

## COMMENTARY

### ECONOMIC ANALYSIS OF LAW: SOME REALISM ABOUT NOMINALISM

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WITH the publication of Richard A. Posner's *Economic Analysis of Law*, that field of learning known as "Law and Economics" has reached a stage of extended explicitness that requires and permits extended and explicit comment. But one of the dangers of reviewing a work "mainly designed for use either as a textbook in a law school course . . . or as supplementary reading for law students . . .,"<sup>1</sup> and getting down to the job later than one ought, is that one perforce reads it straight through, as if it were a real book. Having done that one cannot help being nagged throughout by what may be the literary critic's most pernicious and unavoidable naggerie: Where have I seen this before? At any rate, from my first glance at the table of contents, with its relentless item by item march through all of law—property, contracts, crimes and torts, labor law, corporations, taxation, racial discrimination, civil procedure . . . all the way through to a final "Note on Jurisprudence"—I smelled a familiar genre. But for the longest time, I couldn't place it. A manual of possible uses, the kind that comes with a new chain saw? A text on herbal healing? Not quite. But what? I was more than half way through the book before it came to me: as a matter of literary genre (though most likely not as a matter of literary influence) the closest analogue to *Economic Analysis of Law* is the picaresque novel.

Think of the great ones, *Tom Jones*, for instance, or *Huckleberry Finn*, or *Don Quixote*. In each case the eponymous hero sets out into a world of complexity and brings to bear on successive segments of it the power of his own particular personal vision. The world presents itself as a series of problems; to each problem that vision acts as a form of solution; and the problem having been dispatched, our hero passes on to the next adventure. The particular interactions are essentially invariant because the central vision is single. No matter what comes up or comes by, Tom's sensual vigor, Huck's cynical innocence, or the Don's aggressive romanticism is brought into play, forever to transform

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<sup>1</sup> R. POSNER, *ECONOMIC ANALYSIS OF LAW* x (1973) [hereinafter cited as POSNER].

the picture of the pictured world (without, by the way, except *in extremis*, transforming the hero).

Richard Posner's hero is also eponymous. He is Economic Analysis. In the book we watch him ride out into the world of law, encountering one after another almost all of the ambiguous villains of legal thought, from the fire-spewing choo-choo dragon<sup>2</sup> to the multi-headed ogre who imprisons fair Efficiency in his castle keep for stupid and selfish reasons.<sup>3</sup> In each case Economic (I suppose we can be so familiar) brings to bear his single-minded self, and the Evil Ones (who like most in the literature are in reality mere chimerae of some mad or wrong-headed magician) dissolve, one after another.

One should not knock the genre. To hold the mind-set constant while the world is played in manageable chunks before its searching single light is a powerful analytic idea, the literary equivalent of dropping a hundred metals successively into the same acid to see what happens. The analytic move, just as a strategy, has its uses, no matter which mind-set is chosen, be it ethics or psychology or economics or even law. In each case, of course, the approach has its limitations, some of which arise from the single-approach strategy itself, and some of which arise from the particular mode of apprehension chosen to be single-minded with. I expect, in this review, to deal with some of those costs and benefits.

But the peculiarly relentless tone of this book moves me also to another inquiry: what pressures in contemporary legal scholarship might be responsible for the appearance, now, of four hundred pages of tunnel vision and, assuming one could answer that, why this particular tunnel? For Posner's book is, after all, just a fatly reified symbol of a currently important trend. It is a matter of common knowledge that economic analysis of the type Posner's book exemplifies is growing ever more popular among legal scholars. Not only have major and important analytical works recently been written in that style,<sup>4</sup> not only is Henry Manne's summer indoctrination session in economics continuously over-subscribed (to such an extent that his little Pareto-in-the-Pines has its own long and distinguished alumni group rivaling that of more conventional "legal" alma maters), not only do almost all recent "law and" law review articles and law school courses turn out to be "law and economics," but even people like me, with no formal background in

<sup>2</sup> See *id.* at 16 ff. on Ronald Coase's *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

<sup>3</sup> See *id.* at 386-92, ("The Administrative Process").

<sup>4</sup> See, e.g., G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

and little natural taste or aptitude for economic analysis, seem to be drawn to reading it, learning it and, in primitive fashion, even writing it.<sup>5</sup> What is our problem?

In order to approach that question at all, I shall have to begin with a very brief examination of the difficulties in which those who want to continue to talk about law presently find themselves. Then, having roughly outlined the hidden darkness from which the lawyer's current lust for economic illumination springs (for when you see a drunk finch, you will never understand his action unless you know about the pink viper whose fangs he is trying to avoid), I shall go on to a more detailed discussion of certain aspects of Posner's approach. First, therefore, we will have to take rather a bleak architectural tour of a modern intellectual box. Only then will we be able to comment usefully upon the most recently designed and most elegantly constructed of the presently purported doors.

### *The Way We Live Today*

Let us start with a couple of vicious intellectual parodies. Once upon a time there was Formalism. The law itself was a deductive system, with unquestionable premises leading to ineluctable conclusions. It was, potentially at least, all consistent and pervasive. Oh, individual judges messed up, and even individual professors, and their misperceptions and mispronouncements needed rationalization, connection, and correction. But that was the proper job of one of the giants we had in the earth in those days. The job of legal commentators, and a fortiori of treatise writers, was to find the consistent thread in the inconsistent statements of others and pull it all together along the seam of what was implicit in "the logic of the system." When you found enough threads and pulled them just hard enough, you made a very neat bag—say, Beale's *Conflict of Laws*.<sup>6</sup>

Then, out of the hills, came the Realists. What their messianic message was has never been totally clear.<sup>7</sup> But it is generally accepted that, at least in comparison to the picture of their predecessors which they drew for themselves, they were much more interested in the way law actually functioned in society. There were *men* in law, and the law created by men had an effect on other men in society. The critical ques-

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<sup>5</sup> See Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 *YALE L.J.* 1 (1970).

<sup>6</sup> J. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* (1935).

<sup>7</sup> See W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 375-87 (1973).

tions were henceforward no longer to be those of systematic consistency, but of existential reality. You could no longer criticize law in terms of logical operations, but only in terms of operational logic.

Now such a move, while liberating, was also ultimately terrifying. For if you were interested in a society, and with law as an operative variable within that society, you would have to find out something about that subject matter and those operations. You would, it seems, have to become an empiricist. That, as we shall see, is no picnic when the facts you are searching out are social facts. But there is a worse worry yet. If you no longer are allowed to believe in a deductive system, if criticism is no longer solely logical, you no longer can avoid the question of *premises*. Premises, in terms of logic, are just that: those things you don't talk about. But if you are under an obligation to talk about non-foreordained conclusions, you must start to talk about non-given starting points. Any (mostly implicit) assumptions that one's premises in some mysterious manner are at least congruent with the commands of the universe would (and did) come under increasing pressure. If "good" were seen solely in terms of effects, the only good premises were those that came up with good effects. Thus, by dropping formalism we (quite rightly) fell into the responsibility of good and evil.

But not, alas, the knowledge thereof. While all this was going on, most likely conditioning it in fact, the knowledge of good and evil, as an intellectual subject, was being systematically and effectively destroyed. The historical fen through which ethical wanderings led was abolished in the early years of this century (not for the first time, but very clearly this time); normative thought crawled out of the swamp and died in the desert.<sup>8</sup> There arose a great number of schools of ethics—axiological, materialistic, evolutionary, intuitionist, situational, existentialist, and so on—but they all suffered the same fate: either they were seen to be ultimately premised on some intuition (buttressed or not by nosecounts of those seemingly having the same intuitions), or they were even more arbitrary than that, based solely on some "for the sake of argument" premises. I will put the current situation as sharply and nastily as possible: there is today no way of "proving" that napalming babies is bad except by asserting it (in a louder and louder voice), or by defining it as so, early in one's game, and then later slipping it through, in a whisper, as a conclusion.

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<sup>8</sup> See, e.g., L. WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS*, esp. Prop. 7, at 151 (D. Pears & B. McGuinness transl. 1961). See also A. JANIK & S. TOULMIN, *WITTGENSTEIN'S VIENNA*, esp. chs. 6 and 9, at 167-201, 263-75 (1973).

Now this is a fact of modern intellectual life so well and painfully known as to be one of the few which is simultaneously horrifying and banal. As I said, I raise it here only because it seems so very important both in explaining and understanding Posner's book, and the impulse in current legal scholarship it exemplifies.

Let us say you found yourself facing a universe normatively empty and empirically overflowing. What I suppose you would want most to do, if you wanted to talk at all, would be to find some grid you could place over this buzzing data to generate a language which would at the same time provide a critical terminology ("X is bad because . . .") and something in terms of which the criticism could be made (that is, something to follow the "because . . ."). Now "because it is" is a bit naked as a satisfactory explanation. "Because you won't get to Y that way" is better, but when you make "good" teleological, you rather promptly run into "what's so great about Y?" It is hardly convincing if you explain the goodness of X in terms of the desirability of Y if you can't say anything more about Y than that it is desirable. You might just as well skip the intervening step and stick with X, saying all the pretty things about it itself, rather than about its product.

But what if you said X wasn't "good" or anything like that, that is, wasn't normative at all? What if you described X solely in empirical terms, for instance, X is what people, as a matter of fact, want. That way you can get to the well-known neo-Panglossian position of classic utilitarianism: while all is not for the best (because the best is what people want and they don't have it yet), the best is still nothing more than what they do want. Admittedly, this is just an example of one of the now-classic normative copouts—essentially, "good" becomes just a function of nosecounting—but it does have the advantage of providing a ready-made critical vocabulary: because there is now a clear area between what people want and what they have, while you can no longer say that doing anything is bad, you *can* say of some things that they are being done badly.

Of course, you still haven't solved all your intellectual (or practical) problems. The world may no longer be normatively empty (you've filled it by definitional fiat), but it is still full of all sorts of puzzling things. You have, that is, solved only one difficult problem. True, you need no longer ask if people *ought* to desire other things than they do desire, for those desires are the measure of all things. But what do people (some or all and is that relevant?) desire? If you don't know

that, then you can't criticize what they presently have, or what they are right now doing, with reference to their failure to reach that desire. That is, while you are now working with *is*-terms only (you have escaped the dreaded *ought*), they are, as a matter of fact, very difficult matters of fact: what indeed *is* of "value" must be known before one rates the "efficiency" in getting there. Thus it is possible that all you have ended up doing is substituting for the arbitrariness of ethics the impossibilities of epistemology.<sup>9</sup>

Now all of the above is but by way of introduction to Posner's solution to these scarifying problems.<sup>10</sup> He does indeed solve the normative "oughtness" problems by the neo-Panglossian move: good is defined as that which is in fact desired. But then he makes a very pretty move, one that renders his work, and work like it, so initially attractive to the dwellers of the box: in place of what one might have expected (and feared)—a complex regimen for an empirical investigation of human wants and values—he puts a single-element touchstone, so narrow a view of the critical empirical question as to be, essentially, a definition. "What people want" is presented in such a way that while it is in form empirical, it is almost wholly non-falsifiable by anything so crude as fact.

To follow this initially attractive development in legal criticism (for purposes both of admiration and scorn), one will have to master the critical early moves. The first and most basic is "the assumption that man is a rational maximizer of his ends in life. . . ." <sup>11</sup> As Posner points out, this assumption "is no stronger than that most people in most affairs of life are guided by what they conceive to be their self-interest and that they choose means reasonably (not perfectly) designed to promote it." <sup>12</sup> In connection with this assumption, several "fundamental economic con-

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<sup>9</sup> This may be a not quite fair, but close enough, description of utilitarian ethics in general.

<sup>10</sup> A note on the relationship between this book and economic analysis in general is necessary at this point. Am I talking about Posner's particular brand of economics, or something wider? More precisely, am I commenting upon and sometimes criticizing a "school" of economic analysis, or the thing in itself? My uncertain answer is that I really don't know, for I am not really widely enough acquainted with enough of the literature to be able to make any independent contribution to any "schools" controversy. I certainly do not think that the downward sloping demand curve is some kind of "political" tenet of the "Chicago School." But good economists disagree about many things, many of which are relevant to what I say here. Thus, whenever I refer herein to "economic analysis," even in lower case, let it be taken as having no necessarily wider application than to its particular context, that is, the book under review.

<sup>11</sup> POSNER 1.

<sup>12</sup> *Id.* at 5.

cepts"<sup>13</sup> emerge. "The first is that of the inverse relation between price charged and quantity demanded."<sup>14</sup> The second is the economist's definition of cost, "the price that the resources consumed in making (and selling) the seller's product would command in their next best use—the alternative price."<sup>15</sup>

The third basic concept, which is also derived from reflection on how self-interested people react to a change in their surroundings, is the tendency of resources to gravitate toward their highest valued uses if exchange is permitted. . . . By a process of voluntary exchange, resources are shifted to those uses in which the value to the consumer, as measured by the consumer's willingness to pay, is highest. When resources are being used where their value is greatest, we may say that they are being employed efficiently.<sup>16</sup>

Now it must immediately be noted, and never forgotten, that these basic propositions are really not empirical propositions at all. They are all generated by "reflection" on an "assumption" about choice under scarcity and rational maximization. While Posner states that "there is abundant evidence that theories derived from those assumptions have considerable power in predicting how people in fact behave,"<sup>17</sup> he cites none. And it is in fact unnecessary to cite any, for the propositions are not empirically falsifiable at all.

Efficiency is a technical term: it means exploiting economic resources in such a way that human satisfaction *as measured by aggregate consumer willingness to pay* for goods and services is maximized. Value too is defined by willingness to pay.<sup>18</sup>

In other words, since people are rationally self-interested, what they *do* shows what they value, and their willingness to pay for what they value is proof of their rational self-interest. Nothing merely empirical could get in the way of such a structure because it is definitional. That is why the assumptions can predict how people behave: in *these* terms there is no other way they can behave.<sup>19</sup> If, for instance, a society

<sup>13</sup> *Id.* at 1.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 2-3.

<sup>16</sup> *Id.* at 4.

<sup>17</sup> *Id.* at 5.

<sup>18</sup> *Id.* at 4 (emphasis supplied).

<sup>19</sup> This may also help to answer George Stigler's question why, though professional bliss awaits anyone who proves false the "law of demand," no one has yet done so. Academic knighthood does *not* await anyone who merely violates someone else's sys-

dentist raises his prices and thereby increases his gross volume of business, it is no violation of the principle of inverse relation between price and quantity. It only proves that the buyers now perceive that they are buying something else which they now value more highly, "society dentistry," say, rather than "mere" dentistry. And if circularity isn't sufficient, the weak version of the rational maximization formula ("most people in most affairs of life . . . choose means reasonably (not perfectly) designed . . .") has the effect of chewing up and spitting out any discordant empirical data anyway. Any puzzling observation fed into that kind of definition will always be able to find a "most," or a "reasonably," way out.<sup>20</sup>

Thus what people do is good, and its goodness can be determined by looking at what it is they do. In place of the more arbitrary normative "goods" of Formalism, and in place of the more complicated empirical "goods" of Realism, stands the simple definitionally circular "value" of Posner's book. If human desire itself becomes normative (in the sense that it cannot be criticized), and if human desire is made definitionally identical with certain human acts, then those human acts are also beyond criticism in normative or efficiency terms; everyone is doing as best he can exactly what he set out to do which, by definition, is "good" for him. In those terms, it is not at all surprising that economic analyses have "considerable power in predicting how people in fact behave."<sup>21</sup>

I shall argue that lovely as all of this is, it is still unsatisfactory as anything approaching an adequate picture of human activity, even as expressed in that subcategory of living loosely called "law." But one can

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tem of definitions. See G. STIGLER, *THE THEORY OF PRICE* 24 (3d ed. 1966). For a short but elegant discussion of the empirical status of certain basic economic hypotheses, see P. SAMUELSON, *FOUNDATIONS OF ECONOMIC ANALYSIS* 90-92 (1947).

<sup>20</sup> It is painful to point this out to an economist-lawyer, but most reasonably adequate sociologists would blush to present any such standard as part of a research matrix for an empirical study. Compare P. SAMUELSON, *supra* note 19, at 92:

Nevertheless . . . the modern utility theory with all its qualifications is not in a technical sense *meaningless*. It is a hypothesis which places definite restrictions upon demand functions and price-quantity data; these could be refuted or verified under ideal observational conditions. One should have thought that these empirical implications would have been the sole end of the theorists who have concerned themselves with these matters. Strangely enough, means and ends have been so confused that only a small fraction of the literature has been concerned with this problem even indirectly; moreover, in this there are scarcely half a dozen papers in which valid demand restrictions have been developed. (Emphasis in original).

<sup>21</sup> POSNER 5. That is often the problem with heuristically simplified models; when you think you are describing a curve, you are really describing the graph paper.

still admire the intelligence with which it is tried, and the genuine, though limited, illuminations the effort provides. More than that, one can now understand the forces that shaped the attempt. All of us are unable to tell (or at least to tell about) the difference between right and wrong. All of us want to go on talking. If we could find a way to slip in our normatives in the form of descriptives, within a discipline offering narrow and apparently usable epistemological categories, we would all be pathetically grateful for such a new and more respectable formalism in legal analysis. We would leap to embrace it. Since that is the promise of economic analysis of law, to an increasing (and not wholly delusive or pernicious) extent, many of us are leaping.

To summarize, the move to economic analysis in law schools seems an attempt to get over, or at least get by, the complexity thrust upon us by the Realists. There was nonsense in Beale, but, ah, there was a feeling of elegance and power too. It was lovely to be able to say things like, "law . . . is not a mere collection of arbitrary rules, but a body of scientific principle."<sup>22</sup> It was marvelous not to be embarrassed to say that "Law . . . in great part . . . consists in a homogeneous, scientific and all-embracing body of principle . . ."<sup>23</sup> Now we have a book in which it is apparently plausible to declare, "it may be possible to deduce the basic formal characteristics of law itself from economic theory . . ."<sup>24</sup> *and then do it in a two-page chapter.*<sup>25</sup> What bliss.

We are, I think, beginning to see in the speedy spread of economic analysis of law the development of a new basic academic theory of law. Since its basic intellectual technique is the substitution of definitions for both normative and empirical propositions, I would call it American Legal Nominalism.<sup>26</sup>

### *The Power of Positive Economics*

I shall devote most of the remainder of this discussion to a criticism of various aspects of Posner's book. But I would rather not leave any impression of thorough negativism, if for no reason other than that such a response would be stupid. The economic analysis of law (including *The Economic Analysis of Law*) continually manages to provide rich and varied insights into legal problems. Its growing popularity among

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<sup>22</sup> J. BEALE, *supra* note 6, at 24-25.

<sup>23</sup> *Id.* at 25.

<sup>24</sup> POSNER 393.

<sup>25</sup> *Id.* at 393-94 ("A Note on Jurisprudence").

<sup>26</sup> "Econominalism" was tempting. Luckily, it was also obviously barbaric.

legal scholars is, as I have noted, no accident. But in addition to its value as a way to continue to ignore our otherwise desperate intellectual straits, it frequently serves intelligently to inform actual legal choices. For the central tenet and most important operative principle of economic analysis is to ask, of every move (1) how much it will cost; (2) who pays; and (3) who ought to decide both questions.

That might seem obvious. In fact, it is not. It is a most common experience in law schools to have someone say, of some action or state of events, "how awful," with the clear implication that reversing it will de-awfulize the world to the full extent of the initial awfulness. But the true situation, of course, is that eliminating the "bad" state of affairs will not lead to the opposite of that bad state, but to a third state, neither the bad one nor its opposite. That is, before agreeing with any "how awful" critic, one must always ask him the really nasty question, "compared to what?" Moreover, it should be, but often is not, apparent to everyone that the process of moving the world from one state to another is itself costly. If one were not doing *that* with those resources (money, energy, attention), one could be doing something else, perhaps righting a few different wrongs, a separate pile of "how ghastly's."

One can illustrate this basic kind of economic analysis by working with quite simple fact situations. There is this old widow, see, with six children. It is December and the weather is rotten. She defaults on the mortgage on her (and her babies') family home. The mortgagee, twirling his black moustache, takes the requisite legal steps to foreclose the mortgage and throw them all out into the cold. She pleads her total poverty to the judge. Rising behind the bench, the judge points her and her brood out into the swirling blizzard. "Go," he says. "Your plight moves me not." "How awful," you say?

"Nonsense," says the economic analyst. "If the old lady and kids slip out into the storm, they most likely won't die. There are people a large part of whose satisfactions come from relieving the distress of others, who have, that is, high utilities for beneficence and gratitude. So the costs to the widow are unlikely to be infinite. Moreover, look at the other side of the (you should pardon the expression) coin. What would happen if the judge let the old lady stay on just because she was out of money? First of all, lenders would in the future be loathe to lend to old widows with children. I don't say that they wouldn't lend at all; they'd just be more careful about marginal cases, and raise the price of credit for the less marginal cases. The aggregate cost to the class of old ladies

with homesteads would most likely rise much more than the cost imposed on this particular widow. That is, the aggregate value of all their homes (also known as their wealth) would fall, and they'd all be worse off.

"More than that, look at what such a decision would do to the motivation of old widows. Knowing that their failure to pay their debts would not be visited with swift retribution, they would have less incentive to prevent defaults. They might start giving an occasional piece of chicken to the kids, or even work up to a fragment of beef from time to time. Profligacy like that would lead to even less credit-worthiness as their default rates climbed. More and more of them would be priced out of the money market until no widow could ever *decide for herself* to mortgage her house to get the capital necessary to start a seamstress business to pull herself (and her infants) out of poverty. What do you mean, 'awful'? What have you got against widows and orphans?"

Now, I have with malice aforethought tendentiously chosen and written this particular example sharply to highlight an otherwise unexpected possibility: the economic analyst may well be right. He is not necessarily "right" in the sense that one ought to throw out this particular old lady (for the analysis is too sketchy and data-free to decide that). But he is certainly "right" in this sense: the effect of not throwing her out is not a net gain, to society in general, or even to others in her "class," equal to what she personally is saved by staying in possession. Choosing to favor her is not cost free, *even to others like her*.

And one of the things Posner does throughout his book is display one analysis after another, in one problem area after another, along the lines of the above. Naturally his analyses are, most of the time, much more thorough and sophisticated than my parodistic example.<sup>27</sup> For one thing, they implicate, more clearly than the above parody, themes additional to the non-freeness of lunches, notably the general gains, at least in effi-

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<sup>27</sup> It should be borne in mind, moreover, that Posner has set out to cover a great deal of ground in one book in order to show economic analysis at work in a vast number of concrete legal contexts, and to do so in a work designed for neophyte students and teachers. Thus, while his treatments are by and large vastly much more thorough, vigorous, and sophisticated than those encountered in the usual law-school classroom (where "transaction cost," "opportunity cost," and "externality" come trippingly and emptily to the tongue at every analytic impasse), they are still, obviously, not what he can do, and does, when he is essaying a fuller job. See, e.g., Posner, *An Economic Approach To Legal Procedure and Judicial Administration*, 2 J. LEG. STUD. 399 (1973). I hope to be able to avoid criticizing Posner for not doing what he (quite properly) did not set out to do.

ciency terms, of letting people wherever possible decide for themselves what they want and what they are willing to pay. Especially when he is essaying analyses of the relatively short-run effects of changes in relatively measurable variables, and most particularly in areas where the aims of the variation are explicitly, cognizably economic, Posner is superbly illuminating.<sup>28</sup> There is no doubt that the mind at work in this book is supple, strong and even (in a sense) sensitive. No one reading it, student or teacher, could fail to have his thinking about particular legal issues and about law in general enlarged and clarified.

Thus, if, at this point, I choke off my genuine admiration, the reader must understand that I do so only because so directed by Posner, who states that he himself has chosen not to emphasize "the limitations of economic analysis, as both an interpretive and a normative tool . . . in the text" so as to give others a chance.<sup>29</sup> No, I am being disingenuous. The rest of this discussion is as it is because I have an ax to grind, and more than enough fury to turn the wheel. But let no one be misled; it is the high intellectual quality of the book which enrages me, not its incompetence.

### *"Inefficiency" As A Critique*

That obligatory (though sincere) piece of admiration out of the way, let us now return to that most key passage in the book:

Efficiency is a technical term: it means exploiting economic resources in such a way that human satisfaction as measured by aggregate consumer willingness to pay for goods and services is maximized. Value too is defined by willingness to pay.<sup>30</sup>

Since the assumption is that "man is a rational maximizer of his ends in life,"<sup>31</sup> (which, as you recall, means nothing stronger than that most people in most affairs of life are guided by what they conceive to be their self-interest and that they choose means reasonably (not perfectly) designed to promote it),<sup>32</sup> you can tell what people want, and how much they want it, by seeing what they buy, and how much they pay for it. By and large, therefore, whatever people might *say*, you can get

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<sup>28</sup> See, e.g., POSNER 139-55, on "Public Utility and Common Carrier Regulation," but there are many, many equally powerful examples in the book.

<sup>29</sup> *Id.* at xi.

<sup>30</sup> *Id.* at 4.

<sup>31</sup> *Id.* at 1.

<sup>32</sup> *Id.* at 5.

a fair idea of what is really to their taste by seeing what they actually *do*. Now that is not just a lovely way to avoid frightfully difficult empirical inquiries; it is also a powerful analytic idea. It is closely analogous to one of the central messages of legal realism: when reading opinions, see what the judge does in the case, not what he says about what he is doing. People (including judges) do seem to do what they want to do.

But if one thoroughly accepts the idea that the results people actually achieve for themselves are the ones that, among the available alternatives, they wanted to achieve, then one trembles on the edge of a worrisome paradox. For it is then also possible to state matters this way: Whatever people achieve for themselves, they perceive it as the best they can do. If what they want can be determined only by seeing what they "buy," then what they "buy" must (by definition) be what they wanted (again, given the available choices). One cannot say that though *A* achieved state *X*, he "really" wanted to achieve state *Y* (and certainly not that he *ought* to have wanted to achieve state *Z*), because the only test of the "rightness" of his choice, for him, given his circumstances, is what he did.

Given this initial position about the autonomy of people's aims and their qualified rationality in reaching them, one is struck by the picture of American society presented by Posner. For it seems to be one which regulates its affairs in rather a bizarre fashion: it has created one grand system—the market, and those market-supportive aspects of law (notably "common," judge-made law)—which is almost flawless in achieving human happiness; it has created another—the political process, and the rest of "the law" (roughly legislation and administration)—which is apparently almost wholly pernicious of those aims. An anthropologist coming upon such a society would be fascinated. It would seem to him like one of those cultures which, existing in a country of plenty, having developed mechanisms to adjust all intracultural disputes in peace and harmony, lacking any important enemies, nevertheless comes up with some set of practices, a religion say, simultaneously so barbaric and all-pervasive as to poison almost every moment of what would otherwise appear to hold potential for the purest existential joy. If he were a bad anthropologist, he would cluck and depart. If he were a real anthropologist, I suspect he would instead stay and wonder what it was about the culture that he was missing. That is, he would ponder why they *wanted* that religion, what was in it for them, what it looked like and felt like to be *inside* the culture. And he would be especially careful not to stand outside and scoff if, like Posner, he too leaned to the

proposition that "most people in most affairs of life are guided by what they conceive to be their self-interest and . . . choose means reasonably (not perfectly) designed to promote it."<sup>33</sup>

The point is this: at least as an initial position, anything that happens in a culture has as much likelihood at being "desired" as anything else. One needs an extracultural standing place, or some evidence of "real" intention other than that which is the product of observing actual practice, in order to criticize any facet of the culture, in normative *or efficiency* terms. For nothing can be considered inefficiently achieved until one discovers what the aim of the activity was.

This caution is, I think, especially applicable to certain of Posner's critiques, and helps in more general terms to illuminate the limitations of his method. Consider, for instance, his chapter on crime control.<sup>34</sup> He begins:

The economic content of legal theory is nowhere clearer than in the rationale of criminal punishment. The usual justification offered by legal theory for why the state punishes criminal violators is that it is necessary in order to deter people from committing crimes.<sup>35</sup>

Posner then goes on to tie this asserted aim (much more explicitly, by the way, than anywhere else in the book) to its underlying philosophical pillar, a rather crude version (even for Bentham) of Benthamite utilitarianism.

Bentham's utilitarianism, in its aspect as a positive theory of human behavior, is another name for economic theory. Pleasure is value, and pain cost. People . . . can be deterred from criminal activity by a punishment system that makes the cost of criminal activity greater than the value of that activity to them.<sup>36</sup>

But there is a serious problem here. Posner assumes (apparently because it is the "usual justification offered by legal theory," that is, because that's what people *say*) that the purpose of criminal punishment is to deter criminal behavior, and on that basis criticizes certain aspects of current criminal law and procedure as inefficient, even silly. But what if deterring criminal behavior is not the aim, or even one of the

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 357-74.

<sup>35</sup> *Id.* at 357.

<sup>36</sup> *Id.*

principal aims, of the criminal law as practiced in the society? If that were so, then it might be argued that there was no inefficiency at all.

Consider, for instance, Posner's discussion of incarceration as a punishment. It is, he says, "a more costly remedy to society than a fine is."<sup>37</sup> He points not only to the costs of running the prison system, and the loss of the prisoner's productivity, but to the damaging effects on the prisoner himself. Imprisonment tends to decrease the likelihood that the criminal will "go straight" and earn honest dollars, the failure to earn which is, as Posner puts it, "one of the opportunity costs of crime." Thus it costs money to jail a man, and costs more when the jailing confirms him in a life of crime. Society has spent money (incurred costs) in order to incur further costs (more crime).

But what if society's interest in deterrence is, *in fact*, not very strong? What if it is the incarceration itself society likes and wants to "buy"? What if it doesn't want deterrence, or even rehabilitation, but the satisfaction of some other interest, revenge say, or what (if one were being judgmental) one might call sadism? After all, a link between prison and increased crime has been suspected by quite a number of people for quite a long time. There has even been some evidence of a link between the nastiness of the prison and the *rate* of increased crime. Nonetheless there has been firm opposition, at least from large segments of the public, to any decrease in imprisoning or amelioration of prison life. It is altogether possible that while the society does see increased crime as a cost, it considers it one well worth incurring in order to experience the otherwise socially unobtainable joy of inflicting pain. (Remember, not all "goods" have substitutes; rape is not rape, but alters when it enthusiasm finds, and thus one cannot substitute prostitution for it, or even love.)

But there is a further possibility. Society, or at least important segments of it, may not see increased crime as a cost at all. It is possible that "we" *want* crime. Criminals provide huge positive returns to non-criminals. Nor am I thinking only of trivial cases involving magistrates who gamble, smoke pot, and use prostitutes. Even theft, even murder, helps to establish, by contrast, our rectitude. Moreover, if one hated and feared the lower classes, incarceration for criminal activity would be a gorgeous strategy: most of the victims of crime are in the lower classes, as are most of the criminals; one punishes the perpetrators of crime in a way that not only doesn't deter them from further crime, but encourages

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<sup>37</sup> *Id.* at 363.

more of it, thereby punishing the victims of crime in a manner designed to keep the cycle going.

Naturally, one would not buy crime as a product forever, even if crime were what one wanted. As its impact shifted so that those who loved it became increasingly its direct victims, then crime might turn into a positive cost and bring about, for the first time, efforts *actually* to decrease its incidence. It is at least arguable that something like that is happening now. As “*we*” have started increasingly to become mugges, some of “*us*” (for instance, in Massachusetts) seem to have started seriously to explore the elimination of that most potent crime generator, the prison.

It is not important, however, which of these widely diverging social cost-benefit analyses—mine or Posner’s—is more accurate. The more important issue is this: Posner can find a social activity “inefficient” only by assuming that what society does, and what it wants to do, are different. But how can he know that? Certainly he can’t say “because people *say* they want something different,” for as he apparently knows as well as any man alive, what counts is not what people say is of value to them, but what they buy and how much they pay.<sup>38</sup> And he certainly cannot argue that they *ought* to want something different, not in the face of his own careful strictures against any normativity.<sup>39</sup>

In principle, the foregoing argument can be brought to bear on many of Posner’s analyses of social inefficiency. One cannot say, for another instance, that it is “inefficient” to have a trial-type hearing in a situation where the chance of decreasing error by doing so is slight.<sup>40</sup> The social purpose of trial-type hearings may have little to do with eliminating error, despite what everyone *says* the purpose is. It may be pure theatre for the participants, or an alternative to ulcers (or a way of producing them in others). Certainly we have for a millenium been having trial-type hearings in circumstances, and under rules (of evidence, for instance) which seem much more designed for theatrical or therapeutic than epistemological purposes. Once again, you can’t know that a thing is not being done well until you know what it is that is being done.

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<sup>38</sup> Posner is elsewhere very explicit about this: “If I say I prefer a cheap foreign import to an expensive American car, but then buy the latter, the purchase speaks louder than the words. Willingness to pay provides more credible evidence of preference than willingness to say.” Posner, *Economic Justice and the Economist*, 33 THE PUBLIC INTEREST 109, 114 (Fall, 1973).

<sup>39</sup> See POSNER 4-5.

<sup>40</sup> See *id.* at 334.

I could go on multiplying instances with respect to particular analyses of particular legal problems.<sup>41</sup> But what I find most interesting is the possibility that my thesis—that you can't know something is ill-done unless you *assume* an aim other than the one achieved—might also be applicable to one of Posner's most central, important, and apparently beloved points, the comparative inefficiency of, and "market failure" in, what one might call "the political market."

Posner writes:

There is abundant evidence that legislative regulation of the economy frequently, perhaps typically, brings about less efficient results than the market-common law system of resource allocation. The crucial question is whether this failure is accidental and easily remediable, or perhaps inherent in the nature of political decision making. The latter view is gaining support. The essential problem seems to be that the generalized consumer interest in efficient markets is systematically underrepresented in legislative decision making."<sup>42</sup>

Let us assume that legislative regulation does, in fact, bring about less "efficient" results (in Posner's technical meaning of the term) than the market as buttressed by common-law adjudication. That is no big-hearted concession on my part; the evidence, only a small part of which is cited by a comparatively restrained Posner, is exceedingly persuasive. Let us also assume that generalized consumer interest in efficient markets is systematically underrepresented in the political process; Posner's arguments are exceedingly summary on the point,<sup>43</sup> but he is backed up by some strikingly intelligent people who have argued the same point with exceeding (perhaps excessive) pertinacity and thoroughness.<sup>44</sup> The obvious question remains, however: So what? Remember, the issue is not, for every consumer/citizen, what he gets out of "the market" or what he gets out of "politics," but what he gets out of the society which is the product of both of these grand systems together. To say of a system that it is defective because, taken by itself, it fails to maximize or optimize something good is somewhat like arguing that steak is a defective

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<sup>41</sup> It would be interesting, to take just one more instance, to discuss whether the entire corpus and vocabulary of lyric poetry is inapplicable to the social subsystem of marriage. If it is not, that might well have some effect on Posner's rather icy discussion. See *id.* at 61-64.

<sup>42</sup> *Id.* at 329-30 (footnotes omitted).

<sup>43</sup> See *id.* at 330-32.

<sup>44</sup> See the list of "Suggested Readings" on the point, *id.* at 332.

food because it has virtually no carbohydrate. It would be defective (that is, conducive to early death) if that were all one ate. But in the context of general nutrition it might be seen as an important part of the process of sustaining life.

Thus it is at least plausible that the "weaknesses" in the political system, such as its frustration of allocational efficiency, are really complementary to, or even corrective of, "weaknesses" in the economic system, such as its tendency to distribute power in proportion to wealth, or even in proportion to wealth-producing talents. Giving everyone one vote may help people keep from themselves their natural inferiority, a truth which, if it surfaced, would substantially affect their tempers and their utility schedules. Politics may, that is, be a method of cementing social solidarity through even *distributive* injustice, and the purpose of the political process may indeed be anti-efficient *and* distributively absurd. But once again, "we" may be getting, overall, what we want.<sup>45</sup>

One can, of course, go too far with this sort of argument, and I may have done so already. It is not going to help matters much if I attempt to substitute for Posner's extremely careful version of what I take to be the essentialist fallacy ("the *real* explanation of this social practice is . . .") my own less careful avatar of the holistic fallacy ("this practice can only be explained in the context of all of the dynamics of the entire society"). If the first is overly arid, the second is a swamp. Not only *can* one say very interesting things about subparts of societies, but Posner actually does so over and over. But a society, and its creation of human satisfactions and frustrations, is more complicated than Posner's economic model makes it appear. It is possible, I suppose, that the entire political structure of advanced technological societies is just a mistake, and as presently articulated it has almost no wholesome purpose. But that seems to me bloody unlikely. For if "the market" is a creation of human choice, so is the government.

Moreover, the argument that governments, even the particular shapes they take, are not functionless in particular societies is made immeasurably stronger, it seems to me, by considering the alternatives. In other words, I commend to Posner his own most powerful analytic device, asking of each proposed move what it costs, and who pays. Is it likely that the revolutionary (though not necessarily violent) changes neces-

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<sup>45</sup> It is, of course, clear that political choice, while complex, tells us *something* about human desire. It has recently told Posner, for instance, that "The real lesson of the McGovern campaign is that most people do not believe that the distribution of income and wealth in this country is fundamentally unjust . . ." Posner, *supra* note 38, at 115.

sary to bring on what I take to be the Posner millenium—no governmental coercion except in support of market efficiency—would bring about any such thing?<sup>46</sup> Would those who might perceive themselves made worse off as a result of not having a government to capture goodies on their behalf stand still while the market, efficient as all get-out, made them, at least relatively, poorer and poorer? Even if in efficiency and distribution terms they might be “wrong,” would not those groups, “guided by what they conceive to be their self-interest,”<sup>47</sup> do what men seem historically always to have been tempted to do, to *take* a piece of the action for themselves? Would they not, as they always have in the past, in order to prosper form alliances with other men who saw their self-interests as at least temporarily congruent? In brief, wouldn't we eventually get not “no government” (except on Posner's terms) but another government, most likely not the same as Posner's, or the same as our present one, but something altogether different? And if we got that, would we all, or anyone, be better off?

Obviously, I don't know. I too find it hard to believe that all is for the best in this best of all possible worlds. But there is something to be said for gross conservatism like mine, at least if one is, as I am, fairly risk averse: the radically unknown is always frightening (at least to those making out all right as is), especially considering how many lives can be lashed to pieces as a new distributional curve flails about, desperately seeking a new equilibrium.

But that is just personal risk averseness on my part. Also involved here is a matter much more generally interesting than my fears about my own particular future: when *is* the future, and how does one go about deciding what it will be once one decides *when* it is. Posner does a lot of thinking about that (as do we all), and his techniques and results are interesting. Let us therefore address some more detailed attention to the predictive value of single vocabularies.

### *Avoiding Complexity*

As I have suggested several times, this aura of repetitive relentlessness that Posner's book gives off is not solely the product of Posner's per-

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<sup>46</sup>I should, of course, note at this point that Posner always denies having any such position or, for that matter, any position at all on what society ought to be. See, e.g., POSNER 405, 220-21. See also Posner, *supra* note 38, at 113: “‘More efficient’ is not a synonym for ‘better.’ Economics is a science of means; it does not prescribe ends.” Every reader will have to decide for himself the extent to which Posner actually manages the difficult feat of being “normatively neutral.”

<sup>47</sup>POSNER 5.

sonal literary style. It is dictated, I think, by a basic analytic strategy consciously chosen for the book: first, vigorously to exclude from consideration any normative statements of any kind, and second, to allow in empirical data only of particular kinds and only under the most restrictive of conditions. To put it another way, it was Posner's conscious choice in writing the book to deal only with what is, and then to exclude any description of that *is-ness* in any uncongenial vocabularies, say, those employed in sociology, anthropology, or psychology. This decision has the natural collateral effect of excluding any *data* relevant to the categories used by those disciplines but not by Posner's.

Such a choice has obvious advantages, as I have earlier pointed out.<sup>48</sup> But let me just sketch, in connection with some of Posner's particular analyses, what the possible effects of a somewhat less narrowly tunnelled vision might have been. Take sociology. Now I don't pretend to know what sociology is, but I can mention one thing that seems to interest or at least bother some sociologists—social groups and classes. The following kind of question is frequently posed: Can I say anything interesting, or predictive, or even amusing about a number of people more than one and less than all? Posner considers questions of that form throughout his book, for it is implicated every time individual demand schedules are talked about as joined into a general demand curve. Much of the time he addresses the problem of class formation explicitly, sometimes indeed to criticize the alleged grossness and insensitivity of other observers of human activity.<sup>49</sup> But note the effect a greater sensitivity to classes formed on criteria other than the particular ones Posner admits as relevant might have.

Consider, for instance, Posner's discussion of the role of judges.<sup>50</sup> For reasons I shall not go into here, it is of some importance to Posner to establish that common-law adjudication is superior, at least in efficiency terms, to legislative decision-making. One pillar of this "proof" is the freedom of the judge from large dollops of allocative bias:

[L]aw resembles the market in its impersonality, its subordination of distribution considerations. The invisible hand of the market has its

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<sup>48</sup> See pp. 451-52 *supra*.

<sup>49</sup> See, e.g., POSNER 5: "Criminologists often classify people in just two groups: law abiding and criminal. [There is nothing cited at this point; one assumes Posner meant to say "*Stupid* criminologists often classify . . ."] The economist's presumption is that some people are law abiding . . . ; others would . . . ; and still others, perhaps a majority would . . ."

<sup>50</sup> See *id.* at 320-28.

counterpart in the aloof disinterest of the judge. The method by which judges are compensated and the rules of judicial ethics are designed to assure that the judge will have no financial or other interest in the outcome of a case before him, no responsibility with respect to the case other than to decide issues tendered by the parties, and no knowledge of the case other than what the competition of the parties conveys to him about it. Jurors are similarly constrained. . . .  
Judicial impersonality is reinforced by the rules of evidence. . . .<sup>51</sup>

Well that's fine; the judge doesn't personally give a damn how the case comes out. At this point, of course, to go along with the game we must overlook the fundamental confusion in this passage between formal law and law in action, that is we must disregard one of the central lessons of legal sociology. We will just pretend that the legal realists had never lived, and that no one is allowed to look through the rules of pleading and evidence to see what judges and juries actually do know, despite these restrictions, about the parties and cases before them. We will even shut our eyes to the fact that it is in the service of getting before judges and jurors these "irrelevant" facts, like the parties' wealth and class, that many lawyers spend most of their time and skill.<sup>52</sup>

Let us assume, then, that the judge is so exquisitely shielded from the world. Why then should he come up with decisions that favor efficiency? "This is a difficult question," Posner has the good grace to note.<sup>53</sup> The "tentative" answer, surprisingly enough, is that judges are *not* without personal interest in how the case comes out. Especially (but not only) "where the judges do not have lifetime tenure" they "frequently aspire to higher office, judicial or political." Indeed "[i]t seems appropriate to view these judges as the agents of the executive or legislative organs of the state."<sup>54</sup> Will that skew the allocative disinterest of the judge? Not at all. Efficiency is also valuable to society, and judges will opt for that. Why? It must be because the efficiency-oriented decisions will help them in *their* quest for higher office. But if that is so, and legislators who also aspire to higher office apparently respond by

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<sup>51</sup> *Id.* at 322.

<sup>52</sup> We shall also overlook the fact that Posner's book is apparently wholly uninformed by any explicit theory of legal "penetration," that is, any consistent attempt to measure the actual effect of legal rules on a society, even its most obviously economic facets. As one might guess, that is itself a formidable problem. See, e.g., Trubek, *Toward A Social Theory of Law: An Essay on the Study of Law and Development*, 82 *YALE L.J.* 1 (1972).

<sup>53</sup> POSNER 325.

<sup>54</sup> *Id.*

taking distributive matters very seriously, why do we assume that judges won't? What is it (a sociologist might wonder) about the class "ambitious politician" that changes the predicted behavior of the two subclasses "legislator" and "judge" with respect to favoring certain interests, notably their own and those of their own class?

This is a particularly piquant question when asked in the context of Posner's extraordinarily shallow definition of the term "interest." Consider the following:

It has sometimes been argued . . . that a judge's decisions can be explained in terms of the interests of the group or class in society to which he belongs—that the judge who owns land will decide in favor of landowners, the judge who walks to work in favor of pedestrians, the judge who used to be a corporate lawyer in favor of corporations.<sup>55</sup>

Note first what Posner means by "class;" his examples are landowner, pedestrian, and corporate lawyer. Those are funny "classes" to choose; one might have expected other classes, for instance "bourgeoisie," or "upper middle class," or "elitist education group," or "Caucasian," or "male." If classes of that kind were chosen, it would have an interesting effect on the remainder of Posner's point:

There are two points to be made here. First, where a particular outcome would promote the interests of a group to which the judge no longer belongs (our last example) [i.e., corporate lawyer], it is difficult to see how the judge's self-interest is advanced by adopting that outcome. *The judge's previous experience may, however, lead him to evaluate the merits of the case differently from judges of different backgrounds.* Second, the increase in a judge's income from a ruling in favor of a broad group, such as pedestrians or homeowners, to which he belongs will usually be so trivial as to be easily outweighed by the penalties . . . for deciding a case in a way perceived to be unsound or biased.<sup>56</sup>

Had Posner chosen other classes it would, first, have been clear that there were many *important* classes (that is, classes with more significant permanence than pedestrianism) in which judges can be placed which cannot *be* left, thereby making his first point inapplicable. It would also have made him reconsider the meaning of the word "income" in the modified sentence "the increase in a judge's income from a ruling in favor of a broad group, such as the upper middle class or Caucasians

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<sup>55</sup> *Id.* at 326.

<sup>56</sup> *Id.* at 326-27 (emphasis supplied).

. . . will usually be so trivial . . . ." Most important, it would have pointed toward a considerably more sophisticated treatment of the cognitive and emotional effects of class membership than the single sentence italicized above; it is arguable at least that being a Caucasian male member of the bourgeoisie with a professional school education. (which describes almost all judges) has a somewhat more striking effect on one's very perceptual and cognitive apparatus than being, say, a corporate lawyer or a pedestrian. This class-conditioned status might even affect the judge's evaluation of his "income" from a particular ruling, and of the "cost" to him of *his* class's perception of what "unsoundness" or "bias" might be.<sup>57</sup>

Again, the question is not whether a sociologist's approach or an economist's would, on this issue, be superior. They are obviously complementary over a wide range. Even a lawyer's views, say Cardozo's,<sup>58</sup> or Llewellyn's,<sup>59</sup> might be useful.<sup>60</sup> But that too is not the point. It is no more than this: class analysis is beggared by limiting the classes analyzed solely to those defined by narrow explicitly economic characteristics. To do otherwise, of course, would require new data, even empirical information rather hard to come by, certainly harder to come by than assumed responses to changes in price or supply of goods. But it might still help us to "understand" more than we now do about judicial behavior and its springs.

Or take anthropology. What if Posner knew some of that (or let on that he did)?<sup>61</sup> One needn't get into the minutiae of disputes among anthropologists (which, at least in the area of "structuralism," is like falling into a tub of still-warm taffy) to suggest a lesson upon which they would all agree: one cannot say anything conclusive, or even particularly assertive, about any aspect of a culture without trying to place it (as much as one ever can) within all its other aspects. One

<sup>57</sup> One need not be a vulgar Marxist to be surprised at any surprise that those who serve in the legal infrastructure of a market-oriented society tend frequently toward market-rational legal decisions.

<sup>58</sup> See, e.g., B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

<sup>59</sup> See K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

<sup>60</sup> Of course, if one read Llewellyn, one would have to get out of it more than Posner apparently did, to wit: "the judge first decides what outcome is dictated by good common sense and then drafts an opinion rationalizing the result. . . ." POSNER 328. I am sure that for that characterization of his book, but for the transaction costs involved in returning from the dead, Llewellyn would cheerfully strangle Posner.

<sup>61</sup> Posner's only reference to anthropological literature, or indeed to the existence of the field, is his citation, apparently with approval, of an extraordinarily naive use of some anthropological data in a paper by another economist. See *id.* at 10n.2.

need not, for instance, believe with Lévi-Strauss that all cultural artifacts are in some useful sense to be seen as isomers and polymers of each other,<sup>62</sup> to recognize, as I have suggested elsewhere, that a culture's "political" system and its "economic" system together form another system in which the "contradictions" within each subpart may turn out more transcended than one would otherwise suspect.<sup>63</sup>

What about psychology? Oh sure, it has its problems. But various psychologists have said some shrewd things from time to time. Posner concedes that "the assumptions of economic theory are to some extent, certainly, oversimplified and unrealistic as descriptions of human behavior" but that "there is abundant evidence that theories derived from those assumptions have considerable power in predicting how people in fact behave."<sup>64</sup> I am sure there is such evidence (though at this point none is cited) but there is evidence of other kinds too. What happens, for instance, to questions of "utility" if one accepts, even as a hypothesis, the idea of unconscious desires? In speaking about the maximization of utility, does one rate success in achieving what people "conceive to be their self-interest"<sup>65</sup> in terms of their conscious or unconscious aims? If a man kills himself out of incandescent rage at his wife (or *vice versa*), has he "succeeded"? What is the social utility function when, in misery, one substitutes architectural erection for sexual and finds himself equally miserable but with an extra house? Nothing normative, mind you, just a question about the usefulness of defining value solely in terms of people's objective acts, and then generating a social utility function out of their aggregation. Can one actually, now, write four hundred pages about human desire without adverting to Freud, his followers, or even his enemies?

It must once again be emphatically stated that all of these considerations do not destroy Posner's contribution to the understanding of law. Suggesting that other intelligent men, also honestly groping for understanding, have used other matrices to place against society, thereby coming up with other assumptions, definitions, and expectations about the relevance of data, is not to suggest the primacy, or greater virtue or power, of any of the approaches. But do allow me to say that again: *any* of the approaches.

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<sup>62</sup> That's me and not Lévi-Strauss, by the way; he is a good deal more subtle and powerful than that. See, e.g., C. LEVI-STRAUSS, *THE SAVAGE MIND* (1966), esp. at 1-33.

<sup>63</sup> See pp. 467-69 *supra*.

<sup>64</sup> POSNER 5.

<sup>65</sup> *Id.*

Of course, giving in to the temptation to eschew recognition of any approach but one's own is hardly merely self-indulgent. It may well be an absolute precondition to getting anything thought out or written down at all. Especially in the analysis of social states which are the product of many variables, and especially when one's interest is in a predicted state some substantial time in the future, *even if one restricts ones' vocabulary of inquiry very sharply*, the problems are enormous. If  $q$  is the future state, and if you know that  $q$  is a function of  $a, b, c \dots n$ , and  $a, b, c \dots n$  are variables many of which are dependent and reflexive, even if  $n$  is no greater than, say, seven (hell, three), the "solution" of the problem is, to say the least, chancy.

Indeed, one of Posner's key points is that because of the knottiness of such decisions, it is best if, as much as possible, everyone is given the opportunity to untie them for himself. For many of the decisions of life, if anyone can come out more or less where he wants to, it is he himself for himself. Another way to put this, I suppose, is to say that "the market" looks dreadfully inadequate as a way of maximizing human satisfactions, but only until one asks "compared to what?" If, however, one is going to criticize a society, one has in effect to do it for others as well as oneself. Once again, one need not do anything as vulgar as use ethical categories. One can say, after all, "If you are trying to get to  $q$ , you ought [in the non-normative sense] to do  $p$  (or stop doing  $p$ , or do  $\sim p$ , or do *something*)." Posner would, I think agree, especially since he spends much of the book doing just that.<sup>66</sup> And after all, it is frequently possible to tell what a person is trying to do even if he seems to be going about it in rather a peculiar way. That is, one ought to be able, sometimes, to point out that someone is making a big mistake, and even tell him sometimes what it is.

But even while one is giving that kind of advice, it cannot be over-emphasized how on the edge of arbitrariness the game is, especially in long-term multi-variable contexts. There are numerous reasons for this<sup>67</sup> but one deserves particular emphasis, for it seems to me to play much the same role in social criticism that the Heisenberg Principle plays in

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<sup>66</sup> Though it was rather startling to see him toss off a put-down of cost-benefit analyses, ("The vogue of cost-benefit analysis has created inflated notions of the effectiveness of analytical techniques in resolving questions of cost and demand.") in the middle of a chapter of his own cost-benefit analysis. See *id.* at 320-32, esp. at 323.

<sup>67</sup> See Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617 (1973), where a large number of these reasons are set out clearly and powerfully.

the physical sciences, that is, as an absolute bar to the total sufficiency of empirical argument.

Posner gives a page to what is called "The Problem of Second Best."<sup>68</sup> The gist of his special application of the principle is that if substitutes for a monopolized product are themselves monopolized, it is possible that making the otherwise obviously efficient move of breaking up the subject monopoly may have ultimately inefficient results. But there is a stronger form that may be given to second-best problems. One might assert a *general* theory of the second best as follows: "If a state of affairs is the product of  $n$  variables, and you have knowledge of or control over less than  $n$  variables, if you think you know what's going to happen when you vary 'your' variables, you're a booby." That is, in complex processes (which most social processes are) a move in the right direction is not necessarily the right move. To pick a simple illustration, if I am on a desert island, subsisting solely on coconuts and oysters and beginning to hate it a lot, and across the bay from me there is another island, lush and fertile, I do not improve my position in life by swimming half way across.

Various things follow from this, even (perhaps especially) if one doesn't take it too seriously. The most critical need is to identify as clearly as possible, to oneself at least, the following factors in any social decision: (1) what am I assuming will stay constant if I meddle; (2) what do I know is connected to what I'm meddling with; (3) how much do I know about how those connected things will behave when I jiggle the things I've got my hand on; and (4) when I talk about the effects of my intervention, *when* do I mean?<sup>69</sup>

Now this, obviously, is hard enough even if one seeks, as Posner does, to stay within a particular definitional structure. Try it. But note how much more difficult it becomes when the variables are not kept part of the same logical and empirical framework. If a "class" consists, for in-

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<sup>68</sup> POSNER 112-13.

<sup>69</sup> Indeed, one may describe one of the prime virtues of economic analysis as its careful unwillingness to stop the cost-benefit analysis too soon. Getting back to our old widow lady (*see* pp. 460-61 *supra*), it was a systematic error of previous analysts that they stopped their calculations with the result of the particular case. They would often believe that the old lady (and by extension, others like her) just "won" when the eviction was refused. The economists have, by going a little further, shown us how less simple the situation is. The problem is that everything gets less clear again if we choose not to stop at *that* new point, but set out to go even further down the chain of time and inference. It is not just, as Keynes put it, that in the long run we'll all be dead, but that in different middle runs we'll all be different.

stance, not just of "consumers" whose sub-classes are generated by differential responses to, say, price variations, but of income classes, or education classes, or racial classes, and there is no "formula" which governs the transformations between and among the diverse classes generated in these diverse ways, one can hardly talk at all. On the other hand, if one *knows* that such kinds of classes exist (at least as intellectual constructs), unless one assumes (or can prove) their irrelevance to the behavior one is oneself investigating, one must face the certainty of insufficient analysis, and thus the certainty of uncertain prediction. Since that will be the situation of any investigator of human activity, he will be in a continual tension between simplification and falsification. Bluntly, the less he accepts as relevant, the less he can say that is not misleading; the more he accepts as relevant, the less he can say at all. Even more bluntly, tunnel vision (like Posner's) is the price we pay for avoiding total blindness. To suggest to Posner that he look at everything at once or even seriatim, would be vain and foolish advice. Counseling humility, of course, suffers from no such drawbacks.

*Smuggling Normatives: How To Win For Friends And Influential People*

I have saved for last the question that is really most basic, for me, and I think for Posner. For all of his claims to non-normativity, it is obvious that there is at least one value *qua* value that directs and informs Posner's whole analysis. God (and history) knows it's one that does him credit: individual human freedom. One could, I suppose, treat Posner's making his whole structure balance on a definition of value in terms of individual human desire as hypothetical or accidental, but that would be silly. As normatives go, freedom is a good good, and there's no reason for anyone to be embarrassed by its espousal. For Posner, freedom—individual freedom—is a merit good, and why not; it's certainly no worse than, say, equality.

But having said that human freedom is the subterranean value upon which *Economic Analysis of Law* stands, and having praised that foundation, I cannot bring myself to stop. I know I should. Normative premises are just that; they don't get any more proved by being talked about. But I am just not up to resisting the modern moralist's temptation: even if I cannot say anything sensible about the choice of an in-

tuitionist good, I shall nonetheless run on a while about the logical consistency and intellectual elegance of its deployment.<sup>70</sup>

All right, let us consider, one last time, Posner's key definitional paragraph:

Despite the use of terms like "value" and "efficiency," economics cannot tell us how society should be managed. Efficiency is a technical term: it means exploiting economic resources in such a way that human satisfaction as measured by aggregate consumer willingness to pay for goods and services is maximized. Value too is defined by willingness to pay. Willingness to pay is in turn a function of the existing distribution of income and wealth in the society. Were income and wealth distributed in a different pattern, the pattern of demands might also be different and efficiency would require a different deployment of our economic resources. The economist cannot tell us whether the existing distribution of income and wealth is just, although he may be able to tell us something about the costs of altering it as well as about the distributive consequences of various policies. Nor can he tell us whether, assuming the existing distribution is just, consumer satisfaction should be the dominant value of society. The economist's competence in a discussion of the legal system is limited to predicting the effect of legal rules and arrangements on value and efficiency, in their strict technical senses, and on the existing distribution of income and wealth.<sup>71</sup>

In such a system whatever is, is. If you do not "buy" something, you are *unwilling* to do so. There is no place for the word or concept "unable." Thus, in this system, there is nothing which is coerced. For instance, let us say that a starving man approaches a loaf of bread held by an armed baker. Another potential buyer is there. The baker institutes an auction; he wants cash only (having too great doubts about the starveling's health to be interested in granting credit). The poor man gropes in his pockets and comes up with a dollar. The other bidder immediately takes out \$1.01 and makes off with the bread. Now under Posner's definitional system we must say that the "value" of the bread

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<sup>70</sup> Let me nonetheless make clear that proving logical inconsistency within an ethical system has no effect at all on its "validity." The propositions (1)  $A > B$ ; (2)  $B > C$ ; (3)  $C > A$  are logically incoherent; they are not evil. And for any closet Kantians among you, it should be pointed out that the proposition, "Act always as if under a general law applicable to all mankind except Morris Schwelb" is pretty silly, but hardly immoral. That is, there is no meta-ethical rule that morality be logically elegant, or even comprehensible.

<sup>71</sup> POSNER 4-5.

was no more than a dollar to the poor man because he was "unwilling" to pay more than that. An observer not bound within that particular definitional structure might find it somehow more illuminating to characterize the poor man's failure as being the result of being unable to pay more than a dollar. But one cannot, consistent with Posner's system, say any such thing. One's actual power is irrelevant.

Now, if one were to suggest that one's basic definitional structure ought to be altered to take account of a possible critical distinction between two empirically discernible kinds of "unwillingness"—to confront the possible effect of various kinds and levels of brute necessity upon will—one would not be changing the *realm* of definition. That is, no attempt would thereby be made to generate some normative definition of value. If one defines value in terms of objective willingness to pay (*i.e.*, actually paying), to see those acts as ambiguous across certain ranges of actualization is not to call them better or worse, but only more complex.

But let us pass all that. A man is entitled to his own definitional structures for his own "non-normative" deductions. It is, after all, not very useful to tell Richard that unarmed Morris' fleeing a battlefield in the face of an armored division coming his way is not "cowardice" when Richard has just written "'Cowardice' is defined as fleeing a battlefield in the face of an armored division coming one's way." All you can say is that if you had the defining to do, you might have defined cowardice somewhat differently. And that is not really to the point.

If, however, one thinks intellectual consistency is worth talking about, it is worth pointing out that a similar argument can, perhaps must, be made if one applies Posner's definitional structure to political decisions. There are two ways to put the case. One is that if the poor man is forever to be deemed "unwilling" to buy, then the individual (rich or not) must be deemed "unwilling" to change or leave the political system, and so we will not hear his complaints about being coerced. That is tempting, but maybe it would be more instructive to say no more than that in both cases, he is "unwilling" to pay the price charged. The poor man could grab the bread (and risk being shot); the political man, unsatisfied with his lot, could revolt and seek to form his own polity (and risk getting squashed). In each case, all that stands in his way is a serious worry about his likelihood of success, given the inequality of power between him and the others.

What this all means is that Posner has not played fair with the question of power, or inequalities thereof. He has made a very common move: *after* something of value has been distributed he has defined *taking* as illicit and *keeping* (except when paid) as in tune with the expressed wishes of the universe. It is not as if force is never to be used; Posner assumes, indeed commands, its use against theft. One of the purposes of the state is to detect the terrible inefficiencies of non-consensual transfers by having the government really smash those who persist in such behavior. But by and large the government is to have no role in even annoying<sup>72</sup> those who choose to exclude others from what they already have. Keepers keepers, so to speak.

But why is that? Let us say I am naturally superior to a rich man in taking things, either by my own strength or by organizing aggregations of others (call them governments) to do my will. I am not much of a trader, but I'm one hell of a grabber. That's just the way things are. Is there any way to criticize my activities except from the standpoint of taste (or some other normative proposition)? It would be inefficient to allow violent acquisitions? How can one know that? All of Posner's arguments about the efficiency-inducing effects of private property<sup>73</sup> assume only that someone has the right to use and exclude, not that it be any particular person. If force, organized or not, were admissible as a method of acquisition there is no reason to assume that eventual equilibrium would not be reached, albeit in different hands than it presently rests. After all, as Posner would be the first to tell you, "force" is just an expenditure. If a man is "willing" to pay that price, and the other party is "unwilling" to pay the price of successful counterforce, we have an "efficient" solution. That is, we are "exploiting economic resources in such a way that human satisfaction as measured by aggregate consumer willingness to pay for goods and services is maximized."<sup>74</sup>

In brief, there seems to be some normative content in Posner's neo-Panglossianism after all. Only some kinds of inequality are to be accepted as an unquestionable *grundnorm* upon which to base efficiency analyses.<sup>75</sup> The transfers that come about against a background of

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<sup>72</sup> See *id.* at 357-60.

<sup>73</sup> See *id.* at 10-13.

<sup>74</sup> *Id.* at 4. It is of some interest that not all economists seem quite as squeamish about force as Posner. See A. ALCHIAN & W. ALLEN, EXCHANGE AND PRODUCTION-THEORY IN USE 6 (1964).

<sup>75</sup> Posner is ostentatiously close-mouthed about how wealth inequalities may originally have occurred and been perpetuated. See POSNER 10-15 for the relevant void. It is certainly possible that some of this ground-state material inequality is directly or

wealth inequality are fine; any that come about against a background of inequality in strength, or the power to organize and apply strength, are unjustifiable. Some inequalities are apparently more equal than others—and all without reference to any apparent normative criterion at all.

### Conclusion

There is none, and that's the point. We all know that all value is not a sole function of willingness to pay, and that it's a grievous mistake to use a tone which implies (while the words deny) that it is. Man may be the measure of all things, but he is not beyond measurement himself.<sup>76</sup> I don't know how one talks about it, but napalming babies *is* bad, and so is letting them or even their culpable parents starve, freeze, or merely suffer plain miserable discomfort while other people, more "valuable" than they are or not, freely choose snowmobiles and whipped cream. Whatever is wrong with all that, it is only partly statistical. People are neither above reproach, nor are they ever just "sunk costs." And "*the law*" has always known it; that is the source of its tension and complexity. If economic efficiency is part of the common law (and it is), so is *fiat justitia, ruat coelum*.<sup>77</sup>

Thus, though one *can* graph (non-interpersonally comparable) marginal utilities for money which are the very picture of geometric nymphomania,<sup>78</sup> we still preserve our right to say to those whose personalities generate such curves, "You swine," or "When did you first notice this anal compulsion overwhelming you?" or even "Beware the masses." And indeed "the law," even "the common law," has on impulses like those often said, even against efficiency—"Sorry buddy, you lose."

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indirectly the result of prior force, applied individually or politically. For an illuminating and sophisticated discussion of "entitlements," initial and other, see Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090-93 (1972).

<sup>76</sup> Man may even be changeable. God forbid that human nature should be inalterable—and there is even some theological warrant for the suggestion that He did.

<sup>77</sup> There is also the cognate aesthetic position, which may also be a delusion, that the "value" of art is not solely a function of price, even if price is taken to be a function of human evaluation.

<sup>78</sup> See POSNER 216-17. The graph actually drawn at page 217 shows only mild greed. Posner's text promised a graph which compared the marginal utilities of a millionaire and a pauper. Had that actually been drawn, the nastiness of the situation would have been much more apparent.

I admit that it is not easy these days to be a moralist *manqué*, when what it is that one lacks is any rational and coherent way to express one's intuitions. That's why it is, today, so very hard to be a thinking lawyer. But I will tell you this: substituting definitions for both facts and values is not notably likely to fill the echoing void. Much as I admire the many genuine insights of American Legal Nominalism, I think we shall have to continue wrestling with a universe filled with too many things about which we understand too little and then evaluate them against standards we don't even have. That doesn't mean that any of us—especially bright, talented and sensitive people like Richard Posner—should stop what they are doing and gaze silently into the buzz. What he is doing and has done (including this book) enriches us all. But (to get back to where we started) he (and all of us) should keep in mind what I think is the most lovely moment in *Don Quixote*. When asked by a mocking Duke if he actually believes in the real existence of his lady Dulcinea, the Don replies:

This is not one of those cases where you can prove a thing conclusively. I have not begotten or given birth to my lady, although I contemplate her as she needs must be. . . .<sup>79</sup>

One can understand the impulse, and be touched by the attempt, but the world is never as it needs must be. If it ever so seems, it is not the thing illuminated one is seeing, but the light.

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<sup>79</sup> M. CERVANTES, *DON QUIXOTE*, Part II, ch. XXXII (S. Putnam transl. 1949).