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Microeconomics Made (Too) Easy: A Casebook Approach to Teaching Law and Economics

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MICROECONOMICS MADE (TOO) EASY: A CASEBOOK APPROACH TO TEACHING LAW AND ECONOMICS

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CASES AND MATERIALS ON LAW AND ECONOMICS. By *David W. Barnes* and *Lynn A. Stout.* St. Paul: West Publishing Company. 1992. Pp. xxix, 538. $38.95.

The economic approach to law has become a respectable mode of legal analysis.[1] Legal educators should encourage those students with the necessary background and abilities to develop some facility in applying microeconomic principles to legal questions. Most of the "better" law schools now offer at least one upper-level elective course, usually taught by a law professor with a substantial background in economics (often a Ph.D. degree), that reviews the basic concepts of price theory and efficiency analysis and then applies those concepts to the core doctrines of property, contract, and tort law.

The greatest difficulty that a teacher faces in offering such a course is selecting course materials. One can provide students with a set of articles, book excerpts, cases, and other handouts individually selected to develop the themes that one wishes to emphasize. The effort involved in such a painstaking assembly, however, is considerable, and one labors with the nagging suspicion that one is perhaps reinventing the wheel. Since "law-and-economics" courses have been standard offerings at the elite law schools from at least the early 1970s, and have diffused rapidly thereafter into the lower-tier schools, one would expect a treatise to be available that could serve adequately as a core course text, requiring only modest supplementation to reflect a teacher's particular perspective and choice of topics. Somewhat

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1. THE AALS DIRECTORY OF LAW TEACHERS 1992-93 (1992) lists 118 law professors who upon occasion teach law-and-economics courses, and it notes that 71 of those professors are currently teaching the subject. *See id.* at 108-09. This information likely understates both the number of professors qualified to teach the subject and the number of courses offered. For example, the directory does not list Guido Calabresi, Henry Hansmann, and George Priest of Yale, all noted scholars in the field, and it lists only one person from Harvard Law School, which also houses a number of prominent law-and-economics scholars. In addition, this registry omits the smaller but still significant number of law-and-economics seminars that economics departments offer to their undergraduate majors and graduate students.

surprisingly, none of the available books has all of the qualities necessary to fill that role.

David W. Barnes[2] and Lynn A. Stout[3] have attempted to meet this clear need with their new publication *Cases and Materials on Law and Economics*[4] (hereinafter *Cases and Materials*). In my opinion, their effort is unsuccessful. While the book compares favorably in some regards to earlier attempts, it exhibits significant and pervasive shortcomings that will probably prevent it from being widely adopted.

Economics is the science of rational choice under constraints; the study of maximizing behavior when tradeoffs must be made. *Cases and Materials* should thus be evaluated not against some abstract standard of perfection, but instead by the more appropriate (and forgiving) benchmark of the best available alternatives. In this review I will first briefly describe and criticize the four most serviceable texts available to teachers of law-and-economics courses prior to the publication of *Cases and Materials.* Then, I will outline the structure and content of *Cases and Materials* and compare it to those earlier works. I will conclude by offering a few comments concerning the institutional and other problems that are retarding the development of suitable texts for law-and-economics courses.

I. THE COMPETITORS

Prior to the publication of *Cases and Materials,* four legitimate candidates were available as core texts for law school courses designed to review basic microeconomic principles and apply those concepts to analyze the efficiency and other characteristics of legal rules: Richard A. Posner's *Economic Analysis of Law;*[5] A. Mitchell Polinsky's *An Introduction to Law and Economics;*[6] Robert Cooter and Thomas Ulen's *Law and Economics;*[7] and Robin P. Malloy's *Law and Economics: A Comparative Approach to Theory and Practice.*[8]

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2. Professor of Law, University of Denver.

3. Associate Professor of Law, Georgetown University.

4. Barnes and Stout have also published the accompanying supplementary volume TEACHER'S MANUAL TO ACCOMPANY CASES AND MATERIALS ON LAW AND ECONOMICS (1992).

5. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. 1992).

6. A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (2d ed. 1989).

7. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (1988).

8. ROBIN P. MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE (1990). Two additional treatises written by Americans appear less well suited to serve as core texts than the books discussed herein. WERNER Z. HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS (1979) is similar in its style and approach to the Posner text but is not nearly as comprehensive. CHARLES J. GOETZ, CASES AND MATERIALS ON LAW AND ECONOMICS (1984), which presents a rather idiosyncratic selection of topics in an unusual sequence, would be highly inconvenient to use as a core text in a traditional law-and-economics course.

British writers have prepared several treatises and essay collections. Because of either their selective focus or their style of discourse, however, these books all seem poorly suited for use as

Richard Posner's seminal book, now in its fourth edition, was the first work comprehensively to apply economic principles to a wide range of legal questions,[9] and it has received considerable critical attention.[10] Its great strength is its very broad range of topics: *Economic Analysis of Law* insightfully and provocatively applies price theory not only to property, contract, and tort law, but also to criminal law, family law, administrative law, corporate and financial regulation, constitutional law, civil and criminal procedure, and a number of other areas. While incredibly broad in scope, however, it is exceedingly narrow in its unqualified endorsement and relentless application of the Kaldor-Hicks wealth-maximization normative efficiency criterion.[11] Posner barely pauses to acknowledge the rather persuasive criticisms of that criterion,[12] let alone to develop the implications of assessing legal rules by other standards. Posner also marshals little, if any, empirical support for his strong policy positions, and he generally relies upon hypotheticals to make his points rather than applying economic principles to actual cases. Moreover, while Posner declares in the preface to the latest edition that "no prior acquaintance with economics on the part of the reader is assumed,"[13] the book is extremely heavy going for a law student who has not taken a solid introductory microeconomics course and had some exposure to intermediate price theory and efficiency analysis.

If one is a devotee of the Kaldor-Hicks efficiency criterion and is teaching a class of law students who all have relatively strong economics backgrounds, then *Economic Analysis of Law* may be a suitable text. If, however, one confronts the usual cross-section of law students

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core texts for American law school courses. *See* THE ECONOMIC APPROACH TO LAW (Paul Burrows & Cento G. Veljanovski eds., 1981); J.M. OLIVER, LAW AND ECONOMICS: AN INTRODUCTION (1979); FRANK H. STEPHEN, THE ECONOMICS OF THE LAW (1988); CENTO G. VELJANOVSKI, THE ECONOMICS OF LAW: AN INTRODUCTORY TEXT (1990).

9. The first edition of *Economic Analysis of Law* appeared in 1972.

10. *See, e.g.*, C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975); Arthur A. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); A. Mitchell Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655 (1974); Patrick W. Brennan, *Economic Analysis of Law. 3d Ed.*, 55 U. CIN. L. REV. 1159 (1987) (book review); John J. Donohue III & Ian Ayers, *Posner's Symphony No. 3: Thinking About the Unthinkable*, 39 STAN. L. REV. 791 (1987) (book review).

11. The Kaldor-Hicks criterion endorses any policy for which the aggregate benefits exceed the aggregate costs, with benefits and costs measured by the willingness to pay evidenced by the affected persons. This criterion is consequently insensitive to the distribution of costs and benefits across the affected population. POSNER, *supra* note 5, at 13-16. For an insightful and highly entertaining critique of its embrace of the Kaldor-Hicks criterion and other aspects of Posner's book, see Leff, *supra* note 10. No one should read *Economic Analysis of Law* without also reading Leff's review.

12. *See, e.g.*, Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1980).

13. POSNER, *supra* note 5, at xix.

that enrolls in a law-and-economics course — the majority of whom have only taken a single year of introductory economics at least two or three years before, and a few of whom have no prior economics background — and wishes to develop in these students not only an ability to engage in efficiency analysis but also a critical understanding of the wealth-maximization criterion, informed by utilitarian, Kantian, Christian, Marxist, racial, feminist, nihilist, and perhaps other perspectives, Posner's book is unsuitable as a core text. Just to equip the students with the microeconomic concepts and philosophical perspectives necessary to read *Economic Analysis of Law* and to take it with the appropriate shaker of salt would take virtually the entire semester; insufficient time would remain to apply these concepts to substantive legal questions.

An Introduction to Law and Economics, by Mitchell Polinsky, differs greatly in approach from Posner's effort. It is short (about one quarter the length of *Economic Analysis of Law*), lucid, and well written.[14] Polinsky's book also suggests that the reader need not possess prior knowledge of economics, but unlike *Economic Analysis of Law* the book lives up to this claim. Polinsky builds his work around a concise explication of the Coase Theorem, which he then applies to increasingly sophisticated hypothetical contract and tort contexts. He keeps the economics terminology to a minimum and limits the mathematics to relatively simple numerical examples. No case analysis is provided. Polinsky's avowed goal is to convey the spirit and flavor of the economic approach to law rather than to provide a comprehensive survey of its applications.[15] The book is quite successful in achieving this objective.

Good as it is, however, *An Introduction to Law and Economics* is unsuitable as a comprehensive core text for a law-and-economics course for at least three reasons, all deriving from the book's limited objective and scope of coverage. First, while it may well serve to motivate a law student with little or no economics background to learn microeconomics, it will not teach that student microeconomics. If used in a law-and-economics course enrolling the usual diverse group of law students the book requires substantial supplementation with technical microeconomics material. Second, if one wishes to move beyond the most basic common law doctrines in applying the efficiency paradigm, or to examine any actual cases, topical supplementation is required. Third, while Polinsky avoids Posner's "in your face" stance with regard to the importance of wealth maximization and expressly

14. For a number of insightful and favorable reviews of Polinsky's book, see B. Beavis, *A.M. Polinsky, An Introduction to Law and Economics,* 4 INTL. REV. L. & ECON. 96 (1984); Judith A. Lachman, *Knowing and Showing Economics and Law,* 93 YALE L.J. 1587 (1984); John E. Noyes, *An Introduction to Law and Economics,* 59 N.Y.U. L. REV. 410 (1984); Stewart Schwab, *A. Mitchell Polinsky, An Introduction to Law and Economics,* 35 J. LEGAL EDUC. 142 (1985).

15. POLINSKY, *supra* note 6, at xiii.

recognizes the tensions between Kaldor-Hicks efficiency and various equitable considerations, the limited attention he devotes to this important question necessitates substantial supplementation if students are to develop a critical understanding of the normative pivot of conventional law-and-economics thinking.

Because of this need for considerable supplementation, *An Introduction to Law and Economics* leaves the core text problem unsolved. As a small piece of a "homemade" course drawing upon many other sources, however, it serves well. I have found it a very useful book for students to read lightly prior to commencing the course. It has proved particularly helpful to students with no prior economics background; the book gave some of them a basic appreciation of economic modeling and deductive reasoning that helped them make great early strides and (to be candid) efficiently demonstrated to others that their economics and analytical skills were unfortunately so deficient that they should enroll in a different course. I have also found quite useful certain of its substantive chapters, particularly the excellent materials on risk-bearing and insurance and on activity-level issues in tort law. Polinsky's book is too narrow, however, to serve as the core course text.

Unlike either Posner or Polinsky, Robert Cooter and Thomas Ulen, in *Law and Economics,* provide the reader with a comprehensive and systematic discussion of basic microeconomic theory.[16] While their discussion serves as an excellent review for someone already familiar with microeconomics, its theoretical sophistication may overwhelm a student with little or no prior economics background. Cooter and Ulen cover a fairly broad range of legal issues, though not as many as Posner's book. The book also includes a chapter that introduces law and legal institutions, although in a fashion too simplistic to be of much benefit to upper-level law students.

Cooter and Ulen have designed a text primarily for upper-level undergraduate or graduate students majoring in economics who wish to learn to apply economic reasoning to legal issues and who have little or no prior legal background.[17] For law students who were undergraduate economics majors or have graduate degrees in economics or a related field, *Law and Economics* would serve fairly well as a core text. For the more typical law student who is struggling to recall the rudiments of her long-ago microeconomics principles course, the level of economic analysis is too sophisticated. Moreover, Cooter and Ulen's book suffers from the same serious failing that characterizes Posner's and Polinsky's efforts, as well as law-and-economics scholar-

16. Cooter and Ulen cover such topics as maximization, equilibrium, efficiency, the theory of consumer choice and demand curves, supply curves and market structure analysis, game theory, welfare economics, and the basic mathematical and graphical tools by which such concepts are given rigor. *See* COOTER & ULEN, *supra* note 7, at 15-54.

17. For a review of Cooter and Ulen's book, see John P. Speir, *Law and Economics,* 34 ANTITRUST BULL. 951 (1989).

ship generally: it gives unduly short shrift to normative considerations other than efficiency, and it incorrectly implies that efficiency considerations should necessarily be given a major role in resolving legal disputes.[18]

The recent short book by Robin Malloy, *Law and Economics: A Comparative Approach to Theory and Practice,* takes an innovative approach to teaching students how to apply economic concepts to legal analysis.[19] Malloy calls for a move away from the preoccupation with price theory and efficiency criteria that characterize most economic analyses of law to accord at least equal consideration to other analytic approaches and evaluative criteria more favorable to the interests of the economically disadvantaged.[20] The book begins by drawing a distinction between the *economic analysis of law* — the conventional application of price theory to legal issues — and a broader, more philosophical and comparative inquiry meriting the name *law and economics.*[21] It subsequently provides a brief, but quite lucid, introduction to basic supply-and-demand theory, and then moves on to introduce succinctly more sophisticated concepts such as the Coase Theorem, Pareto and Kaldor-Hicks efficiency, and the Arrow Impossibility Theorem. Malloy then turns to his main objective, making clear the central role of ideological presuppositions in economic and legal theory, by laying out in general terms the contrasting features of the conservative, liberal, left-communitarian, neo-Marxist, libertarian, and classical liberal approaches to economic theory. Several common law applications emphasize the sensitivity of the conclusions reached to one's choice of ideological starting point. *A Comparative Approach* is enjoyable reading, if you favor a broad, critical approach to social theory, and students with little or no economics background can understand its arguments. The work's apparent aim, however, is to reveal the limitations of neoclassical price theory, not to teach it. It consequently serves poorly as a text for a teacher who seeks to enable students to conduct sophisticated efficiency analyses as well as make them aware of the ideological presuppositions and limitations of the efficiency paradigm. A teacher who intends to structure a law-and-economics course for law students along conventional lines is well advised to supplement his core text with Malloy's book, as well as with other materials critical of the wealth-maximization criterion that are

18. For a more comprehensive discussion of this problem, as well as a discussion of the theoretical problems resulting from the nonfalsifiability of the rationality postulate, see Gregory S. Crespi, *The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Nonfalsifiability and Normative Bias,* 67 NOTRE DAME L. REV. 231 (1991).

19. For insightful and favorable reviews of Malloy's book, see Paul H. Brietzke, *A Law and Economics Praxis,* 25 VAL. U. L. REV. 51 (1990); Robert A. Weninger, *Law and Economics: A Comparative Approach to Theory and Practice,* 65 TEMP. L. REV. 187 (1992).

20. MALLOY, *supra* note 8, at 48-56.

21. *Id.* at 2-3.

grounded in utilitarian or Kantian perspectives. One would be doing one's students a disservice, however, if one relied upon Malloy's book as the core text rather than using it in a gadfly role.

The Posner, Polinsky, Cooter and Ulen, and Malloy alternatives that were available prior to the publication of *Cases and Materials* all have their strengths, but as discussed above each also has serious weaknesses that lessen its attractiveness as a core text. Their problems are sufficiently severe to make it advisable for professors to compile selected articles and other readings rather than using a single text. I now examine whether *Cases and Materials* advances sufficiently beyond these other works to merit its widespread adoption.

II. THE CASEBOOK APPROACH

The authors of *Cases and Materials* have attempted to provide a textbook suitable for teaching law students with no prior economics background how to engage in the economic analysis of legal issues (p. vi); to achieve this end, Barnes and Stout utilize the pedagogical format of a casebook rather than a theory-oriented treatise (p. v). They have gone much too far, however, in attempting to address law students in the students' own vernacular. The resulting product is an awkward work that is inadequate as a core text for a law-and-economics course.

Cases and Materials is of moderate length — slightly over 500 pages in the standard West treatise format — and is divided into seven chapters. Chapter One briefly introduces the concepts of rationality, scarcity, utility maximization, wealth maximization, and allocative efficiency. Chapter Two applies economic principles to basic questions of property and nuisance law; it introduces the Coase Theorem and the concepts of transaction costs and externalities. Chapter Three examines the economic incentives provided by tort law, compares various negligence and strict liability regimes, and investigates damages issues. Chapter Four discusses the economics of contract law, focusing primarily on the question of remedies. Chapter Five examines the efficiency of the common law. Chapter Six presents basic microeconomic concepts of supply, demand, and marginal analysis and applies them to issues of regulation and antitrust policy. Chapter Seven applies economic and public choice theory to analyze questions of constitutional law and the design of political institutions.

This range and sequencing of topics is fairly conventional and parallels the overall design of the Posner, Polinsky, Cooter and Ulen, and Malloy texts. The topical format of *Cases and Materials* does have several distinctive features. First, the review of basic market theory is deferred until the next-to-the-last chapter of the book.[22] Second, an

22. Pp. 311-408. In contrast, Posner discusses "The Nature of Economic Reasoning" in his opening chapter, *see* POSNER, *supra* note 5, at 3-19, Polinsky talks about the role of assumptions

entire chapter is devoted to discussion of the common law efficiency hypothesis.[23] Finally, the last chapter emphasizes the application of economic theory and public choice analysis to questions of constitutional law and political structure.[24]

The most distinctive aspect of *Cases and Materials,* however, is its unwavering commitment to a casebook format. The authors rely almost exclusively upon case excerpts followed by author notes rather than upon the more abstract theoretical discussions favored by Posner, Polinsky, Cooter and Ulen and, to a somewhat lesser extent, Malloy.

Trying to harness casebook pedagogy to teach law and economics, however, raises serious problems. Economic analysis is a mode of deductive reasoning closely akin to that employed in the "hard" sciences such as physics and chemistry. One does not begin with the "real world" in its full complexity, but instead with a simplified model based upon severely limiting assumptions. Within this framework of assumptions, the analyst attempts to derive the consequences of the interaction of a well-defined group of economic actors, each having a certain structure of preferences and subject to particular behavioral, governmental, and resource constraints. The explanations and predictions derived from the idealized model are then compared with empirical data. The model's assumptions and postulated relationships are modified to result in explanations and predictions that better fit the data. The conclusions derived from the improved model are then compared with further empirical data in an unending iterative process.

Analytical approaches to knowledge such as microeconomics are difficult to master. They are usually taught to students through the use of texts and other materials that systematically and incrementally develop a structure of assumptions and postulated relationships in an abstract, theoretical fashion. The texts then illustrate the resulting models' operation by applying them first to carefully constructed and highly simplified hypothetical circumstances and then to more complex and realistic situations. Each of the four law-and-economics texts discussed above largely follows this conventional, proven approach to enabling students to develop a facility in applying deductive theory.

Conventional first-year law teaching, in sharp contrast, generally

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in economics in his first chapter, *see* POLINSKY, *supra* note 6, at 2-4, Cooter and Ulen devote their second chapter to a comprehensive review of microeconomics, *see* COOTER & ULEN, *supra* note 7, at 15-54, and Malloy discusses "Basic Economics for Law and Economics" in his second chapter. *See* MALLOY, *supra* note 8, at 14-45.

23. Pp. 277-310. Neither Polinsky nor Malloy discusses the common law efficiency hypothesis. Both Posner and Cooter and Ulen present some discussion of this hypothesis, *see* POSNER, *supra* note 5, ch. 8; COOTER & ULEN, *supra* note 7, ch. 10, but they do not give it anywhere near the emphasis Barnes and Stout do.

24. Pp. 409-529. Neither Polinsky, Cooter and Ulen, nor Malloy addresses constitutional law issues or applies public choice analysis. Posner does discuss constitutional questions in several chapters, *see* POSNER, *supra* note 5, chs. 23-28, but makes only incidental use of public choice analysis.

begins by presenting actual cases in their full factual complexity and then inductively abstracts from those cases the general principles underlying judicial decisions. Upper-level law students are thus by training — and probably by natural inclination as well, given their self-selection for legal careers — more comfortable with the inductive case law approach to learning than with the study of formal theoretical models that dominates most other areas of graduate education. It is unclear, however, whether an elaborate body of abstract theory such as microeconomics can be effectively communicated through judicial opinions articulated in "legal" rather than "economic" language and embodying organizing conceptual structures (such as, for example, "justice," "statutory authority," and "stare decisis") that differ sharply from the core theoretical categories of microeconomics and price theory (such as, for example, "efficiency," "transaction costs," and "elasticity"). While there may be an economic logic implicit in many or most common law decisions — a matter of some controversy among scholars[25] — such economic reasoning where present is usually veiled beneath a thick layer of doctrinal elaboration of legal concepts and is visible only to the discerning eye of the trained specialist.

Barnes and Stout are no doubt correct that "[a] case orientation should appeal to those eager to escape the artificial assumptions associated with economics. . . ." (p. vi). Nevertheless, microeconomic theory in its essence is nothing more than an attempt to provide a view of the world through a lens of "artificial assumptions" carefully chosen to focus attention on features particularly significant for understanding resource allocations. Students who wish to "escape" this analytical framework should first be encouraged to learn more about its structure, logic, and power, and then to subject it to a critical examination from various ethical perspectives and in light of important equitable considerations not fully captured by the framework.

While I fully endorse Barnes and Stout's desire to provide a "vehicle for appreciating and critically examining, rather than merely promoting, the economic analysis of law" (p. vii) — all of my own law-and-economics scholarship has similarly been critical rather than promotional[26] — Barnes and Stout have put the cart before the horse with their casebook format. This is the major shortcoming of *Cases and Materials.* The first order of business for a comprehensive law-and-

25. *See, e.g.*, Ramona L. Paetzold & Steven L. Willborn, *The Efficiency of the Common Law Reconsidered*, 14 GEO. MASON U. L. REV. 157 (1991); Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775 (1981); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

26. *See, e.g.*, Gregory S. Crespi, *Efficiency Rejected: Evaluating "Undue Hardship" Claims Under the Americans With Disabilities Act*, 26 TULSA L.J. 1 (1990); Gregory S. Crespi, *If Pigs That Could Fly Could Reply: A Response to Daniel Posin*, 38 WAYNE L. REV. 75 (1991); Crespi, *supra* note 18.

economics course text is to assist students in developing a solid understanding of basic and intermediate-level microeconomics; this should be done in as clear and explicit a fashion as possible, tailored to the background of the target students. This task requires a format of theoretical discussions, graphical demonstrations, and carefully framed hypotheticals, not a series of judicial opinions that at most implicitly reflect economic factors and rationales. Judges are not economists, by and large, and their decisions generally do not present and apply economic principles in a fashion that highlights their economic rationales and consequences. Only after a text has properly developed the theoretical foundations of economic analysis should it examine the application of economic principles in judicial or administrative decisions.

Judicial opinions are inadequate vehicles for teaching economic analysis. Barnes and Stout attempt to deal with this problem without abandoning the casebook format by truncating most of the cases presented down to the barest excerpts — thus sparing students from having to read and reflect upon lengthy judicial discussion that is obviously irrelevant to the economic issues of interest — and then following each of these snippets with an extensive series of notes in which the relevant economic concepts are defined, discussed, and applied to hypothetical circumstances. The cases are in effect reduced to mere jumping-off points for the subsequent extensive case note discussions. In this limited role, the cases are more distracting than helpful; they still serve poorly to illuminate the economic concepts, and in their severely excerpted form they lose the advantage of being able to convey the human dimensions of the underlying disputes more fully than can abstract theory.

The case note discussions in *Cases and Materials* are generally quite good, introducing a broad range of important microeconomic principles in a relatively concise and nontechnical fashion. Barnes and Stout write well, and they clearly know their topic. The book would have been much better had the authors taken the next logical step: eliminating most of the case excerpts altogether and reorienting the book around their theoretical discussions and hypothetical applications, which the case note format presents in an unnecessarily choppy and subordinated fashion. This, however, would have made the book just another theoretical law-and-economics treatise that would have had to compete directly for course adoption with the genre's formidable established competitors such as *Economic Analysis of Law* and *An Introduction to Law and Economics.* Uniqueness is sometimes more effective than quality as a marketing tool, and the authors may have wisely decided that product differentiation is the better part of valor.

To point out in more detail the inadequacies of Barnes and Stout's casebook approach, I will focus upon the materials presented in Chapter One. The criticisms that I would offer of Chapters Two through

Seven would be quite similar.[27]

The initial section of Chapter One is titled "Efficiency and Utility Maximization," a reasonable subject with which to commence a law-and-economics text. The section begins rather oddly, however, with a one-and-a-half page excerpt from *Cidis v. White,* an obscure New York State trial court opinion holding that a nineteen-year-old minor could not disaffirm her contract to buy contact lenses from an optometrist because these lenses constituted "necessaries."[28] After reading this excerpt, I failed to see any obvious connection to the concepts of economic efficiency and utility maximization. The *Cidis* excerpt is followed by almost three pages of fine-print author notes (pp. 3-5). The first case note suggests that the parties are likely to enter into a contract with the expectation of increasing their satisfaction, although they may not subjectively understand their actions to constitute "utility maximizing" behavior. A true, though obvious, point, but what does the *Cidis* excerpt add to a bare statement of that proposition? The next six notes embark upon a readable if somewhat disjointed discussion of rational maximization under constraint, the concepts of opportunity cost and efficiency, the contours of the rationality assumption, the theory of revealed preferences, and the desirable efficiency properties of voluntary transactions. This discussion is stimulating but would be more helpful to students were it not forced into the Procrustean bed of fine-print case notes to *Cidis.* The fourth case note refers to the potential conflict between the goal of utility maximization and the availability of the minority defense to contract enforcement, a matter to which *Cidis* bears at least a tangential relation.[29] This conflict, of course, reflects the much broader tension between efficiency and other social objectives, comprehensible to students only after they understand both Pareto and Kaldor-Hicks efficiency. The discussion of this question at this early point in the text is premature.

The next section of Chapter One — titled "Efficiency and Wealth Maximization" — similarly begins with a two-page excerpt from *Ross v. Wilson,*[30] a New York case holding that a school district lacked the authority to sell surplus real property to a church at a certain bid price when it had received a higher offer for the same property from another local organization. The opinion (or what small fraction of it is presented) is couched in terms of whether the school district possessed statutory authorization to avoid the otherwise applicable fiduciary

27. *But see infra* note 33 (noting some positive aspects of these latter chapters not shared by Chapter One).

28. 336 N.Y.S.2d 362, 363 (Dist. Ct. 1972).

29. The *Cidis* court, however, makes no reference to this conflict. Furthermore, the *Cidis* court did not allow the minority defense except insofar as it reduced the adult's recovery to the fair value of the lenses. *Cidis,* 336 N.Y.S.2d at 363.

30. 127 N.E.2d 697, 703-04 (N.Y. 1955).

duty to local taxpayers, thus enabling the school district to accept less than the highest offer for the property. The opinion fails to discuss economic efficiency, wealth maximization, welfare maximization, or any other economic concepts. The subsequent author notes launch into a discussion of the relative utility consequences of the property's going to either of the various bidders, the differences between wealth maximization and utility maximization, the problems of measuring utility, and so forth (pp. 8-11). All of this discussion is entirely appropriate for an introductory chapter intended to impart to students an understanding of the principles of utility maximization and wealth maximization, and the differences between them, but a standard statutory interpretation opinion like *Ross* adds nothing to this discussion and serves only to distract the reader.

The last two sections of Chapter One suffer from similar shortcomings. The third section opens with a helpful general discussion of the Pareto-superiority and the Pareto-optimality criteria and closes with case notes that introduce the concept of Kaldor-Hicks efficiency and weigh its significance against broader equitable concerns (pp. 11-17). These discussions are unfortunately sandwiched around a short excerpt from *United States v. Causby*,[31] which does not further the analysis. The final section utilizes a Maryland marital property division opinion[32] that focuses on a constitutional takings discussion of alternative fairness criteria and their efficiency properties (pp. 17-20).

In short, students would have been better served had the authors dispensed with the lead cases altogether and defined and discussed the theoretical concepts in the sort of comprehensive and cohesive fashion that one expects to find in an intermediate microeconomics text, and does find to an extent in the books by Posner, Polinsky, and Cooter and Ulen. The cases are distracting, not helpful,[33] and the theoretical discussions are made less accessible by their relegation to the fine print and arbitrary structure of author notes. The problem, moreover, is

31. 328 U.S. 256 (1946).

32. Pitsenberger v. Pitsenberger, 410 A.2d 1052 (Md. 1980).

33. I must concede, however, that in a few instances the cases presented in Chapters Two through Seven illustrate the relevant economic principles with sufficient clarity to be useful pedagogical vehicles. I am thinking particularly of the classic *Boomer-Spur-Carpenter* trilogy of nuisance cases, presented in Chapter Two, and of the *Transatlantic* impossibility case and *Hadley v. Baxendale*, presented in Chapter Four. In addition, Chapters Two through Seven draw upon helpful noncase materials. They include, for example, short excerpts from a number of classic law-and-economics works, including, among others, JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LEGAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); Guido Calabresi & A. Douglas Malamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968); and George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977). These excerpts, however, are unduly truncated — five pages from Buchanan and Tullock (pp. 492-97), four pages from Calabresi and Malamed (pp. 56-57, 75-77), one page from Coase (p. 36), one page from Hardin (p. 28), and four pages from Priest (pp. 293-97) — and thus fail to communicate the relevant concepts to beginning students.

not one of poor case selection. While careful research might have unearthed marginally better judicial opinions than *Cidis* and *Ross* for teaching the fundamental concepts of microeconomics, even the most economically oriented opinions of law-and-economics stalwarts such as Judges Bork, Easterbrook, or Posner are likely to prove unsuitable. One would not attempt to learn law by analyzing the speeches given by economists to their peers at professional conventions; why should one expect official judicial pronouncements made to litigants and their attorneys to serve well as economics primers?

The second major failing of *Cases and Materials* is its attempt to present the usual range of topics covered in a law-and-economics course to a target audience of students having no prior economics background without first making a serious effort to teach them basic microeconomics. This simply will not work. The economic analysis of law, even if conducted at a rather rudimentary level, requires a solid grasp of market theory and of its roots in consumer demand models and in the theory of the firm. It also requires a fair degree of understanding of more subtle concepts that students do not usually encounter in introductory microeconomics courses, such as consumer and producer surplus, Pareto and Kaldor-Hicks efficiency, the Coase Theorem, transaction costs, risk aversion, externality analysis, general equilibrium theory, game theory, and the theory of the second best. Basic microeconomic principles alone warrant a full-semester undergraduate course. It usually takes yet another semester for students to learn intermediate price theory well enough to work through even a few simple applications. There is no reason to expect a law student who has not taken microeconomics, and who probably has not had extensive exposure to any other formal body of abstract deductive theory, to master those difficult concepts more quickly than do undergraduates. Any cursory review of microeconomics will surely be wasted on complete beginners, who will not develop sufficient understanding from such a review to profit from exposure to applications.

If one is teaching law and economics to law students with little or no prior economics background, all that one can reasonably hope to accomplish in a single semester is to provide them with a solid introductory microeconomics course flavored with basic normative critiques of the efficiency criteria and a few applications to basic legal questions. *Cases and Materials,* because it slights the basic economic theory to focus upon legal applications, is unsuitable to serve as the text for such a course. Moreover, while an introductory course is just what law students without prior economics training need, law schools should not necessarily have to provide remedial education to compensate for poor undergraduate course selection. Turning the law-and-economics elective into essentially an undergraduate microeconomics course is unfair to those properly prepared students already familiar

with basic economics and ready to learn how to conduct relatively sophisticated and policy-relevant economic analyses of legal issues.

A text designed to teach law and economics to law students with no prior economics background should include a comprehensive introductory chapter presenting the basic concepts of supply and demand and marginal analysis in both discursive and graphical form. Unlike each of the four previously discussed texts, however, *Cases and Materials* has no such introductory chapter. Could Barnes and Stout really believe that students not only can *commence* a law-and-economics course without any prior economics background, but also can effectively *complete* the course without ever confronting and mastering the standard microeconomic apparatus of utility functions, firm cost curves, supply-and-demand models, and the like? Would that it were true!

Once they reach the regulatory and antitrust issues presented in Chapter Six, the authors apparently recognize that virtually nothing can usefully be said about the economic aspects of these issues to someone who does not understand the workings of competitive markets. Accordingly, they insert approximately sixty pages of material covering basic supply and demand theory, marginal analysis, and producer and consumer surplus concepts, complete with the standard tables and graphs, albeit in an awkward case law followed by case note format. This insertion was poorly positioned; whatever formal microeconomic theory the authors chose to include should have been placed toward the front rather than in the rear of *Cases and Materials.* Supply-and-demand models and other basic economic concepts and graphical tools are useful generally for analyzing a wide range of legal issues, not just questions of antitrust or regulatory policy. While Barnes and Stout note in their preface that Chapters Three through Seven "may be read in any order" (p. v) and that an instructor may wish to "assign Chapter 6 early on" (p. vi), this book would have been easier to use had the technical economics material been presented immediately after Chapter One, before any of the substantive applications.

I do not mean to appear unduly critical of *Cases and Materials.* Barnes and Stout merit considerable praise for their efforts. Their book represents an innovative attempt to confront the yet-unsolved problem of writing a broadly suitable law-and-economics text. The authors have boldly chosen to aim their work primarily at students with no prior economics background, to spare these students as much as possible from having to grapple with the complex formal apparatus of microeconomics, and to see how much mileage they can get out of a novel casebook approach. Within the severe constraints that these choices impose, their effort is quite respectable. Almost every important concept of microeconomics makes its appearance somewhere in

the case notes, and the nontechnical explanations communicate the gist of those concepts with admirable clarity. The treatment of the common law efficiency hypothesis is much more complete than that in any of the major competitor texts. The emphasis placed upon questions of constitutional law and the insights of public choice scholars is innovative and effective. To its great credit, the book exhibits a more sustained awareness of the limitations of neoclassical price theory and the efficiency paradigm than do any of the alternatives here discussed (with the exception, of course, of Malloy's book, which discusses little else), and the authors repeatedly urge students to weigh efficiency consequences against other equitable considerations.

Barnes and Stout are entirely correct in their assertion that "[a]nalyzing reported decisions requires economics to come to grips with reality" (p. vi), and I agree that students should be encouraged to subject judicial opinions to economic scrutiny. To be able to do this effectively, however, students must first learn quite a bit of microeconomic theory. Studying case law is definitely not the best way to achieve this prerequisite understanding.

CONCLUSION

None of the prior attempts to produce an adequate text for a law-and-economics course has proven entirely successful. *Cases and Materials* has now come up short as well. A persistent problem obviously exists, and it appears to be rooted in both psychological and institutional factors.

Three of the four best law-and-economics texts that were available prior to *Cases and Materials* — the Posner, Polinsky, and Cooter and Ulen books — are seriously deficient because of the limited attention they devote to critiques of the efficiency paradigm.[34] These noted scholars would not consciously slant their work to favor a partisan ideological stance; this pattern of omission appears more likely to be grounded in convention and in the unconscious psychological processes of rationalization and justification. Perhaps one should not expect scholars who have devoted a substantial portion of their careers to mastering a complex analytical apparatus enthusiastically to embrace and trumpet critiques that call into serious question the validity of the entire enterprise. For all its failings as a core text, *Cases and Materials* shows significant movement toward a more forthright and sustained appreciation of the ideological biases inherent in price theory and in the use of wealth-maximization criteria. Perhaps this book, along with the Malloy text and other recent innovative law-and-economics monographs such as Jules Coleman's *Markets, Morals and The*

34. *See supra* Part I.

Law[35] and Robert Ellickson's *Order Without Law,*[36] heralds the arrival of a new generation of law-and-economics scholars free of the uncritical commitment to efficiency that characterizes much of the work of their predecessors.

Even if this is so, another and perhaps more intractable problem blocks the emergence of an adequate law-and-economics text. The difficulty is the institutional structure within which law-and-economics courses are offered. Universities now provide these electives in two different settings. Economics departments offer a relatively small number of classes as advanced seminars for their undergraduate and graduate majors. These students all have substantial and current economics backgrounds but often have little or no prior exposure to legal questions. Law schools account for a much larger proportion of law-and-economics classes. The students enrolling in these courses are almost exclusively upper-level law students, with economics backgrounds that range from nonexistent to substantial.

Without undue difficulty, a knowledgeable person could prepare a text well suited for teaching law and economics to economics majors and graduate students. A firm understanding of basic and intermediate-level microeconomics could be presumed, allowing the introductory technical material presented in such a text to focus directly upon the relevant intermediate-level concepts. The text would have to devote a substantial section to a comprehensive overview of the legal institutions and issues likely to be the primary focus of the course, such as, for example, the optimal structure of property entitlements, the proper nature of contract default rules, and the choice among different regimes of tort liability. The normative critiques presented in such a text could presuppose a working familiarity with the Pareto and Kaldor-Hicks criteria, and with welfare economics generally, and could thus focus upon the less familiar utilitarian and Kantian alternatives to wealth-maximization criteria. Such a text need not differ radically from the existing Cooter and Ulen text, except for giving much greater play to the normative critique.

An "economic" problem, however, stands in the way of the availability of such a text. A book so narrowly and precisely targeted, even if adopted by a large majority of those few economics departments now offering such a course, would likely sell only a few hundred copies per year, probably too few to justify its commercial publication and sale at standard textbook prices.

The central problem facing the prospective writer of a law-and-economics text for the substantially larger law school market is not one of too few students, but of having simultaneously to meet the needs of two very different student populations. Students with little or

35. JULES L. COLEMAN, MARKETS, MORALS AND THE LAW (1988).

36. ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991).

no prior economics background need a microeconomics principles text modified to include substantial discussion and critique of the efficiency criteria, comprehensive explication of the Coase Theorem, and applications to basic legal questions. Students with strong economics backgrounds, however, need only a summary review of basic microeconomics and are ready for a fairly rigorous discussion of intermediate-level theory, formulation and in-depth analysis of alternative normative criteria, and sophisticated applications of economic principles to a wide range of legal issues. They are also ready to read judicial opinions and search for hidden economic rationales. A book targeted exclusively at one of these groups will likely fail to be widely adopted because of teachers' concerns for the needs of the other group. A book that attempts simultaneously to meet the needs of both groups risks avoiding the Scylla of redundancy only to founder on the Charybdisian shoals of awkward compromise. *Economic Analysis of Law, An Introduction to Law and Economics, Law and Economics,* and now *Cases and Materials* all exhibit the latter difficulty. *Law and Economics: A Comparative Approach to Theory and Practice* does not, but Malloy did not seriously intend it to serve as a comprehensive core text and, as previously discussed, it has other problems if pressed into that role.

The prospects for enhanced academic reputation and commercial gain would likely lead to the publication of suitable texts, at least for the law school-based courses, *if* a key institutional reform took place. Schools might move toward replacing the existing single-semester general enrollment law-and-economics elective with a two-semester sequence: Law and Economics I for students with little or no prior economics background; Law and Economics II for students with strong economics backgrounds and those who have taken the first course. Such a sequence would segregate students into groups with consistent levels of initial economics expertise. To design appropriate texts for each course would then be far easier. Assuming that each of these two courses had sufficient aggregate enrollment nationwide to assure the commercial viability of a widely adopted text, which would appear likely if most or all law schools adopted this curriculum format, one or more suitable texts for each course would probably become available.

I am not, however, aware of any widespread movement toward offering students a broader menu of law-and-economics electives. To the contrary, the law-and-economics movement in law schools appears to have crested if not receded somewhat from its high point.[37] Curric-

37. *See* Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics,* 65 CHI.-KENT L. REV. 23, 32 (1989) ("Compared to a decade ago, law and economics is less often seen as an intellectual tide with which every scholar must come to terms, but rather as a technical sideshow that a young law professor may now spurn with little professional peril.").

ular reform efforts in legal education now focus more upon enhancing student writing skills and practical lawyering abilities than on offering a broader selection of interdisciplinary electives.[38] The awkward mix of students in law-and-economics courses will probably persist indefinitely. Conscientious teachers will have to continue to muddle through without an adequate core text, laboriously cutting and pasting their homemade sets of course materials. No relief is in sight, and *Cases and Materials* unfortunately provides little help.

38. For example, Southern Methodist University, where I teach, recently adopted a significant curricular reform centered around the introduction of a first-year "Lawyering Process" course and expanded availability of upper-level elective seminars with stringent writing requirements. No expansion of the single-semester "Economic Analysis of Law" elective into a two-semester sequence along the lines discussed in this review was seriously considered.