

A Review of Efficiency Instead of Justice? Searching for the Philosophical Foundations of the Economic Analysis of Law*

By William B. Griffith**

* Klaus Mathis (author), translated by Deborah Shannon, Springer, 2009, 220 pages.

** Elton Professor of Philosophy and Professor of Public Policy, George Washington University.

Although it is not at all obvious from the title, this book is intended as a text for law students with an interest in the "economic analysis of law". It is an English translation of the third revised edition of a book that has already been used, apparently successfully, to capture or supplement lectures in the subject at the University of Lucerne and in some German law schools. On the whole it seems admirably designed to present students with a not-very-detailed, but an unusually broad, view of its subject.

Thus it is not, as one has come to expect from American texts on the subject, a book intent on persuading students of the importance and significance of the economic approach – although this is not an illegitimate aim of such texts, after all. Rather, one of the central intentions seems to be to demonstrate not only the advantages but also the *limitations* of this form of analysis. All of the chapters on economic analysis of law contain expositions showing the positive power of the economic point of view to clarify what is going on, or should go on, in certain legal transactions. But each also has explicitly critical sections that make no bones about the problematic aspects of attempting to substitute a new goal for a judge, i.e., to find an "optimal" policy to "solve" a legal problem, e.g., of "tort liability".

Thus, only the first four chapters are on the positive economic analysis of law directly, although there is an important additional chapter on Richard Posner's normative theory and defense of "wealth maximization" as superior to "utility maximization". But before approaching Posner's theory, Mathis attempts to "place it in a broader context", and proceeds to discuss "philosophical foundations" of the normative analysis of law. Thus, in addition to questioning the imposition of a norm of "efficiency" on legal analysis, somewhat surprisingly there are chapters on alternative conceptions of the normative analysis of legal systems, including one on Adam Smith's theory, on Bentham's utilitarianism, and on Rawls's theory of justice.

A Detailed Example of Economic Analysis of Law

It is perhaps worth dealing in some detail with an example of Mathis's explanation and analysis of the application of economics to law. In a section entitled "Applications of Economic Analysis of Law" (69-83), Mathis discusses one of the most "popular" fields of application, tort law. This field covers the legal issues arising from civil litigation over (non-criminal, non-contractual) harms that one agent imposes or allegedly imposes on another, either intentionally or negligently. He notes that the goal of an economic analysis is not the usual legal one, of finding the proper compensation owed to the party who suffered damages, but rather the goal is to find a decision rule such that in the future the "incentives" for action by the parties are properly placed. That is, the imposition of damages may be expected to cause one or both of the parties to take precautions to avoid repetitions of the event giving rise to the damages, and the aim is to get this right.

This turns into a search for what Guido Calabresi called "the cheapest cost avoider",¹ that is, making liable for damages the party who can avoid damages at the lowest cost. Thus the aim becomes "efficiency" or the "minimization of the social costs of accidents" by forcing all parties to take into account the full internal and external costs in determining an "optimal course of action". After discussing the various alternative cases (burdening the victim, burdening the injurer, or burdening both), Mathis critiques this sort of analysis. Mostly he does this by quoting well-known critics such as law professors H.L.A. Hart and Jules Coleman. Hart notes that the fundamental question presented to the court is "who has the right to damages", and not just how to set the right incentives (78). Mathis quotes Coleman's *Practice of Principles*² to good effect: economic analysis "...seems to ignore the point that litigants are brought together in a case because one alleges that the other has harmed her in a way she had no right to do", and NOT to invite the judge to "pursue or refine his/her vision of optimal risk reduction policy" (78). Mathis is sympathetic to this line of criticism, but goes on to argue that accepting this critique does not

preclude attempting, as a secondary objective, to bear social costs in mind and take them into account when defining liability rules...The goal of any economic analysis of law must be to shed light on the effects of different regulations without demolishing the fundamental structure of liability law...(79)

This statement is fairly indicative of what Mathis is trying to do: to present a balanced interpretation of the economic analysis of law, one in which students will come to see what he refers to as "the explosive force of economic analysis of law" but also be aware of its limitations as a paradigm of analysis.

Philosophical Foundations of the Economic Analysis of Law

The most unusual parts of the book are the chapters intended to set out "the philosophical foundations" of economic analysis of law, including as a centerpiece Posner's theory of wealth maximization contrasted with some

alternative theories. But, and this is the major problem of the book, these suffer from being inadequately *integrated* with the presentation of Posner's theory, or with each other. They are not bad as brief summaries of the views they present, although one might surely quarrel with some of the details. But they are placed in the text as more or less independent units. Any law student would probably be hard pressed to see exactly what the relationship is between Rawls's theory and Posner's theory because the text just presents them side by side, so to speak, with little effort to analyze them comparatively. For example, in critiquing Rawls' *Theory of Justice*, Mathis cites and discusses criticism by "communitarians" such as Michael Sandel, a political philosopher who emphasizes the importance of the community in which an individual develops as a major source of his moral insights. But he avoids discussing criticisms that are closer to, and more sympathetic to, the "economic paradigm", such as that of Robert Nozick or James Buchanan, who are only mentioned in passing (133). Oddly, he prefers to bring in the criticism of a philosophical "outlier" (the very distinguished) Seyla Benhabib who comes from a different (Continental) tradition and whose criticisms have little connection with economics. Thus students would certainly learn to appreciate some flaws in the philosophical theories presented, but would be left up in the air as far as seeing how these relate to the economic analysis of law.

Conclusion

In summary, this reviewer's judgment is that Mathis's text, while constituting a reasonably valuable addition to the available textbooks, suffers from two main flaws. One is that it does not present the economic analysis of law in enough detail so that a law student could really grasp its possibilities and achievements, though the student would certainly grasp its problematic aspects.

The second flaw, just mentioned above, is that the philosophical materials are insufficiently integrated with the "normative" dimension of the economic analysis of law, i.e. Posner's theory. This would mean that an instructor choosing to use this text would be placed in the position of needing to supplement these readings with *extensive* lecturing, for example comparatively analyzing Adam Smith's, Bentham's, and Rawls's theories and also comparing them with Posner's theory of wealth maximization as the guiding principle of legal analysis and argument. I would not think this would be something that most law professors would be happy to have to take on, but my observations, from attending quite a few "philosophy and law" conferences, leave me in no doubt that the American professoriate of law schools contains a significant number of "philosophemanque" who might be eager to take on such a task.

¹ Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis*. New Haven, 1970.

² Jules L. Coleman, *Practice of Principles: In Defence of a Pragmatist Approach to Legal Theory*. Oxford et al, 2001.