

# Planning for Serfdom — An Epilogue on Law, Economics, and Values

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*It is important not to confuse opposition against this kind of planning with a dogmatic laissez-faire attitude. The liberal argument is in favor of making the best possible use of the forces of competition as a means of coordinating human efforts, not an argument for leaving things just as they are. It is based on the conviction that, where effective competition can be created, it is a better way of guiding individual efforts than any other. It does not deny, but even emphasizes, that, in order that competition should work beneficially, a carefully thought-out legal framework is required and that neither the existing nor the past legal rules are free from grave defects. Nor does it deny that, where it is impossible to create the conditions necessary to make competition effective, we must resort to other methods of guiding economic activity.*

Friedrich A. Hayek  
*The Road to Serfdom*<sup>1</sup>

In *Planning for Serfdom*<sup>2</sup> and much of my other work<sup>3</sup> I have taken inspiration from the classical liberal philosophy of Adam Smith, Friedrich Hayek, and Milton Friedman. First and foremost in my efforts has been an attempt to provide new definition to the field of study commonly

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1. Contemporary events differ from history in that we do not know the results they will produce. Looking back, we can assess the significance of past occurrences and trace the consequences they have brought in their train. But while history runs its course, it is not history to us. It leads us into an unknown land, and but rarely can we get a glimpse of what lies ahead.

FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 36 (1944).

2. ROBIN P. MALLOY, *PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT* (1991) [hereinafter MALLOY, SERFDOM].

3. See Robin P. Malloy, *Planning for Serfdom — An Introduction*, 25 *IND. L. REV.* 621 (1992).

referred to as Law and Economics.<sup>4</sup> This area of study has been too long dominated by the rhetoric of Judge Richard Posner and other neoclassical Chicago School legal economists. Although their contributions have been many, their shortcomings have also been tremendous. Chief among these has been their relentless pursuit of economic "science" applied to law. Borrowing from modern practices in economics, these legal economists seek to cleanse the corpus of law and vanquish from memory all traces of moral discourse and value conflicts. They seek to mimic the twentieth century economists' continuing efforts to wash away layers and layers of historical commitment to philosophy. They seek science, not morality. They discuss equations, not values. They cherish a tradition cleansed of its innermost feelings and offer a foundationless and hollow structure of "scientific" brick and mortar as their accomplishment. They have been misguided in their efforts. Economics, efficiency, and wealth maximization applied to law and social policy is not science, nor is it a neutral, objective, or valueless end to be achieved.<sup>5</sup> The end to be achieved, rather, is intrinsically value driven and any successful form of economic discourse serves only as a means of attaining that end.

Adam Smith, Friedrich Hayek, and Milton Friedman understood that any particular social, economic, and political arrangement had to be evaluated for the subjective ends to be promoted. They understood that capitalism and free market economics supplied a philosophical foundation for structuring social organization, not just because it produced wealth, but more importantly, because it enhanced freedom, liberty, and autonomy.<sup>6</sup> Admittedly, each had their own view of what these amorphous terms meant. However, their key insight is that they each understood that economics and law, as complex systems, were about enhancing specific subjective values.

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4. See, e.g., ROBIN P. MALLOY, *LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE* (1990) [hereinafter MALLOY, *LAW AND ECONOMICS*] (this basic introductory text is designed to introduce the reader to Law and Economics while presenting that subject matter in a new format); Robin P. Malloy, *Toward A New Discourse of Law and Economics*, 42 SYRACUSE L. REV. 27 (1991) [hereinafter Malloy, *Discourse*].

5. See Robin P. Malloy, *Is Law and Economics Moral? — Humanistic Economics and a Classical Liberal Critique of Posner's Economic Analysis*, 24 VAL. U. L. REV. 147 (1990); Robin P. Malloy, *The Limits of "Science" in Legal Discourse — A Reply to Posner*, 24 VAL. U. L. REV. 175 (1990) (these articles make up my part of a published debate with Judge Richard Posner and include arguments and references to other works illustrating the significant difference between his view and my view of Law and Economics).

6. A free society, I believe, is a more productive society than any other; it releases the energies of people, enables resources to be used more effectively, and enables people to have a better life. But that is not why I am in favor of a free society. I believe and hope that I would favor a free society even if it were less productive than some alternative-say, a slave society. . . .

I favor a free society because my basic value is freedom itself.  
Milton Friedman, *Free Markets and Free Speech*, 10 HARV. J.L. & PUB. POL'Y 1 (1987).

I have made the Smith-Hayek-Friedman insight the cornerstone of my teaching and research. It is in fact the basic premise of *Planning for Serfdom*. Although hopefully my book brings many issues to light concerning downtown development, it is first and foremost a book on law, economics, and values. I attempt to illustrate that law and economics as a creative process, as a method for inquiry, can be helpful in unmasking hidden values and ideological commitments in the communities that surround us.<sup>7</sup> I present my subjective commitment to classical liberal principles as a referential guidepost for the values I believe are important, values that are consistent with traditional rhetorical and discursive positions evident in American political and legal history as well as much of our popular culture. I use these referential guideposts as a lens for viewing current practices involving downtown development and revitalization.

Law and economics, as I understand it, concerns itself with any discourse involving the allocation of political power and scarce resources. Thus, any number of competing ideological perspectives can rightly be considered the subject matter of law and economics.<sup>8</sup> Therefore, the first task of the legal economist is inherently one of trying to uncover the values promoted or challenged by alternative ideological frameworks. The second task is to argue persuasively for the promotion of one particular framework (set of values) over that of the others. Lawyers and economists miss their greatest opportunities for insight and for contributing to our social evolution if they fail to converse directly on the subject of competing and oftentimes conflicting value choices. Analyzing what governments are doing in the area of downtown development is one example of how to use this approach. There are many other areas and many other examples that are in need of study.

I think *Planning for Serfdom* opens the door for an important reconsideration of what is going on in America's cities. If the book serves as a useful new vehicle for reexamination, it is a success. It is good that different people have different reactions to it. We live in a free society where as individuals, we are free to possess and create many individual perspectives. The classical liberal marketplace is enhanced by this discourse. I am thankful to the *Indiana Law Review* for providing such a wonderful forum for this discussion.

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7. See, e.g., ROBERTA KEVELSON, FOUNDATIONS OF SEMIOTICS — CHARLES S. PEIRCE'S METHOD OF METHODS (1987) (discussing the method of methods in complex sign systems); Robin P. Malloy *Discourse*, *supra* note 4 (discussing law and economics as a creative process and method).

8. See, e.g., MALLOY, SERFDOM, *supra* note 2, at 61-83; MALLOY, LAW AND ECONOMICS, *supra* note 4; Malloy, *Discourse*, *supra* note 4.

