature and the "inevitable" redistribution of wealth. As long as the law does not "unfairly" preclude people's participation in the economy, then everyone has an opportunity to affect the original distribution.¹⁹ Although Professor Malloy is right to note the similarity of the two systems in their dependence on existing distributions, his analysis of the "problem" betrays his own affection for the individualist philosophy of Classical Liberalism. From the perspective of neoclassical efficiency analysis there is no distributional "problem" to be addressed. There is no basis under the Pareto or Kaldor-Hicks criteria for extending opportunities to people who have previously been excluded due to their race, sex, religion, sexual preference, or national origin, if they are poor and cannot compensate their persecutors for the loss the persecutors suffer in admitting them to these opportunities.²⁰ Indeed, as Professor Malloy has himself pointed out, it is not hard to hypothesize the complete exclusion of such individuals from society under the Kaldor-Hicks criterion.²¹ Malloy's redistributive and antidiscrimination tendencies spring from his own philosophical objective of maximizing individual liberty in accordance with the Classical Liberal tradition.

Malloy is also astute enough to realize that the societal discourse he describes is subject to the same distributional bias as neoclassical efficiency analysis.²² Just as wealthy people's preferences find greater representation in the economic market place, so too will they find

17. Compare Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEG. STUD. 65 (1977), Goodman, *An Economic Theory of the Evolution of the Common Law*, 7 J. LEG. STUD. 393 (1978), and Posner, *supra* note 2, at 487, with M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 151-85 (1987), and Turk, *Law as a Weapon in Social Conflict*, 23 SOCIAL PROBLEMS 276 (1976).

18. Malloy, *supra* note 4, at 68-69.

19. *See id.*

20. *But see* Donohue, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986) (arguing that antidiscrimination legislation speeds the demise of discriminatory employers, who would be forced out of the market in any event, and is therefore efficient).

21. Malloy, *supra* note 13, at 252-53.

22. Malloy, *supra* note 4, at 51.

greater representation in the political marketplace because money influences elections and, in turn, public debate and public policy. Malloy argues that the creative process of law and economics indicates that American society must do "much more" to empower currently disenfranchised individuals and groups.²³ Beyond criticizing the enshrinement of certain "politically correct" views, however, Professor Malloy does not volunteer much guidance as to how this might be accomplished. My own view is that to the extent that effective free speech in the form of access to the mass media is allocated through the market place, this bias in favor of the wealthy is inevitable in our political system. The solution is to largely remove political speech from the market place and allocate it on a more egalitarian basis. Recent legislative efforts toward the public funding of election campaigns and limitations on campaign contributions and "independent" campaign expenditures seem directed at this goal.²⁴ Although some may object that the allocation of speech on an egalitarian basis tramples the rights of the wealthy, these critics should realize that allocating speech through the market place undermines the effectiveness of poor people's free speech rights.²⁵ There is historic precedent in our country for movement from a wealth-based system of allocation to an egalitarian system of allocation on the subject of democratic rights. The right to vote was first granted only to property holders but now is bestowed on everyone.²⁶

C. Individual and Societal Perspectives on Examined Problems

Adoption of either of the efficiency criteria as a normative criterion also implicitly adopts a radically individualist perspective of the world.²⁷ Under the Pareto criterion the merit of an act or policy is judged alternatively from each affected individual's position to deter-

23. *Id.* at 52.

24. *Campaign Finance: Major Legislative Plans Compared*, 47(30) CONG. Q. 1919 (July 29, 1989).

25. My views on this topic place me at odds with current Supreme Court doctrine on the subject. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976).

26. THE BILL OF RIGHTS AND AMERICAN LEGAL HISTORY (P. Murphy ed. 1990); K. PORTER, THE HISTORY OF SUFFRAGE IN THE UNITED STATES 2-3 (1977). Meiklejohn's "town meeting" theory of the constitution also supports a more egalitarian allocation of political speech. It is hard to imagine a town meeting in which access to the microphone is rationed according to willingness to pay. A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960).

27. Malloy, *supra* note 4, at 67.

mine whether he or she is made better or worse off. There is no interpersonal comparison of benefits and costs or societal perspective on these benefits and costs. The Kaldor-Hicks criterion adds an interpersonal comparison of benefits and costs based on willingness to pay given the current distribution of wealth, but once again there is no societal perspective on the act or policy. Thus, in neoclassical efficiency analysis the costs and benefits of an activity or policy, according to that individual's preferences, are afforded full weight in social planning regardless of how society may value those cost and benefits and the preferences that give rise to them.

At first this individualistic view of the world may seem appealing as an egalitarian guide in public policy analysis, and indeed, there is a broad range of questions on which individual and societal evaluations of costs and benefits roughly coincide and the efficiency criteria can be usefully applied even in a normative sense. When the individual and societal evaluations of the costs and benefits of an activity diverge, however, application of the efficiency criteria in a normative sense can lead to anomalous results. For example, as Coase has told us, from the individualized perspective of the efficiency criteria, externalities are reciprocal in nature.²⁸ If we allow the rancher to let his cows roam free this imposes costs on the farmer, and if we prohibit the cows from roaming this imposes costs on the rancher. As a result, it is impossible to assign "fault" in the above situation. This argument may work well when the activities are both socially valuable activities such as ranching and farming; if the activities are rape and the preservation of control over one's body, however, the argument breaks down. Although from the individual perspective of the rapist, prohibiting rape imposes costs on him, these are not costs society takes into account in planning social policy. Accordingly, it is consistent with current societal values to say that the rapist is at "fault" in his crime and to attempt to limit such activity to less than some efficient amount.

It is the radical individualistic perspective of neoclassical efficiency analysis that causes traditional law and economics scholars to reject natural rights theory as noted by Malloy.²⁹ Natural rights theory, as developed in the Classical Liberal tradition by Locke, posits

28. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1, 2 (1960).

29. Malloy, *supra*, note 4, at 54. Malloy is correct that scholars who adopt neoclassical efficiency analysis as a normative criterion do, in general, reject natural rights theory. See, e.g., Posner, *Law and Economics is Moral*, 24 VAL. U.L. REV. 163, 170 (1990).

that society should be viewed as a compact in which people surrender just so much of their own individual liberty as is necessary to protect the equal liberty of the other people in society.³⁰ Under neoclassical efficiency analysis there is no surrender of individual liberty save recognition of the initial distribution of assets and exchanges based on that distribution. Accordingly, application of neoclassical efficiency analysis as a normative value can run afoul of individual liberties commonly fostered or protected by the state against infringement by other individuals. For example, although racially restrictive covenants may be wealth maximizing,³¹ society refuses to enforce them to protect the individual liberty to live where one chooses. Similarly discrimination in employment may be wealth maximizing,³² but society prohibits it to protect individual liberty. This rejection of natural rights on the basis of individualism distinguishes neoclassical efficiency analysis from the Liberal and Left Communitarian schools of thought which reject natural rights on a communitarian basis.³³

D. Societal Valuation and Shaping of Individual Preferences

Finally, adoption of either of the efficiency criteria as a normative criterion carries the implicit assumption that each individual's preferences are equally meritorious and should not be subject to societal pressure for change. This assumption is a product of the individualistic perspective of neoclassical efficiency analysis. Both the Pareto and Kaldor-Hicks criteria evaluate actions and policies alternately from each affected individual's position on the basis of that individual's existing preferences. This perspective implicitly gives value to each individual's preferences. Moreover, in neoclassical analysis it is generally assumed that preferences are immutable or at least exogenous to the examined problem.

It is apparent, however, that society does not value all individual preferences and sometimes actively promotes the adoption of preferences consistent with certain social norms. A case in point would be the example previously given of rape. Society does not value individual preferences for such behavior and uses criminal punishment to

30. LOCKE AND LIBERTY (M. Salvadori ed. 1960).

31. R. POSNER, *THE ECONOMICS OF JUSTICE* 84-85 (1983).

32. M. FRIEDMAN, *CAPITALISM AND FREEDOM* 108-15 (1962); R. POSNER, *THE ECONOMIC ANALYSIS OF LAW* 622-23 (3d ed. 1986); Landes, *The Economics of Fair Employment Laws*, 76 J. POL. ECON. 507, 548 (1968). *But see* Donohue, *supra* note 20.

33. *See* Malloy, *supra* note 4, at 54.

discourage such preferences both in the punished individual and the members of society as a whole. Indeed, I have argued elsewhere that the criminal punishment of all crimes that are *malum in se* is the last step in a larger societal process to discourage preferences for such behavior and that this preference shaping purpose explains many of criminal law's fundamental doctrines and its distinction from tort law.³⁴ Other areas of the law that have been identified as having a preference shaping purpose include: implied nonwaivable contract terms to protect renters, consumers and employees; civil rights legislation; and constitutional equal protection doctrine.³⁵ Some scholars have gone so far as to argue that in all areas of the law, by creating entitlements and affirming "rights" to various properties and activities, the law promotes preferences in favor of those properties and activities.³⁶

Malloy recognizes this preference shaping influence of the law. In his law and economics discourse not only do societal values influence the law, but the law can also affect the underlying societal values.³⁷ The implications of this realization, however, have largely gone unexplored in his work to date. This may be because Professor Malloy judges the causative relationship to be primarily from values to law so that this is the most important vector for analysis. It may also be that from his own perspective as a Classical Liberal, Professor Malloy finds the preference shaping purpose of the law distasteful because of its infringement on individual autonomy. In any event, I hope that Professor Malloy will address the second vector of the law's affect on values in future work. Preference shaping is an important

34. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference Shaping Policy*, 1990 DUKE L.J. 1.

35. Donohue, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337, 1338-41 (1989); Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1130 (1986). See also Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 44 (1989); Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 130, 137 (1989).

36. STEVEN KELMAN, WHAT PRICE INCENTIVES? ECONOMISTS AND THE ENVIRONMENT 50 (1981); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 695 (1979). The brothers Kelman have also argued that even the way in which we analyze the law can shape preferences. In particular, that the use of the economic model, assuming and legitimating selfish behavior, will increase the amount of such behavior. Mark Kelman, *Spitzer and Hoffman on Coase: A Brief Rejoinder*, 53 S. CAL. L. REV. 1215, 1223 (1980); Steven Kelman, "Public Choice" and Public Spirit, 87 PUB. INTEREST 80, 93-94 (1987).

37. Malloy, *supra* note 4, at 34.

societal function for the control of individual behavior that finds representation in many areas of the law. There are important questions concerning the preference shaping function of the law, for example the appropriate bounds of individual autonomy, on which I would value Professor Malloy's opinion.

II. EXTENSION OF THE NEW DISCOURSE FROM LAW AND ECONOMICS TO LAW AND THE SOCIAL AND BEHAVIORAL SCIENCES

Perhaps the hallmark of Professor Malloy's work has been his realization that, just as the normative values of neoclassical efficiency analysis can be represented in economic analysis, so too can other sets of values find representation in an economic discourse.³⁸ In this important insight I believe he is correct. I would extend this insight, however, by arguing that, as we examine and relax the assumptions of the neoclassical model and their associated normative values, it is possible to see not only that alternative values can be represented in an economic discourse, but also that this discourse is related to work in other social and behavioral sciences. Accordingly, Professor Malloy's discourse is not just "economic" but is in fact multidisciplinary.

Historically there were three criteria by which the various social and behavioral sciences could be distinguished. First, the questions considered by each discipline. Traditionally economists concerned themselves with markets and the material requisites of well-being³⁹ whereas other social scientists concerned themselves with other social and political institutions. Second, the methodology used by each discipline. As a basis for logical reasoning, economics adopted the science of math while other disciplines relied on discursive logical arguments.⁴⁰ As a basis for empirical work, all social sciences have used both statistical analysis and case analysis although some, for example economics and sociology, employ statistical analysis to a greater extent while others, for example anthropology, predominantly employ the case method.⁴¹ Finally, the traditional assumptions employed by each discipline in its analysis. Economists traditionally based their arguments on the neoclassical economic assumptions previously out-

38. R. Malloy, *supra* note 3, at 2-13.

39. A. MARSHALL, *PRINCIPLES OF ECONOMICS* 1 (8th ed 1920).

40. Cooter, *Law and the Imperialism of Economics: An Introduction to the Economic Analysis of Law and Review of the Major Books*, 29 *UCLA L. REV.* 1260 (1982).

41. *Id.* at 1261.

lined while members of other disciplines were more relaxed in the assumptions they would consider. Indeed some of the other disciplines can be thought of as a detailed examination of questions that are entirely consumed by one of economics's neoclassical assumptions. For example, psychology can be thought of as a detailed study of the assumption of rational action.

Economists have enjoyed a great deal of success in the examination of their traditional questions relative to the success of other social and behavioral scientists in examining their traditional questions. In part this is due to the fact that the logic of math is more rigorous and verifiable than the logic of discursive arguments, and this efficiency has sped the progress of the discipline. Also in part this success is due to the fact that economists started with some relatively easy questions which were amenable to the simple assumptions of the neoclassical model. Although very complex, the workings of a market or even an economy as a whole are relatively simple compared to the development of the individual's psyche or the workings of our greater social and political institutions. Perhaps as a result of their success, economists have recently been emboldened to examine questions and institutions that have traditionally been the province of other disciplines.⁴² Like the child who finishes his or her homework early, economists long to kibitz with their neighbors.⁴³

With the expansion of economics into other fields of inquiry, the distinctions between economics and the other behavioral and social sciences have begun to diminish. First, of course, there is now less difference in the examined questions. Economists now freely examine questions concerning human rationality, the family, and our larger social and political institutions that were traditionally the province of other disciplines.⁴⁴ Second, there has also been some coalescence

42. See, e.g., R. POSNER, *THE ECONOMIC ANALYSIS OF LAW* (1972); G. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976); J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1962). Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99 (1955); Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135 (1957).

43. It is of course an overstatement to say economists have "finished" their homework. There is still much work to be done on basic economic questions. For example, to my knowledge there exists no adequate economic explanation for even so common and important an "economic" phenomenon as demand deficient unemployment. See, e.g., C. DAVIDSON, *RECENT DEVELOPMENTS IN THE THEORY OF INVOLUNTARY UNEMPLOYMENT* (1990).

44. See sources cited *supra* note 42. For more recent material see D. KAHNEMAN, P. SLOVIC & A. TVERSKY, *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BI-*

among the disciplines on methodology. As economists have expanded their analysis into nontraditional fields and sought to address broader audiences, they have adopted a less formal, more discursive style for the traditional economic arguments.⁴⁵ At the same time, some in other disciplines have adopted a more formal and more mathematical form of argument, often based on the economic model.⁴⁶ Moreover, these differences in methodology were always secondary in distinguishing the social and behavioral sciences since all depend on logical arguments and regardless of whether that logic is mathematical or discursive, logic is logic. The final true distinction between economics and the other disciplines is the extent to which economists cling to the traditional assumptions of the neoclassical model and the extent to which the practitioners of other disciplines reject those assumptions. But it seems that the time is at hand for even this distinction to end. As economists have pushed further into areas that are not their traditional areas of expertise it has become apparent that only by relaxing the traditional neoclassical assumptions can a greater understanding of the examined phenomena be obtained.⁴⁷ Human psychology cannot be adequately represented by a simple utility function or rank ordering of preferences. Family relations, religion and socialization cannot be fully understood from a purely individualized perspective with an assumption of exogenous preferences. Finally, our political system and laws cannot be fully described based on those same assumptions nor can they be normatively examined while ignoring all distributional questions.

ASES (1982); G. BECKER, *TREATISE ON THE FAMILY* (1981); R. POSNER, *THE ECONOMIC ANALYSIS OF LAW* (3d ed. 1986); D. MUELLER, *PUBLIC CHOICE II* (1989). Akerlof & Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 *AM. ECON. REV.* 307 (1982); Posner, *A Theory of Primitive Society with Special Reference to Law*, 23 *J. LAW & ECON.* 1 (1980).

45. Compare R. POSNER, *THE ECONOMIC ANALYSIS OF LAW* (3d ed. 1986), with any volume of the *American Economic Review*.

46. Akers, *Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken*, 81 *J. CRIM. L. & CRIMINOLOGY* 653 (1990). See, e.g., *THE REASONING CRIMINAL: RATIONAL CHOICE PERSPECTIVES ON OFFENDING* (D. Cornish & R. Clarke eds. 1986); Paternoster, *Decisions to Participate in and Resist From Four Types of Common Delinquency: Deterrence and the Rational Choice Perspective*, 23 *LAW & SOC. REV.* 7 (1989); Piliavin, Thorton, Gartner & Matsueda, *Crime, Deterrence and Rational Choice*, 51 *AM. SOC. REV.* 101 (1986); Opp, *What Can We Learn From the Utilitarian Tradition?*, 4 *CONTEMP. SOC.* 445 (1988).

47. A. ETZIONI, *THE MORAL DIMENSION: TOWARD A NEW ECONOMICS* (1988); Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 *CHI.-[]KENT L. REV.* 23 (1989).

As we relax the assumptions of the neoclassical model we see that, not only does our analysis afford the representation of other values, but it also becomes multidisciplinary in nature. If we relax the assumption of rationality, we quickly find ourselves drawn to the work of psychologists.⁴⁸ If we relax the assumption of the individualized perspective and that individuals' preferences are all equally valued and exogenous, we can find parallels between our analysis and that of sociologists, anthropologists and criminologists.⁴⁹ As Jack Hirshleifer, a noted economist, has observed:

*There is only one social science. . . . While scientific work in anthropology and sociology and political science and the like will become increasingly indistinguishable from economics, economists will reciprocally have to become aware of how constraining has been their tunnel vision about the nature of man and social interactions. Ultimately, good economics will also have to be good anthropology and sociology and political science and psychology.*⁵⁰

Accordingly Professor Malloy's discourse which admits alternative values and assumptions is actually multidisciplinary in nature.

III. CONCLUSION

Professor Malloy has made a valuable contribution to the study of law and economics. He has persuasively argued that the traditional neoclassical economic analysis of law is founded on a fairly narrow set of normative values and that other values can find representation in the law and economics discourse. Moreover, he has supplied a positive description of the law and economics discourse by which various normative values find representation in our legal institutions. The realization that this discourse is open to alternative assumptions and values, frees the discourse to pursue solutions that best serve existing societal values that do not find representation in the neoclassical economic model. This realization also frees the discourse to consider the

48. See, e.g., Tversky & Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251 (1986); Thaler & Shefrin, *An Economic Theory of Self-Control*, 89 J. POL. ECON. 392 (1981) (postulating the economic equivalent of Freud's ego and id).

49. A. ETZIONI, *THE MORAL DIMENSION: TOWARD A NEW ECONOMICS* (1988); Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference Shaping Policy*, 1990 DUKE L.J. 1.

50. Hirshleifer, *The Expanding Domain of Economics*, 75(6) AM. ECON. REV. 53 (1985) (emphasis in the original). See also Donohue, *Law and Economics: The Road Not Taken* 903 (1988); Marschak, *On the Study of Taste Changing Policies*, 68 AM. ECON. REV. PAPERS & PROC. 386 (1978).

work of other disciplines and fulfill its true multidisciplinary nature. The latitude this realization engenders allows an enrichment of the discourse on law which will serve both the resulting legal institutions and the underlying social values they represent.

