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978-0-521-81624-3 - Law in a Market Context: An Introduction to Market Concepts
in Legal Reasoning

Robin Paul Malloy

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LAW IN A MARKET CONTEXT

An Introduction to Market Concepts in Legal Reasoning

In *Law in a Market Context*, Robin Paul Malloy examines the way in which people, as social beings, *experience* the intersection of law, markets, and culture. His work recognizes that experience varies by such characteristics as culture, race, gender, age, and class, among others. Thus, market analysis must account for these variations. Through case examples, illustrative fact patterns, and problems based on hypothetical situations he demonstrates the implications and the ambiguities of law in a market society. In his analysis he provides a complete and accessible introduction to a vast array of economic terms, concepts, and ideas – making this book a valuable primer for anyone interested in understanding the use of market concepts in legal reasoning.

ROBIN PAUL MALLOY is Professor of Law, and Economics of Law, as well as Director of the Program in Law and Market Economy, at the College of Law, and a Professor of Economics (by courtesy appointment) in the Maxwell School of Citizenship and Public Affairs of Syracuse University. He has published seven other books including *Law and Market Economy: Reinterpreting the Values of Law and Economics* (Cambridge, 2000).

Advance Praise for *Law in a Market Context*

As someone who writes in the areas of critical race and feminist theory, I find Malloy's approach to be particularly useful because it provides critical scholars who are concerned with issues of social justice and equality with a new and theoretically sophisticated way to understand and reckon with the market. *Law in a Market Context* should find its way on to every critical scholar reading list.

Professor Emily Houh, University of Cincinnati, U.S.A.

Malloy builds a strong and long-needed bridge between humanistic and economic approaches to the study of law. I recommend this book to lawyers, judges, policymakers, and academics who want to sharpen their critiques of market thinking, as well as those who want to be better armed in the defense of markets.

Professor Shubha Ghosh, University at Buffalo, S.U.N.Y., U.S.A.

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*For
Gina and Giovanni
and
in celebration of the first twenty-five years of marriage to
Margaret Ann
June 1978–June 2003*

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PREFACE

In this book, I offer a new way of thinking about the relationship between law and market theory. The approach is *not* the same as one would find in books on Law and Economics or an Economic Analysis of Law. In contrast to those types of books, I undertake to think more broadly about the way in which law is understood in a market context. I am *not* driven by concerns for particular conceptions of economic efficiency, but instead hope to explain how law and legal institutions work with markets and market institutions in shaping the contours of public policy and social organization.

I do not employ a traditional neoclassical economic methodology, and my audience is not made up of people in the law and economics movement. While a few progressive scholars of law and economics will find this work of interest, the book is primarily designed to assist non-law and economic scholars. It provides an introduction to using economic concepts in legal reasoning from a perspective of Law and Society, and Law, Culture, and the Humanities.

This book positions economics as an important and influential tool when used in legal reasoning and public policy making. It does not, however, treat economics as a “hard” science, nor does it present economics as independent of politics and ideology. Economics, because of its scientific appearance, has gained influence with lawyers and judges. This is because it gives the judge and the law an appearance of objectivity and neutrality in dealing with complex social problems. Appearance is not, however, reality. This book lifts the veil of economic objectivity and shows the subjectivity and malleability of economic reasoning in law. It explains that economic outcomes depend upon the way in which facts and issues are framed. Consequently, there is often more than one economically sound way of approaching a particular problem.

This book is also concerned with cultural differences in the relationship between law and market theory. With this in mind, it explores the way in which people, as social beings, *experience* the relationship between law,

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markets, and culture. This is a very different point of inquiry than that of traditional law and economics, which is concerned with an empirical or social science approach to understanding law within a particularized discourse of economics *as* science. This inquiry examines the relationship among law, markets, and culture with respect to a variety of characteristics such as race, gender, age, education level, class, income, and geographic location, among others. Thus, I see the primary audience as people who are interested in law, and its relationship to the social, political, and cultural structure of the marketplace. These are people who understand the significance of market forces in everyday life, appreciate the sense in which we are all embedded within markets, and yet question, doubt, or even reject some, or all, of the constraints of traditional approaches to an economic analysis of law.

There is, in this regard, a gap between the current works in law and economics, and the experiences of many people. This divergence carries over to the process of legal reasoning employed by many lawyers, judges, and public policy makers. This book is offered to bridge this gap. To achieve this goal I focus on building a basic conceptual vocabulary in economics rather than on promoting any particular conception of efficiency. I believe that there is a need for a book that simply and clearly explains the relationship between law and market economy with a concern for showing how certain market assumptions relate to legal reasoning, particular legal outcomes, and the formulation of public policy. I want the reader to become skilled at using and understanding various economic concepts and assumptions. I want the reader to appreciate the way in which these concepts and assumptions can be used to advance particular socio-legal values in legal reasoning, public policy, and the advancement of social justice and prosperity.

I also want readers to understand that the ideas and concepts discussed in this book are already part of our legal discourse. Courts, legislatures, and regulatory agencies already use many of these concepts. Consequently, it is important to understand these ideas and how they work. One needs to understand that knowledge of these ideas is fundamental to the modern-day practice of law. Just as lawyers must know property law, contract law, and tort law, they must also know basic economics and the market context in which law operates.

The book provides materials on all of the basic elements and concepts needed for understanding law in a market context. It discusses the relationship between law, markets, and culture. It also explains, in a non-quantitative way, all of the basic terms and concepts of economics that are

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used in the law and economics literature, and that are used in legal reasoning. In each chapter there are a number of examples and illustrations, and at the end of each chapter there are problems for thought and discussion. I designed these problems to assist the reader in thinking about the issues raised in the material. I also developed these problems to serve as the basis of group discussion or as essay questions that can be assigned when the book is used in conjunction with a course or seminar. The idea behind the problems is to use them to develop an ability to manipulate different frames, references, and representations for advancing a variety of logical and persuasive legal arguments.

In writing this book I realize that some people will suggest that more attention should have been paid to political theory, and others may suggest that there should be more material on cultural studies. I also realize that there are different approaches to interpretation theory and to semiotics. As with any book of this type, compromises have been made in an effort to make concepts accessible and understandable. I have made my own adjustments to Peirce's work so as to develop an approach with applicability to legal and economic reasoning. I do not purport to say that Peirce would say what I do, only that my approach has a clear Peircean influence. In particular, this influence is a product of my many years of work with Roberta Kevelson, who during her lifetime published numerous works on Peirce, and who served, for approximately fifteen years, as Director of the Center for the Study of Law and Semiotics at Penn State University.

As with any book of this kind, each individual reader is likely to have his or her own personal way of addressing the various issues covered. This is good because it can enrich the discussion of the material and lead to making further progress on the overall project of broadening our understanding of the relationship among law, markets, and culture. I hope that each reader understands that my effort is to offer an introduction to a new way of understanding law and market relationships. I do not purport to offer a new or definitive set of answers. Instead, I offer an invitation to anyone interested in taking this book as a starting point for rethinking the use of economic ideas in law. I am hopeful that my invitation will be taken up not only by people who think in a way similar to me, but also by people that merely find new ways of addressing the issues of law in a market society as a result of reading this book.

As an introductory book, this work is designed for people interested in jurisprudence; law and society; legal theory; law, culture, and the humanities; and law and markets. The book can be used to structure a course on the topic of "Law in a Market Context," "Law and Market Economy," or

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“Law, Markets, and Culture.” It can also be used to supplement materials in a variety of courses related to jurisprudence, and contemporary legal theory, including courses on law and society, law and humanities, law and culture, and feminist and other types of critical theory. Likewise, the book can be used as a supplement to law school courses such as property, contracts, torts, real estate transactions, and land use. This is particularly true when the course is taught with a casebook making reference to a variety of economic concepts applied to law. In such a course my book can be a useful supplement for the person seeking to integrate market concepts while wanting an approach that differs from that of traditional economic analysis of law. (See the notes on p. xvi for a few suggested ways to pair this book up with other readings when used in different types of courses.)

I can report that I developed and used these materials in a course with law students and graduate students. The course, titled “Law and Market Economy,” is a cross-listed course that typically enrolls about thirty students. These students are primarily based in the College of Law but always include about a half dozen graduate students from other departments on campus. Many of these students would identify themselves as being interested in feminism, critical race theory, social justice, and public interest law. All of the students would identify themselves as interested in the problems of law, legal institutions, and public policy as related to the pressures and constraints of markets. In using the materials over several years I benefited greatly from student feedback. I also found that students completed the course with a clear ability to recognize, construct, and deconstruct a variety of economic arguments in law. This was even true for students with no prior study in economics or interpretation theory, and true for my graduate students with no prior work in law. The outline of “tools” included near the end of chapter 3 proved to be an important and valuable organizing kit for all of my students. It gave them an easy and useful way to go back and organize their notes and provided a structured guide for building the skills necessary to go on to advanced work.

I also used some of the materials in this book in teaching a first-year course on property and in teaching upper-level courses on real estate transactions and land use planning. The materials worked well to explain a number of concepts including, among others, risk, externalities, the commons problem, Coase, valuation, and cost and benefit analysis.

Many of the ideas in the book can be extended or expanded upon, but the goal is not to write the definitive word on the subject matter. The goal is to provide an accessible and reasonable-length primer. For a more

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detailed examination of some of the ideas and concepts addressed in this book I suggest that you refer to the list of sources, and in particular to Robin Paul Malloy, *Law and Market Economy: Reinterpreting the Values of Law and Economics* (Cambridge, 2000); and Robin Paul Malloy, *Framing the Market: Representations of Meaning and Value in Law, Markets, and Culture*, 51 *Buffalo Law Review* 1 (2003). Many of the ideas expressed and developed in chapters 1–3 are extensively footnoted in the article I wrote for the *Buffalo Law Review*.

In completing this book I benefited from the input and assistance of a number of people, and from the supplemental research support of the Syracuse University College of Law. Therefore, I wish to express my gratitude to those who supported me in this project. In particular, I thank Chris Ramsdell for her administrative assistance, and the following people who provided helpful comments and suggestions in reviewing various parts or drafts of this manuscript, including: Brian Bix, David Brennen, Alan Childress, Wythe Holt, and Martha McCluskey. I also benefited from ongoing discussion with my colleague, David Driesen. I thank Shawn Sauro, Nazakhtar Nikakhtar, and Meghan Honea for research assistance at various times over the time period involved in writing this book. I also thank the people who reviewed and commented upon the manuscript for Cambridge University Press. Mistakes and errors are of course my own. Finally, I wish to thank Finola O’Sullivan, Nikki Burton, Jackie Warren, Barbara Docherty, and others at Cambridge University Press for their support and assistance throughout the long and difficult process of publication.

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NOTE FOR TEACHERS

I now offer a few suggestions on ways of pairing this book with other readings to be used in various types of courses. These are only suggestions, offered with the hope of giving the reader a more specific idea on how to integrate this book into different types of courses.

**Courses on “Law and Market Economy,” “Law in a Market Context,” or
“Law, Markets, and Culture”**

The book can be used on its own with time devoted to discussion of the Problems. It can also be used with supplemental law review articles or with full text versions of the cases discussed in the text. Some books that can be paired with *Law in a Market Context* to build a one-semester course or seminar include the following books: David Throsby, *Economics and Culture* (Cambridge, 2001); Cass R. Sunstein, *Behavioral Law & Economics* (Cambridge, 2000); Robin Paul Malloy, *Law and Market Economy: Reinterpreting the Values of Law and Economics* (Cambridge, 2000); Nicholas Mercurio and Steven G. Medema, *Economics and the Law: From Posner to Post-Modernism* (Princeton, 1997); Regenia Gagnier, *The Insatiability of Human Wants: Economics and Aesthetics in Market Society* (Chicago, 2000); Deirdre N. McCloskey, *The Rhetoric of Economics* (2nd ed., Wisconsin, 1998); Hernando DeSoto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books, 2000); *Beyond Economic Man: Feminist Theory and Economics* (Marianne A. Ferber and Julie A. Nelson, eds., Chicago, 1993); and Richard A. Epstein, *Simple Rules for A Complex World* (Harvard, 1995), David Driesen, *Economic Dynamics of Environmental Law* (MIT, 2003).

Courses on jurisprudence and contemporary legal theory

For these types of courses one might pair *Law in a Market Context* with one or two of the following: Robert Hayman, Nancy Levit, and Richard

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Delgado, *Jurisprudence – Classical and Contemporary: From Natural Law to Postmodernism* (West, 2nd ed., 2002); Dennis Patterson, *Law and Truth* (Oxford, 1996); Martha Chapallas, *Introduction to Feminist Legal Theory* (Aspen, 1998); Peter Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (Blackwell, 1986); Brian Bix, *Law, Language, and Legal Determinacy* (Clarendon, 1996); Brian Bix, *Jurisprudence: Theory and Context* (Carolina Academic Press, 2000); Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University, 1995); Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford, 1998); and Samuel J.M. Donally, *A Personalist Jurisprudence, The Next Step: A Person-Centered Philosophy of Law for the Twenty-first Century* (Carolina Academic Press, 2003).

Courses using *Law in a Market Context* as a supplemental reader

Most subject areas of law now have leading casebooks and textbooks that reference various economic terms and concepts. This is the result of the widespread acceptance by legal institutions of market theory as relevant to legal reasoning. This observation seems to be most true with respect to property law. Consequently, *Law in a Market Context* is especially helpful in addressing the many economic terms and concepts that are frequently expressed or implied in course books for the following subjects: Basic and advanced courses on Modern Property Law; Land Use, Zoning, and Development Law; and Environmental, and Natural Resources Law. Other courses such as Contracts, Torts, Corporate Law, Real Estate Transactions, and Intellectual Property depend upon the particular course book that is chosen.

Other courses

Law in a Market Context is also designed to be a primary or supplemental book for graduate and undergraduate courses on Legal Studies; Law and Policy; Law and Society; Sociology of Law; and other classes related to the subject areas identified above.

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In writing this book I benefited from the use of materials that I published in several previous works. I wish to thank the following publishers for granting permission for this use.

- (1) Buffalo Law Review, for permission to include in chapters 1–3 and 7, substantial material published in Robin Paul Malloy, *Framing the Market: Representing Meanings and Values in Law, Markets, and Culture*, 51 Buffalo Law Review 1 (2003). There are material changes and differences between the chapters and the article.
- (2) Aspen Law Publishers and James Charles Smith, for permission to include materials on valuation and risk in chapter 5, taken from Robin Paul Malloy and James C. Smith, *Real Estate Transactions: Problems, Cases, and Materials*, pp. 8–32 (2nd ed., 2002).
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- (4) Cambridge University Press, for permission to use materials from Robin Paul Malloy, *Law and Market Economy: Reinterpreting the Values of Law and Economics* (2000).

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All footnotes in the book are prepared as short-form citations of the identified sources listed in the Sources section (p. 235). All footnote citations have been prepared with reference to *The Bluebook: A Uniform System of Citation* (17th ed., 2000).