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THE ETHICS OF WEALTH MAXIMIZATION: REPLY TO MALLOY

*Richard A. Posner**

Rarely have my views been so badly misunderstood as by Professor Malloy,¹ and I therefore welcome the editors' invitation to respond to his article.

Malloy seeks to draw a sharp contrast between, on the one hand, Adam Smith and other classical or neoclassical economic theorists up to and including Friedrich Hayek and Milton Friedman, and, on the other hand, me. The game of predicting how an eighteenth-century theorist would react to twentieth-century problems, which leads Malloy to suggest that Adam Smith if alive today might well be a welfare-state liberal supporting "low-income housing" and "job training programs" (p. 238), is a shallow one, as well as being inconsistent with Malloy's derision for a jurisprudence of "original intentions," which seeks to play the same game with a group of other eighteenth-century thinkers—the framers of the Constitution. And it is absurd to suppose that one cannot be a follower of Adam Smith in a significant sense unless one agrees with every one of his policy preferences (*e.g.*, for usury laws)—as if economic science had made no progress in 200 years. The idea that John Kenneth Galbraith is a follower of Adam Smith, to be lumped together with Hayek and Friedman in a group set over against me, is laughable; and Hayek and Friedman will be surprised to find that they, like Adam Smith, are supporters of low-income housing. But I will leave these gentlemen to fend for themselves, and concentrate on Professor Malloy's attack on me.

He lodges many charges against my advocacy of the economic theory of justice known as "wealth maximization." I hope I will be excused for focusing on the more lurid ones; the sober ones (*e.g.*, the dependence of wealth maximization on prices, which are in turn a function of the distribution of income and wealth) have been made² and answered³ many times. Malloy says that I am incorrectly perceived

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1. See Malloy, *Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner and the Philosophy of Law and Economics*, 36 KAN. L. REV. 209 (1988). All page references in the text are to Professor Malloy's article.

2. See, *e.g.*, R. DWORKIN, A MATTER OF PRINCIPLE 237-66 (1985); Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 ETHICS 649 (1984).

3. See, *e.g.*, W. LANDES & R. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 17-19

to be a "supporter of the free market" (p. 211), my economic theory of justice being in fact no better than a "sleight of hand" (p. 244) aimed at perpetuating the "tyranny of the status quo" (p. 242). My theory promotes "amorality and the disrespect for individual liberty" (*id.*) and "is biased in favor of the rich," because it "accepts the current distribution of wealth and resources" (p. 245). Indeed, it "den[ies] the very personhood of those who are poor" (p. 253) and "treats the mobility of people in the same indifferent manner as inanimate objects" (p. 244).

But this is only the beginning. At root "Platonic" (p. 246), my economic theory of justice is "based on privileged elitism, mysticism, and collective order" (p. 246-47), is "indeterminative and elitist" (p. 248), and protects not only the status quo and "law and order" but also patriotism and religion (p. 247). I am "able to acknowledge the conceivable justification of slavery on grounds of limited economic efficiency" (p. 248), and I endorse "'mystical elitism'" (*id.*). My theory is "'new speak'" utilitarianism (p. 250), but is actually much worse than utilitarianism because it "excludes the recognition of any legitimate claims against society by the poor" (p. 251). I make wealth maximization "the ultimate social morality" (p. 252).

The moral shortcomings of my approach are highlighted by the recent trial of Klaus Barbie and by a movie about the Holocaust. (p. 252) "But even 'darker' than these memories is the realization that Posner's wealth maximization theory provides no basis for the recognition of crimes against humanity" (*id.*). Indeed, I seem "unable to firmly denounce the Holocaust as an impermissible and immoral tragedy" (*id.*), because I measure "the ability to subjugate, dominate, and immorally violate the humanity of another human being" by "the tormentor's willingness and ability to pay" (p. 253). My theory "can justify and legitimize many atrocities," perhaps including "the tragic treatment of native American Indians" (*id.*). And "once the Barbies, Hitlers, Pinochets, Marcoses, Stalins, Amins, and Bothas of the world acquire wealth, they have not only the power to subjugate and dominate others but they are legitimate in so doing. Wealth maximization, therefore, can hardly be viewed as anything other than amoral if not immoral." (*Id.*) My theory "expands the framework for totalitarian state action" (*id.*), and can be used "to support most of the dictatorships and totalitarian regimes in Latin America and elsewhere" (*id.*). The theory may even legitimize the "'final solution'" (p. 254).⁴

(1987); Posner, *The Justice of Economics*, 1987-1 *ECONOMIA DELLE SCELTE PUBBLICHE* 15; Posner, *Wealth Maximization Revisited*, 2 *NOTRE DAME J. LAW, ETHICS & PUB. POL'Y* 85 (1985).

4. It is apparent that Professor Malloy's article is part of the same genre of measured,

The theory that Professor Malloy believes generates these ghastly results is a political theory which teaches that government should not, in general, intervene in private activities unless the intervention is likely to increase the wealth of society, as measured by people's willingness to pay for goods and services, tangible and intangible.⁵ Basic criminal laws, laws against pollution, the charitable exemption, the antitrust laws, the common law of torts, property, and contracts, laws providing for courts, police, and national defense, and laws requiring the state to pay for the legal expenses of a poor person accused of crime, are all examples of laws that (depending of course on how they are configured and enforced) are plausibly wealth-maximizing. Purely redistributive laws, many of them obtained by special-interest groups (which Malloy, surprisingly, supposes me to favor), are suspect; so of course are laws interfering with free markets, such as laws restricting opportunities on racial grounds. A society dedicated to wealth maximization would be somewhat less *dirigiste*, less regulated, less redistributive, than our present society, and would thus be more "liberal" in the classical sense. It would not resemble Nazi Germany or Stalinist Russia—antitheses of liberal regimes.

I have argued that wealth maximization provides the best theory, both positive and normative, of common law rights and remedies. I have also argued that wealth maximization would provide a better guide for social policy than utilitarianism, which it closely resembles. I have never argued, and do not believe, that wealth maximization is or should be the only principle of justice in our society.⁶ The passage

temperate legal criticism that produced Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A. J. 569 (1945).

5. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986); R. POSNER, *THE ECONOMICS OF JUSTICE* 48-115 (1981); *The Justice of Economics*, *supra* note 3; *Wealth Maximization Revisited*, *supra* note 3.

6. See Posner, *Wealth Maximization and Judicial Decision-Making*, 4 INT'L REV. LAW & ECON. 131 (1984), where I stated that:

As should be clear by now, my argument is not that wealth maximization is the only social value that government ought to pay attention to, but that it is the only such value (at least if all other social values can be grouped under the distributional rubric) that courts can do much to promote.

Id. at 133 (emphasis in original); see also *Wealth Maximization Revisited*, *supra* note 3, where I noted that:

Almost everyone writing in the individualist tradition thinks slavery improper even if the slave became such through a voluntary transaction. . . . Torture and lynching are other examples where the individualist will be inclined to say that the practice violates essential personhood even if it could be shown to maximize wealth. . . .

All of the examples I have discussed are sufficiently troublesome to make me regard wealth maximization as an incomplete guide to social decision-making.

Id. at 100-01 (emphasis added); see also POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 5, at 25-26 ("there is more to notions of justice than a concern with efficiency. . . . [T]here is more to justice than economics, a point the reader should keep in mind in evaluating nor-

from *The Economics of Justice* that Professor Malloy quotes in a footnote (p. 252, n.186), concerning the possibility that racial or religious discrimination might sometimes be wealth-maximizing, was offered not to defend discrimination but to point out that wealth maximization does not completely escape one of the traditional objections to utilitarianism—that utilitarianism offers no secure protections for minorities.⁷ Another problematic aspect of wealth maximization is that it gives destitute people little claim to a share in society's resources, although it gives them some claim and although other political theories also have difficulty coming up with a principled ground for giving unproductive members of society a legal claim on society's resources.

The features of wealth maximization that are inconsistent with the ethical intuitions of most thoughtful members of our society are features that Professor Malloy mistakenly believes that I advocate. He thinks that because I believe that wealth maximization provides a good guide to common law policy-making and a better guide to legislative policy-making than utilitarianism does, I want to discard every other principle of justice and ram down society's throat every feature of wealth maximization, however repulsive to prevailing moral sentiments. That has never been my desire.

Professor Malloy commits many subordinate errors. It is not true for example that I assume that people have perfect information; most of my book *The Economics of Justice* is devoted to exploring the economics of uncertainty. It is not true that I treat as given the current distribution of income and wealth. I have no idea where Malloy got these ideas. I am not an advocate of the status quo. Many features of our current social arrangements are not wealth maximizing, and, since they are not supported by any other principle of justice either, should be changed. Although I am not hostile to patriotism or religion, nothing in the theory of wealth maximization lends support to either practice. I am not a "mystic elitist," whatever that is, and I have always believed totalitarianism to be not only an evil, but an inefficient, system of political organization.

mative statements in this book"); POSNER, *THE ECONOMICS OF JUSTICE*, *supra* note 5, at vi ("I hope the ethical theory propounded in Part I of this book [wealth maximization] will be taken in the spirit in which it was intended: as a subject of speculation rather than a blueprint for social action") (preface to the 1983 paperback edition); *The Justice of Economics*, *supra* note 3, at 25.

7. See POSNER, *THE ECONOMICS OF JUSTICE*, *supra* note 5, at 85. As a glance at the preceding page in *The Economics of Justice* will reveal, the passage that Malloy quotes was describing—not endorsing—a form of "moral monstrousness" that wealth maximization, like utilitarianism, cannot rule out. See *id.* at 84.

I welcome criticism of my views, but I am distressed when they are misrepresented. I discuss another example of such misrepresentation in Posner, *The Regulation of the Market in Adoptions*, 67 B.U.L. REV. 59 (1987).

I will not bother to deny all the silly charges that Malloy lodges against me. Not only are they wrong in detail, but they rest on his basic error of supposing that by advocating a limited role for wealth maximization I embrace every horrible policy that someone might think implicit in pursuing wealth maximization *à outrance*—though this is the first time I have heard Stalin described as a wealth maximizer. Wealth as I define it is an important social value, and in some settings, such as that of common law adjudication—which Malloy does not even bother to discuss—I believe it should be the paramount value. But I have never suggested that it is the only social value, and a failure to appreciate this point underlies Malloy's mistaken characterization of my views.

