
REVIEWS

Prelude to Political Economy, KAUSHIK BASU. Cambridge University Press, 2000, xv + 288 pages.

There are two kinds of good economics books. The first kind presents some useful body of data, surveys some field of research, or otherwise covers a topic with the requisite thoroughness. The second kind offers some new mechanism or idea, making us go ‘Ah-Ha!’ Schelling, Olson, and Downs are among the masters of this tradition. It is these latter books that most readers truly value, even when the books sometimes fall short of the traditional standards of pure science. Good Ah-Ha books are simply hard to find. Any book, with any Ah-Ha, is for me an excellent book, no matter what other faults it might have.

A quick look at Basu’s book shows that it does not fit the category of a thorough study or survey. He covers everything from game theory to norms to the foundations of economics to the nature of the state. The question remains whether it fits the second category of an Ah-Ha book, and partly it does. Here we have a very smart economist, who knows all the standard results of his discipline, thinking very hard about political economy and government, and willing to entertain speculative notions. He does come up with something.

Basu warns us at the beginning (p. xii): ‘. . . it is not a book that can be read quickly, at least not with comprehension. It is meant to be *worked* through’. He then notes that his book contains messages between the lines, much as poetry might. We are told: ‘In places I have tried to say things that are difficult to articulate with full precision.’

Yet the book, at least at first, lulls the reader into complacency. Despite the warnings of the author, the early material bored me, and I found myself reading it quickly rather than working through it. Basu surveys the usual set of results from game theory, including the nature of a mixed strategy and individual rationality. Short three or four-page sections offer his perspective on a variety of game theoretic concepts and paradoxes, one after the other.

We then turn to norms, culture, and beliefs. Again, short three or four-page sections on various topics of interest, but still no Ah-Ha.

The Ah-Ha, at least my Ah-Ha, comes in Section III on The State. A central problem, perhaps THE central problem in public choice theory (and law and economics) is to endogenize the state. We have realized long ago that the state is not simply a benevolent planner maximizing a social welfare function. Public choice models have proliferated, such as the median voter model, but these typically take the broader institutional structure as given. A state, and a democracy, is already in place. The same limitation applies to most special interest group models.

To this day, the public choice revolution has just barely touched the theory of economic policy. We take the state as an autonomous variable, and ask what better or worse things it should do. Public choice theory *has* been used to remind us that governments are neither omniscient nor necessarily benevolent. But few people have used public choice theory to ask the more fundamental question of which policies comprise possible equilibria for governments.

To endogenize everything, every aspect of the state, would seem to make theory too complex. Economic models typically take most property rights as given, and are partial equilibrium in nature. This practice has demonstrated its usefulness over decades of research.

Economists and social thinkers have offered various solutions to endogenizing government. Some economists argue that we should think of the state as a very special kind of business firm. Libertarian-inspired work, as we find from Franz Oppenheimer and Winston Bush, has treated the state as a predator, equipped with unique coercive powers. Yet neither of these theories seems satisfactory. The corporate analogy falls apart along too many dimensions, including origin and governance structure. More importantly, the current theory of the firm requires that property rights and political institutions be already in place, which makes it an unsuitable base for a theory of the state. The coercive theories capture important aspects of state power, but overlook the role and importance of public consent.

Basu offers a simple yet workable solution to the problem of endogenizing the state. He tells us that the state is 'nothing but a bundle of beliefs and expectations in the minds of the people. The state, in the end, is nothing more tangible than the ordinary citizen's belief, that, if he behaves in a certain way, the agents of the state, who are simply other citizens, will punish him or reward him . . .' (p. 189). It is incorrect to say 'We are the government', as a high school civics class might teach, but our conjectures and expectations nonetheless determine the nature of government.

The historian of ideas will note that this idea has its roots in the writings of David Hume, as Basu indicates. Hume stresses how

governments of all kinds, even tyranny, are based on public opinion. This does not mean that everyone consents to the tyrant, but if public opinion stopped regarding the tyrant as the relevant state authority, the tyrant would quickly lose his power. Hume wrote: 'No man would have any reason to *fear* the fury of a tyrant, if he had no authority over any but from fear; since, as a single man, his bodily force can reach but a small way, and all the farther power he possesses must be found on our own opinion, or on the presumed opinion of others'. (p. 117, taken from p. 34 of Hume (1987) [1758].)

This conception of the state, as opinion, allows us to put game theory at the very core of public choice. The conjectures and expectations I hold, of course, likely depend on the conjectures and expectations of others. This interdependency gives rise to civilization and property rights, but also accounts for potential institutional failure. We know that multiple equilibria are common in such games, and we do not generally expect to end up in the most desirable of such equilibria.

Basu points out how radically this concept of the state changes how we approach economic policy. Government failure is no longer the primitive concept. Rather apparent government failures can be traced back to some non-governmental problem, such as reaching an inferior solution in a game where conjectures matter. Whenever government policy appears to be failing, we need to ask what deeper reason is causing the public sector to malfunction, and how that reason might be remedied, if indeed it can be at all.

The complete endogeneity of the state might imply the unpleasant conclusion (is it unpleasant?) that democratic governments are optimal, all things considered. Economists of all persuasions are fond of criticizing government policies. It is easy to see how such policies fall short of an ideal, just as real world markets rarely meet the perfectly competitive ideal. Yet this does not mean we have government failure. We need to compare the government we have to the best possible government we might have, using some theory of the endogenous state. Once that comparison is made, it might turn out that our government is about as good as it can get, at least given current constraints and technologies.

Although this book is full of interesting ideas, Basu never develops them in depth. He gives a new theoretical account of how to think about the state. And he shows us how this changes policy advice. But beyond that we are not sure how to proceed. He never systematically works through the main problems of public choice theory or shows us how his approach might resolve them. Nor do we get a clear sense of what kind of political philosophy his approach might imply. In this regard his insight will not provide an Ah-Ha to the skeptical doubters, those who wish to see an idea prove itself before lending it credence. The book also

has no empirical component, which will cause many to reject it out of hand.

Numerous points are left hanging. For instance, Basu does not do enough to develop the concept of asymmetric involvement. He notes correctly (p. 192) that the expectations of some people, and their positions, matter more than the expectations of others. This will make certain institutions and certain jobs more 'state-like' than others. We are told this forms the basis for a theory of power, but the analysis remains murky. And how might a totalitarian state differ from a democracy? What kinds of differing conjectures underlie each case?

This treatment of the state does not exhaust every interesting aspect of Basu's book. The discussion of how economists can matter in a world of endogenous government (Chapter Seven) is fascinating. The suggestions for how rule utilitarianism avoids collapsing into act utilitarianism (Chapter Ten) are original and will interest the specialist, if not most economists.

In sum, we have a curious book. The intelligence and clarity of the author can never be faulted. Ideas are at the forefront, not technique. The book is often highly original, but the first half is strictly derivative. Nonetheless there are new ideas of value, most of all about the state. I would have been happier had the author started at the truly new, focused on that, developed it, and thrown out the rest. That disappointment, however, is outweighed by the rare pleasure of receiving something conceptual and substantive, rather than receiving nothing.

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REFERENCES

Hume, David. 1987. 'Of the first principles of government'. In *Essays: Moral, Political and Literary* [1758]. Liberty Fund

Trust: A Sociological Theory, PIOTR SZTOMPKA. Cambridge University Press, 1999, xii + 214pages.

In *Trust* Piotr Sztompka offers a thorough discussion of the workings of trust in society. About half his book is conceptual analysis and half is explanation of various manifestations of trust and the effects on it of political changes. Most of the explanatory work is at the macro-societal

level and draws on his own earlier work and the work of various sociological theorists. Many readers will want to turn fairly quickly to his sharp account of developments in Poland not only from 1989 forward but already from the mid-seventies forward. Here he reports data from his own research done in *medias res* and he conveys a sense of dynamism, change, and uncertainty that is palpable. Those were heady times, made more acute and often fretful by the lack of confidence in where things might go. In one of his ironic twists he observes that the very people who were pleased with the general transition from 1989 criticized the new order for not being socialist enough with public provision of jobs, apartments, medical care, education, and even facilities for leisure activities (p. 179).

Much of the macro-sociological work on trust by numerous scholars, including Ulrich Beck, Anthony Giddens, Niklas Luhmann, and Adam Seligman, among those whom Sztompka cites (p. 39), has associated the rise of concern with trust in modern societies with a supposed increase in the importance and intrusiveness of risk in our lives. Because these scholars do not give us anything like measures of risk in earlier times and today, it is very hard to judge what they mean and whether they are right. They merely cite such modern risks as the environmental disasters that we might bring on ourselves. I think the thesis of increasing risk in our lives, even if we count only those risks that others (and not nature) impose on us, is implausible. In much of history, local communities were subject to the completely unannounced arrival of military hordes who descended upon them and summarily raped and murdered them and pillaged their lands. They were also subject to devastating diseases brought to them by visitors from other places. In part for these reasons, their lives were much shorter and radically poorer than are the lives of people in the advanced industrial states that are supposed to fit the thesis of trust as a response to harsh risk. The supposition that things are much harder today is a variant of a golden age fallacy. It is an especially odd one in that it requires that things have got worse despite the apparent facts that we are doing remarkably better today and that our expectations are that we will continue to thrive.

Among the things that technology and science have brought us are individual connections to vastly more people than anyone in earlier centuries could ever have had relations with. We cannot know these vastly many people as well as the villagers of, say, medieval times knew the several dozen people in their own village, many of whom would have been almost the only people they would ever have met or dealt with. This change means that we must constantly size new people up as a normal part of our dealings. Sizing them up means judging their likely trustworthiness in dealings with us. Of course there are risks in these dealings, but those risks are commonly small. The smaller they are, the

less we need to worry about the trustworthiness of others. When the risks are very large, we want the backing of others and, especially, of institutions to enforce the cooperation we want. In an earlier time, we might have relied very heavily on our communal norms and their enforcement by all of us against any miscreant who behaved uncooperatively in certain contexts. But our lives have long since gone beyond such community.

Sztompka's conceptual discussions raise three worrisome issues that sometimes enter into the later explanatory discussions. First, some of the concern with trust is often better framed as a concern with trustworthiness. For example, Sztompka refers to a 'trust culture' (pp. 99–101 and Chapter 6). Some of the mystery in how we come to develop such a culture becomes less opaque if we focus on how we create trustworthiness in people and institutions. With respect to some things, particular individuals or institutions can establish their general trustworthiness even in the midst of generally untrustworthy others (it would be foolish to be generally trusting in such a context). If you come to see me as trustworthy in some context, then virtually by definition you have come to trust me. My trustworthiness might be a disposition grounded in moral commitments or character, but it might also be grounded in my recognition that being trusted by you and others will open me up to beneficial opportunities that would not be open to an evidently untrustworthy person.

Throughout the burgeoning literature on trust, there is a tendency to write about trust in terms that would be more applicable to trustworthiness. In a story about his being deceived by a student who wanted a grade for a course *before* finishing a required paper, Sztompka gets the issue entirely right in his sly observation that 'rules, codes, and regulations may sometimes embody the collective wisdom about the average trustworthiness of people' (p. 38). The rules at the university where he taught that student barred his giving her a grade before she had finished her paper. The rules were right in her case – she never did the paper. As in the example of the student, it is trustworthiness that we need to secure and then we can generally count on trust. Unfortunately, in English, the phrase a 'trustworthiness culture' is too cumbersome and lacks the rhetorical appeal of a 'trust culture', but it is what we must want. The saving grace is that, if we have a trustworthiness culture, a trust culture is sure to follow.

Second, much of Sztompka's discussion of trust could proceed just as clearly if he substituted 'mere expectations' for 'trust'. Of course, without expectations of another, one would not be said to trust that other. We can be said to trust only if we expect reliability, and if we expect unreliability we distrust. But if there were nothing but expectations at issue, Sztompka would not have written this book. He forcefully

excludes mere expectations of how nature will treat us to focus only on expectations of how people and entities, such as organizations and goods, that are aggregates or products of people will treat us (p. 20). One of Sztompka's many examples is his 'trust' that the new Le Carré novel will give him pleasure if he buys it. He trusts because it is a best seller, it has a reliable publisher, Le Carré gets good reviews, a friend recommends the book, and so forth (p. 47). Some of these considerations are little better than mere expectations. The friend's recommendation begins to sound like something one might trust. But the reliable publisher? If there is anything we can predict here it is that a new Le Carré novel will sell a lot at first, even if it is a lousy book, and any commercial publisher would want to have the book in its list. Expectations of sociological aggregates tend to edge toward expectations of natural phenomena in some contexts and the dividing line between these two categories may not be the best place to look for a definition of trust.

The third conceptual issue is that Sztompka conflates trusting with acting on the trust. On most of his account, for me to say I trust you could mean simply that I think you will be trustworthy. But there might be no occasion for me to act on my trust by entrusting some matter to you. Hence, my action and my knowledge of your trustworthiness – which constitutes my trust – are different. Sztompka speaks of 'resorting to trust' (p. 14) and of 'placing trust' (p. 25), and of trust as a resource (p. 16), a policy (p. 23), a strategy (p. 25), a commitment (p. 27), a decision (pp. 66 and 69), and a kind of capital (p. 77). Despite these moves toward making trust an action, he also speaks of trust as a kind of knowledge with epistemological foundations (p. 97). I think the latter view is the more compelling and that conflation of trust as a form of knowledge with trust as an action confuses analysis. Surprisingly, the passages in which Sztompka makes trust an action seldom actually matter for what he argues in his explanations of trust and the effects of trust, almost all of which could as well be built on a conception of trust as a matter of knowledge. The frequent asides on trust as an action mirror vernacular usage but play almost no theoretical role.

Unfortunately, the conflation enters Sztompka's definition of trust: 'commitment through action, or – metaphorically speaking – placing a bet' (p. 26; also p. 69). Here Sztompka runs against vernacular usage, in which it is perfectly sensible to say I trust you even though I might not now have an occasion to act on my trust by entrusting something to you – I have no bets to place. Perhaps the most common way people use the term trust is simply to say that they trust some particular person, meaning that they would entrust certain matters to them but not that they do so in this moment or maybe ever. Again, however, this definition of trust as 'committing ourselves to action' makes little difference in Sztompka's actual explanations of various social phenomena of trust.

Indeed, it is not clear how the conception of 'trust as commitment' could apply for most people when they say they trust the government. What action commitments do most of these people make? Typical Poles are presumably no more obedient to the newly trustworthy government of the late nineties than they were to the untrustworthy regime of the late seventies. Some have changed their activities in response to the change but not many are likely to have made any action commitments to the later government.

The conflation also leads to two very odd analyses. First, Sztompka remarks that in situations of helplessness in the face of, say, a terrorist's action or a president's decision on tax policy, 'I simply have to resort to trust' (p. 21). On the contrary, I cannot 'resort' to trust if I suppose that these two actors are at all likely to do what I do not want. I am merely helpless and, in the face of their likely untrustworthiness, I have no ground for trust, for belief in the benignity of these two powerful figures toward me. If I think the worst of them, I merely grit my teeth and try to survive their abuses. The only thing that can meaningfully force me to trust someone is evidence that they are likely to be trustworthy toward me in the relevant context.

Second, speaking of trust as placing a bet in a risky context, Sztompka says 'it is a paradox that trust itself, that is, acting "as if" the risk was small or nonexistent, in fact adds another risk, the "risk of trusting"'. Trust copes with one type of risk by trading it off for another type of risk' (p. 32). If trust is based on an assessment of another's trustworthiness in a relevant context, it is clearly apt to be a matter of degree. My degree of trust includes my assessment of the risk I face; it does not mistakenly convert that risk into something small or nonexistent. We do not need a paradoxical salvation of reason here. To act on trust commonly is to take a risk to some extent, sometimes to a very great extent. The degree of risk you think you face in attempting a cooperative venture with me is simply inverse to the degree to which you trust me.

Sztompka discusses reputation, which is a centerpiece in many discussions of trust, in a way that is very common but misleading. He supposes that the value of your reputation is its value in my predicting how you will behave in certain contexts. He defines your reputation as simply the record of your past deeds (p. 71). Hence, it becomes a predictor of your dispositions for certain kinds of action. Reputation does have these qualities, but its great importance in social life is the incentive it gives the person who has a good reputation to behave in ways that sustain that reputation. Your good reputation encourages others to choose you for various cooperative ventures that would be in your interest. Firms pay heavily for reputations because they are so valuable in this way. Individuals do likewise, although they do not typically spend resources on advertising. Once you have a good

reputation, you are likely to want to maintain it and that fact gives me confidence to undertake dealings with you. The best way to establish a reputation is commonly not to tell others of your reliability but rather to demonstrate it very clearly in actual interactions. At the very large scale of our societies, we typically cannot expect many of those with whom we deal to know our reputations or to be able to rely on our incentives to maintain them.

This is a bigger issue than it might seem. Potentially cooperative relations outside our closer circles of relatives, friends, and frequent associates must often depend on confidence in others with whom we might never have occasion to interact again. Reputational effects can be very important in motivating such people to fulfill the cooperative ventures that we entrust to them. For many of us, such interactions are very common, so that the incentive effects of maintaining a reputation are very important to us. Often, of course, we resort to institutional safeguards, such as the law of contracts to protect us in such contexts, but often there is no institutional safeguard that we can turn to. For example, if the scale of our exchange is not very large, the costs of resorting to a legally enforceable contract might outweigh the good that we seek in cooperating with each other. In large part because of the costs and difficulties of turning to institutions for ensuring our cooperative relationships, we find it sensible to protect our reputations by living up to them. Those with good reputations may tend to deal primarily with each other, so that the cost of not establishing or living up to one's reputation may be virtual exclusion from many kinds of cooperative venture.

Sztompka ends his survey of trust with a lively account of the transition in Poland over the past couple of decades. He goes back to the mid-seventies to ground the sense of the roller coaster ride that Poles have been on from good to bad days during the last decade or so of the Communist regime to the even steeper roller coaster ride they have experienced since 1989. In some ways, one might expect that respondents to the several surveys that Sztompka cites would have been even more volatile in their swings because the economic and political swings were dramatic. Sztompka ranks the Solidarity movement – which started in August 1980 – as the greatest political movement of modern history (p. 157). Even if one thinks that some other movements were in some senses greater – for example, the Chinese revolutionary movement affected far more lives and affected them more massively – it is hard for most people to imagine anything in their political lives as dramatic as the Solidarity years in Poland.

Two of the swings during the decade after 1989 were from euphoria to distress as the effects of the transition were at first fairly harsh economically, and then back to optimism as the reforms, both political and economic, began to work positively. It should be no surprise that an

initial transition from central to market allocation is costly in the short run because it undercuts systems that, even if inefficient, did produce and deliver goods. Getting new institutions for the market in place cannot be instantaneous. Neither could it seem entirely certain that the change would work, so people tended to game the changes in the short term, making profits where they could. This fits Sztompka's concern with stable expectations: it takes time to develop stability and in the interim people have weak grounds for trust that is based on expectations of reliability. Because Poland achieved greater success than most of the other eastern transition states, Poles now have reason to harbor relatively optimistic expectations.

Sztompka does not give us the survey questionnaire items, so we cannot be sure just what Poles were claiming about their levels of trust. Even if we knew those items, however, we might still not be very confident about what it is we now know from the survey results. Clearly people seem to have more and less positive views of government and presumably many of them are willing to say that they trust the government. This fits Sztompka's view of trust as expectations of reliability but, as noted above, it does not so clearly fit his definition of trust as an action commitment. From similar survey studies in the United States and many other nations, it seems clear that we do not know very clearly what people mean when they answer particular questions that are then interpreted as trust items. The questions are notoriously poor but the responses to the few questions are nevertheless highly correlated. Perhaps it would already be good enough in the Polish case if all that the respondents are telling us is that they are confident that their government is now benign and maybe even competent. That might even be good enough in the case of other nations as well. But the Polish case is clearly an especially interesting and rich one. We are lucky that such an astute sociologist was at work analyzing the changes as they happened.

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Equality, Responsibility, and the Law, ARTHUR RIPSTEIN. Cambridge University Press, 1999, xii + 306 pages.

Guided by Aristotle's classification of the different kinds of justice, most political and legal philosophy has recognized a division of labor between

the development of theories of distributive, retributive, and corrective justice. The first and second have occupied political philosophers extensively, while the third has, for the most part, been relegated to lawyers and legal theorists. This is puzzling, however, since any comprehensive view of the rights and liberties protected by social institutions should take as much account of the ways that private individuals can cause harm from permissible but risky behavior as it does of the ways that governments can do so. Attending to such issues, however, requires the development of a theory of responsibility that cuts across contexts, applying to questions of economic policy, the criminal law, and the law of torts.

This forms the main current of Arthur Ripstein's thoughtful and original work, the core idea of which, put succinctly, is this: responsibility in both tort and criminal law should be defined not in relation to the conditions of agency but according to objectively determined principles of justice; such principles, in turn, should be defined in terms of reciprocity, specifically the fair terms of interaction among citizens. So corrective and retributive justice must be specified with reference to the 'reasonable person' who embodies the correct balance of interests in security and liberty that such objective, reciprocity-based, principles would require. Responsibility, then, is determined by principles specifying that balance.

This view is marked as 'political' by Ripstein, in the sense that it eschews metaphysical accounts of responsibility (based, say, on the conditions of agency or on an account of causation). What is left unclear, however, is whether Ripstein means 'political' in the sense of 'determined through political, that is democratic, deliberations', or political in the sense of 'specified as part of a philosophical account of the basic principles of justice in a society'. There are many indications that he intends the latter, but as I will remark below, there are other reasons to favor the former.

Ripstein's application of this core idea is wide ranging and authoritative, and anyone wishing for a clear and illuminating survey of problems of responsibility in various corners of legal theory should read this book. He begins with tort law and weaves the idea through various aspects of corrective justice; he then turns to criminal law and deals with theories of mistakes, self-defense, punishment, recklessness and attempts. In a final chapter he applies his political conception of responsibility to questions of distributive justice. The result is impressive, even if, as I will suggest, the conception of responsibility urged as a replacement for dominant views is not as fully articulated as one might like.

Two alternative metaphysical accounts of responsibility that Ripstein rejects are the voluntarist account and the causalist account. The former

affixes liability to those consequences an agent voluntarily (and hence knowingly) brings about. But this is too weak, Ripstein argues, since we often hold people responsible for what they fail to attend to as much as for what they voluntarily bring about (pp. 31–2). Causalist accounts, on the other hand, imply a kind of generalized strict liability, where causal involvement in a loss grounds liability for damages (otherwise all losses lie where they fall). But this view suffers from the metaphysical indeterminacy of ‘cause’ since those affected by a harmful act are as much causally necessary for the effect as those who initiate it. Without a normative account of responsibility (who *should* be tagged as the causally important agent), causal accounts fail to uniquely fix responsibility at all (pp. 35–42).

The replacement view of responsibility that Ripstein develops is a thoroughly normative conception, where the question of who ‘owns’ a risk (who can legitimately be forced to pay the costs of risky acts that ripen into harms) reflects a broad political view of the reasonable balance of interests in security and liberty, a balance which manifests equality, reciprocity, and fair terms of interaction. No non-normative account of agent responsibility will succeed. Because of this, libertarian views of responsibility founder on the failure of wholly individualistic accounts of responsibility. For such libertarian views must rest on either a voluntarist or a causalist account of responsibility, and both, Ripstein shows, prove inadequate (Chapter 2).

Negligence is, as Ripstein points out, the primary basis for tort law in Anglo-American systems (p. 48), but theories of fault notoriously bog down in the morass of subjectivist, agent-centered accounts of responsibility. Ripstein conceives of fault in terms of rights but sees rights as part of a Kantian idea of equal liberty and security for all, a balance of interests manifesting a fair division of risks (pp. 50–8). Here and elsewhere, Ripstein implies that the contours of the concept of responsibility will be worked out by a philosophical account of principles of fair terms of interaction reflective of reciprocity and equality and embodied in a reasonable person standard of conduct. This points to judicial resolutions of hard cases (guided by such abstract principles) rather than, say statutory remedies. However, the latter, blunt-edged as they often are, are expressions of collective deliberation concerning the community’s attitude toward the interests expressed by the reasonable person standard. This again touches on the ambiguity of ‘political’ in these contexts.

The capacity for foresight is basic to tort liability: I can only be held responsible for those outcomes I can be expected to have predicted. But Ripstein’s claim is that I am responsible for those outcomes I can be expected to have foreseen, *according to a reasonable assignment of risk-ownership*. This is importantly different from tying my responsibility to

what I did or even could have foreseen. Grounding tort liability in first-person accounts of moral agency all fail, for Ripstein, because they throw the net of responsibility too widely in some places and too narrowly in others. On the one hand, one is sometimes *morally* responsible for knowingly causing injury to an overly sensitive plaintiff (Ripstein's example is a case where talking in a normal voice causes someone to have horrible headaches), but we would not hold the person liable for damages in such cases. On the other hand, there are cases where one fails to see an effect of an action, and hence escapes moral responsibility, but a fair arrangement of responsibilities would pin the costs of such injuries on the ignorant person because of what she *should have* known (pp. 100–4). One consideration Ripstein does not make here – and one quite in the spirit of his overall project – is that reference to reciprocal relations with others (within a dynamic of fair norms) will need to be made even in *agent-centered* accounts of moral responsibility. It may turn out, in other words, that the best account of moral responsibility *outside the legal context* is also a political one, in Ripstein's sense of that term.

Ripstein also applies this model to various fascinating cases of shared negligence (pp. 108ff.). In such cases, Ripstein shows, no metaphysical account of causation or moral account of responsible agency, alone, will satisfactorily locate liability in the right hands, despite attempts using contributory and comparative negligence as guides; only an account of reasonableness can be utilized to determine when an intervening act (say throwing off to another person a lit stick of dynamite thrown at you) should be seen as merely part of the natural order, and hence not culpable, rather than an act bearing partial responsibility for the harm (p. 111).

The same move is made in handling problem cases of acting out of necessity or harming in the midst of attempting a rescue: if the acts in question can be considered those of a reasonable person, they escape liability for injury. But such an account, as Ripstein brings out, depends on an evaluation of the importance of the activity in question – to save one's own life in the case of necessity, say, or to save another's in the case of injuring during rescue (p. 127). This importance, on Ripstein's account, can never be fixed simply by the subjective weight put on the activity by the involved persons, but rather by an 'objective' balancing fashioned by the political principle embodied in the reasonable person standard.

Of particular poignancy in this balancing act is the case of religious activity. In considering cases concerning the refusal of life saving treatment for religious reasons, for example, Ripstein writes that '[t]he reason for treating the person who fails to mitigate [her own injury] on religious grounds differently is not that the belief is deeply [or widely] held . . . It is rather that the law supposes that the particular category of

belief is so important that it is reasonable to act on it' (p. 129). But this precisely shows how the reasonable standard cannot alone serve as a solution to the problem of conflicting interests but merely provides a re-description of it. For the question is precisely *why* it has been determined that religious belief is so important that it is reasonable to act on it in such cases (or not). This is even more acutely seen when, as Ripstein admits, certain groups use the cover of religious belief to defend racist practices. The weighing of the importance of religious freedom and security against racial discrimination is hardly sorted out by the use of a standard of 'reasonableness' alone. Philosophical theory must be supplemented in such cases by actual collective deliberation, at the legislative stage perhaps, reflective of the voices of all involved (U.S. Native Americans who use peyote in their religious rituals for example).

Turning to criminal law, Ripstein traverses a broad swath of legal terrain (including theories of punishment, excuses, mistakes, attempts, and consent). In all, he insists that an objective standard of reasonableness, based on a principled balance of the relevant interests reflective of equality and reciprocity, should be applied. What counts as an excuse, for example, will be the presence of conditions where a reasonable person would have acted as the defendant did. Such an objective standard functions also in cases of mistakes, specifically mistakes concerning self-defense and consent (Chapter 6). The subjectivist position on mistakes, to which Ripstein is systematically opposed, is that the actual beliefs of the accused are all that are relevant to guilt; questions of reasonableness are beside the point (p. 173). This view, as Ripstein points out, is based on the importance of voluntariness as an element in a crime. But such an approach would allow sincere mistakes of law to exculpate as well (p. 180–2). And the Hegelian position that all moral agents have access to the moral (and hence judicial) law fails to ground the subjectivist position since any conception of agency robust enough to imply knowledge of the relevant law would surely need to include an objective standard of reasonableness within it: what the moral law requires (to which all moral agents have access, on the Hegelian view) will include standards of fair interaction that objective criteria of reasonableness will help to fill out (p. 187). As I noted earlier, this is a view implicit in much of what Ripstein argues but rarely made explicit, that even if one were to ground a model of responsibility in the conditions of agency, any plausible account of such agency itself will necessarily make reference to interpersonal standards of right.

A parallel analysis is given for issues of consent. In cases where a crime is committed when consent for the activity in question is absent, the question of determining valid consent turns on who should bear the risks that mistakes (of consent) are made. Ripstein plausibly claims that the cost of getting valid consent in these cases is so much less than that

of suffering unconsented-to harm (rape for example) that the liberty interests of the accused are handily outweighed by the security interests of the victim. This illuminates why 'no means no' in sexual encounters, for unlike other contexts where struggle and fighting are inherent in the activity (Ripstein's example is boxing), contexts of sexual intimacy are not ones where overt indications of non-consent can be taken reasonably to mean anything but a refusal to cooperate. Ripstein treads in treacherous waters here, though he is guided by otherwise sound theory in doing so. For the implication of his political reading of reasonableness (and hence responsibility) is that norms or reciprocity vary with context, and context is subject to shifting patterns of interpretation and ongoing practice. Such patterns of interpretation and practice are themselves embodiments of power politics: who gets to say what 'no' means in sexual encounters. For a long time, men in power set that standard and unabashedly classified women's resistant behavior as indicating nothing more than blushing acceptance rather than the protection of her bodily integrity (as Ripstein acknowledges – see p. 213, n. 69). Ripstein might here have addressed head-on feminist critiques of reasonableness standards in rape law motivated by just such considerations (such as in Catherine MacKinnon's work).

Ripstein's approach to tort and criminal law, then, puts heavy pressure on the objective standard of reasonableness that he thinks a political conception of risk ownership will yield. This standard is objective in the sense of abstracting from the actual, subjective states of defendant and victim, but not in the sense of 'not open to debate' (p. 88). It is a public expression of the correct balance of interests (in security and liberty) grounded in the importance of leading an autonomous life. However, Ripstein's position should be seen as more of an argument for a *paradigm* (and a paradigm shift) rather than a fully worked out theory. This is because, in many instances, the 'reasonable person' model simply functions as a black box standing in for: 'whatever objectively determined justice solution to the problem of distributing risks would be in situations like this'. The question of fixing liability concerns not merely the scope of liberty *per se*, but the scope of liberty to perform actions expressive of interests of a certain weight. How much weight depends on the substance of those interests. What is left inside the box is a specification of the theory or the procedure envisioned to calibrate the weight of those interests.

This brings the focus to where, in a sense, it was all along, to questions of distributive justice. Ripstein applies his political model of responsibility to debates concerning whether a just distribution of resources must include provisions for holding people responsible for the use they make of those resources (or primary goods, or the like). Ripstein correctly points out that attempts to draw the line between responsibility

and luck in these theories have infelicitously tied responsibility to notions of agent control, a connection that Ripstein has attempted to sever in his alternative, political view. On this alternative, the line between losses for which the person will be held responsible and so be made to absorb and those due to luck and hence due for correction, must be drawn 'objectively' (p. 266), which is to say according to political principles not reducible to the conditions of agency or practical reason. Doing this, of course, requires taking substantive stands on the balance between various competing interests, but Ripstein insists that we do this by imagining such a balance as being struck within the mind-set of a representative reasonable person.

Consistent with some recent egalitarian theorists, Ripstein thinks that responsibility for some misfortunes must be held in common no matter what their source, so that such disabilities that preclude a person from exercising meaningful choice about her life must be repaired, as far as possible, via publicly supplied compensation (pp. 266–7, pp. 272–3). Against the objection that some people bring such debilitating injuries on themselves (by taking drugs or engaging in foolishly dangerous hobbies for example), Ripstein claims that fairness demands we repair such losses since the exercise of basic capacities of autonomous choice is fundamental to ensuring fair terms of interaction of any sort, hence the hapless thrill seeker is given public attention as much as the careful but unlucky homebody (just as an enormously lucky gambler could be liable to a tax on her winnings – agency-responsibility for the outcome is beside the point: see p. 293).

Ripstein argues that accounts of the balance between security interests and liberty interests, and the corresponding substantive accounts of the kinds of activities that express such interests, do not unduly offend against liberalism's commitment to neutrality: 'all are presumed to have interests in liberty and security', he writes (p. 277, n. 9), and all are expected to moderate their plans in light of publicly recognized, objective designations of the proper balance of those interests. However, all do not have *the same* balance of interests in security and liberty, and some are willing to bear (or impose) great risk of harm when the activity in question is central to their value orientation. The view that a single model of the reasonable person can be constructed within whose personality profile we can strike such a balance, for all is to assume an enormous theoretical burden, one which is not delivered upon in these pages.

Ripstein claims for example that a plausible theory of justice will take specific stands on the balance between certain substantive interests:

Suppose that you have a serious, but treatable illness. There are strong moral reasons for others to help you find the resources to pay for the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In a discussion of the problem with methodological individualism:

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

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

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

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

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

Regarding public choice theory,

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

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

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

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

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

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

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

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

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