

Texas Law Review

Dicta

Book Review

Money Can't Buy Me Love

LAW, ECONOMICS, AND MORALITY. By Eyal Zamir & Barak Medina. New York, New York: Oxford University Press, 2010. 363 pages. \$95.00.

Guha Krishnamurthi*

For better or worse, Law and Economics is a part of our law and here to stay. Some of our most famous jurists—Guido Calabresi, Frank Hoover Easterbrook, and Richard Allen Posner—battle under the Law and Economics banner. Most law school classes devote some nontrivial amount of attention to framing legal issues according to a Law and Economics method, and for good reason. As an analytical tool, it is a juggernaut. When employed, it often shoves all other legal reasoning away from the pulpit.

Since learning about the prophecy of Law and Economics, this last point has been the source of some frustration for me. I have great respect for the analytic framework(s)¹ of Law and Economics; it has great consistency and transparency. But at the same time, when Law and Economics enters the picture, scholars and lawyers often treat its diktat as dispositive.² This obfuscates important points of debate. Packed in Law and Economics, especially cost–benefit analysis, are important assumptions about what we should value as a society. These assumptions often escape their deserved scrutiny.

Enter Eyal Zamir and Barak Medina's *Law, Economics, and Morality*.³ In this book, Zamir and Medina explicate the *consequentialist* foundations of Law and Economics' cost–benefit analysis.⁴ That is, cost–benefit analysis goes about its analysis by only assessing the goodness of the resulting consequences.⁵ After detailing formidable objections to the consequentialist underpinnings of cost–

* I would like to thank Professor John M. Golden, Benita H. Brahmhatt, Sriram K. Raman, and Abraham M. Howland for helpful comments. I would also like to thank Anthony F. Arguijo, Tracey A. Bamberger, Daniel C. Clemons, Sarah A. Hunger, and Amanda M. Suzuki for excellent editing. Finally, I would like to thank my parents for their support of my endeavors. This piece is titled after the Beatles' song *Can't Buy Me Love*, as a commentary on the shortcomings of cost–benefit analysis. THE BEATLES, CAN'T BUY ME LOVE (Capital Records 1964).

1. I do not mean to treat Law and Economics as a monolith; indeed, it is an umbrella term for a number of views. There is a corpus of commonality between these views, and this is what I mean to identify.

2. Scholars do continue to point out limitations of Law-and-Economics analyses, however. See, e.g., Michael B. Dorff, *Why Welfare Depends on Fairness: A Reply to Kaplow and Shavell*, 75 S. CAL. L. REV. 847, 865 (2002) (“[I]t is impossible to escape the need to apply some fairness ideology when choosing a social welfare function. This function in turn will determine the policy outcomes recommended by economic analysis.”); Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 921 (2009) (“Normative choices cannot be avoided in the economic analysis of law. The question is whether there is any viable alternative to the methodology of economics to engage in normative analysis.”).

3. EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* (2010).

4. *Id.* at 1.

5. *Id.*

benefit analysis, Zamir and Medina proffer a *deontological* alternative⁶ that takes into account moral obligations, despite the fact that negative consequences may ensue.⁷ Zamir and Medina suggest a way to mathematize moral constraints and to produce a formal, rigorous method of considering deontological obligations as well as good consequences.⁸ After setting up this method, Zamir and Medina apply their method to real-life debates in the law, including the fight against terrorism, freedom of speech, and antidiscrimination law.⁹

In this short Review, I will focus mainly on the first section of the book—the theory. The main worth of this book is in its explication of the foundations of Law and Economics. For the most part, Zamir and Medina lay out in a clear and concise manner the logical space of the philosophical views that may motivate Law and Economics, detailing important objections, possible responses, and the alternatives. To my delight, they clearly describe the crux of my aforementioned frustration: “[E]conomists may still endorse a division of labor between economic analysis and deontological concerns to preserve the alleged value-free and objective nature of economic analysis. However . . . the idea that standard [cost–benefit analysis] is a value-free, ‘scientific’ mode of analysis is false.”¹⁰ Bully!

In light of this, the book is a worthwhile read. The theory portion of the book can catch one up to speed in a hurry on the argumentative dialectic about the underpinnings of Law and Economics. At the same time, it is unclear who the intended audience of this book is. For experts, this book may not be that interesting because it is unsatisfying in substantiating its thesis of the superiority of its deontological alternative. For beginners, this book may proceed too quickly through this difficult material.

I take an expert to be one familiar with the argumentative dialectic (or one who can very easily become familiar with the dialectic). As such, a book targeting experts should be judged on whether it has established its thesis and thereby furthered the debate. I do not think that *Law, Economics, and Morality* is very satisfying in this regard. In the theory portion of the book, Zamir and Medina pose formidable objections to cost–benefit analysis. In particular, they present two tough problems. First, consequentialism seems to *allow* too much—including lying, cheating, and killing innocent people—in order to achieve good results.¹¹ Second, consequentialism seems to *demand* too much—dictating that people sacrifice personal goals and priorities to maximize the good of others.¹² For instance, the wealthy should donate almost all their money to benefit the disadvantaged.¹³ After detailing possible responses on behalf of the cost–benefit analysis apologist,¹⁴ Zamir and Medina conclude that none are satisfactory.¹⁵

Zamir and Medina then proffer their deontological alternative to the cost–benefit analysis, aiming to show that it is theoretically superior. This proposal involves using mathematical threshold functions that weigh deontological obligations and common deontological distinctions in action, so as to avoid the nonintuitive results that plague consequentialism.¹⁶ These constraints can protect against allowing too

6. *Id.* at 1–2. Zamir and Medina espouse a moderate deontological view instead of an absolute deontological view. Absolute deontology claims that there are certain actions that cannot be taken, regardless of the consequences. Moderate deontology holds that, if there are enough good consequences to outweigh, a deontological constraint can be overridden. *Id.* at 2. Hereafter, when I discuss deontology, I am referring to moderate deontology.

7. *Id.* at 2–3. A prototypical example of such a deontological obligation is a prohibition against knowingly convicting and punishing an innocent person to quell the outrage of a riotous mob; even though convicting and punishing the innocent person may lead to good consequences, such as no riots, we still have an obligation not to wrongfully convict him. *Id.* at 64.

8. *Id.* at 3, 6.

9. *Id.* at 6–8.

10. *Id.* at 105. The wonderful details follow in the book. *Id.* at 105–08.

11. *Id.* at 19–20.

12. *Id.* at 20.

13. *Id.*

14. *Id.* at 33–38.

15. *Id.* at 39.

16. *Id.* at 41–48.

much by constraining actions, despite the good consequences that may ensue.¹⁷ As for demanding too much, Zamir and Medina refer to common deontological distinctions between doing/allowing and intending/foreseeing, among others.¹⁸ Through these distinctions, deontologists can show how a moral theory need not require too much: As long as you do not yourself do/intend the harm—but you merely allow/foresee the harm—you are not morally blameworthy.

Zamir and Medina’s solution of using different weights for different obligations is not particularly novel: consequentialists (and shop owners) have been placing different values on different goods for years,¹⁹ and this is merely applying that idea to deontological obligations. Notwithstanding its lack of novelty, it does the trick against allowing too much; however, it is not clear that consequentialists could not follow suit and use this weighing to protect their theory against nonintuitive results.

Moreover, with respect to demanding too much, note (as Zamir and Medina do) that the distinctions between doing/allowing and intending/foreseeing are tenuous at best.²⁰ Indeed, they seem to be as shaky as the consequentialist responses to the problems plaguing consequentialism. Ultimately, Zamir and Medina do little to convince us that deontology stands on firmer ground; they merely state that they think “deontology is more attractive than consequentialism.”²¹ Thus, experts who already know the background might not find this portion of the book all that interesting.

For beginners, the book proceeds very quickly in the theory portion, rushing through important nuances that beginners may be unlikely to recognize or understand. Although it may be exceedingly unfair to present an example of such velocity (because the passages are taken out of context), I am going to do it anyway. Here, Zamir and Medina consider general objections to deontology:

The last critique of deontology to be mentioned here is that any nonconsequentialist concern is incompatible with the (weak) Pareto principle and thus unacceptable. . . . [W]hile a consequentialist normative theory, determining the goodness of outcomes solely on the basis of their effect on people’s well-being, will always favor a rule (or anything else) that makes everybody better off, a deontological theory may sometimes favor a rule that makes *everybody* worse off. There are several persuasive responses to this claim. To begin with, deontological theories do not *necessarily* conflict with the Pareto principle. A deontological theory may plausibly qualify any constraint or option such that it would not apply whenever everybody would be better off without this constraint or option. More fundamentally, the conflict between deontology and the Pareto principle is tautological: it merely restates the conflict between deontology and consequentialism. It may therefore be read as establishing the weakness of the Pareto principle.²²

Even for someone with a philosophical education, it may be difficult to wade through these waters. To their credit, Zamir and Medina do explain the Pareto principle earlier on²³—some 38 pages earlier on—but a phrase in apposition recalling some details about the principle would have been of use. In the same vein, the claim that the “conflict between deontology and the Pareto principle is tautological” is blinding—especially as it occurs right after the claim that “deontological theories do not *necessarily*

17. See *id.* at 41 (“Deontological theories prioritize such values as autonomy, human dignity, basic liberties . . . and keeping one’s promises over the promotion of good outcomes. They include constraints on attaining the best outcomes.”).

18. *Id.* at 43–45.

19. See generally JOHN STUART MILL, UTILITARIANISM 61 (Roger Crisp ed., Oxford Univ. Press 1998) (1861).

20. ZAMIR & MEDINA, *supra* note 3, at 50 (noting that some scholars, including Shelly Kagan, have argued that none of these conceptual distinctions in the literature provide a coherent, intuitively acceptable criterion for distinguishing between moral and immoral actions).

21. *Id.* at 56. Zamir and Medina say that deontology is better, “at least on the factorial level.” *Id.* It is not entirely clear to me what they mean by this. From the little they say, I take them to mean that deontology is better with regard to what factors it considers. See *id.* at 26–27. Yet many of the alleged nonintuitive results dictated by consequentialism seem not to be a matter of factors, but about the weighing of the factors—an issue on the foundational level. So I fail to see the factorial advantages. Of course, I may be off base, but they could have done more to show me why.

22. *Id.* at 50–51 (internal citations omitted).

23. *Id.* at 13.

conflict with the Pareto principle.”²⁴ Perhaps the latter language should have spoken of a tension, rather than a conflict. Regardless, some further discussion would have been extremely helpful.

This same kind of speed in reasoning appears not so infrequently in the theory portion of the book. Consider another example:

A consequentialist would reasonably hold that a world with a vast (but finite) number of temporary, moderate headaches could be worse than a world lacking those headaches and containing one more premature death. There is, in other words, some finite number of headaches such that it is permissible to kill an innocent person to avoid them.²⁵

Though this may be a common view among consequentialists, I do not think it is necessary that a consequentialist hold such a position. A consequentialist could think that the harm created by a premature death or death of an innocent is infinitely greater than the harm of a headache. Thus, as a matter of forward-looking avoidance of harm, one could not kill an innocent person to avoid a lot of headaches. In places like this, it may have been helpful to flag this logical possibility for consequentialism (or, alternatively, to explain why I am incorrect in thinking it is a possibility).

As yet another example, Zamir and Medina rely on a distinction between “factoral” and “foundational” moral theories.²⁶ Though meriting some clarification because it appears throughout the book, the distinction is unfortunately left nebulous.²⁷ The authors do direct the reader to Shelly Kagan’s illuminating discussion of the distinction—but readers who buy books are not usually happy about having to look elsewhere. I bring up these examples not to nitpick, but only because I am the type prone to obsess, and if one is obsessive about their understanding, it may be wise to read this book with expert guidance or the authors’ e-mail addresses handy.

But all in all, for people new to the subject area, this book can do much to further their understanding. It has moments of unclarity and passages that are hard to navigate. That just means that it can be a difficult read at times—not that it is not worth reading. Indeed, effort devoted to overcoming and understanding the difficult theoretical portions of the book may be a worthwhile educational experience for a nascent legal thinker. As my grandmother probably said while I was watching television, “Nothing worth doing is ever easy.”²⁸

24. *Id.* at 51.

25. *Id.* at 87 (internal citations omitted).

26. *Id.* at 26–27.

27. Zamir and Medina do offer this explanation of the difference between factoral and foundational moral theories:

A *factoral* moral theory defines the factors that determine the morality of an act, their relative weight, and interaction. . . . In and of itself, a factoral theory neither explains nor justifies the relevance of the various factors and their interaction. This is the role of *foundational* theories. Interestingly, there is no necessary match between the kind of theory one adopts on the factoral level and the theory one favors on the foundational level.

Id. Even so, this explanation is not all that illuminating without reference to the Kagan work cited by the authors. See *id.* at 26 n.58 (citing Shelly Kagan, *The Structure of Normative Ethics*, 6 PHIL. PERSPECTIVES 223, 224–36 (1992)).

28. My grandmother, Madurambal “Paapaa” Subramaniam, would have delivered this gem in Tamil:

உழைப்பின்றி கனியாது நல்ல செயல். (*uḷaiḻḻinri kaṇiyaathu nalla seyal.*)