

BOOK REVIEWS

ECONOMIC ANALYSIS OF LAW. By Richard A. Posner.¹ Boston: Little, Brown and Company, 1973. Pp. xi, 415. \$9.50.

*[T]he torts with which our courts are kept busy today are mainly the incidents of certain well known businesses. They are the injuries to person or property by railroads, factories, and the like. The liability for them is estimated and sooner or later goes into the price paid by the public. The public really pays the damages, and the question of liability, if pressed far enough, is really the question how far it is desirable that the public should insure the safety of those whose work it uses [T]he economic value even of a life to the community can be estimated, and no recovery, it may be said, ought to go beyond that amount. It is conceivable that some day in certain cases we may find ourselves imitating, on a higher plane, the tariff for life and limb which we see in *Leges Barbarorum*.*²

With these words written more than seventy-five years ago, Justice Holmes seems to have anticipated both the theoretical content and the intellectual spirit of Richard Posner's *Economic Analysis of Law*. In the spirit of Holmes' remarks, Posner suggests a rationale for limiting the recovery of negligence victims to compensatory damages: "If the defendant's liability exceeded the expected accident cost he would have an incentive to incur prevention costs in excess of the accident cost and this would be uneconomical."³

Rational decision-making which maximizes the efficient use of resources is the stated objective, according to Posner, of economic analysis of legal problems.⁴ Efficiency becomes the standard for all proposed solutions, and is measured in terms of maximized *value*, which in turn is a function of willingness to pay.⁵ It is Posner's failure to consider other standards of value which is the major limitation of his

1. Professor of Law, University of Chicago.

2. O. HOLMES, *THE PATH OF THE LAW* 457, 467 (1897).

3. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 77 (1973) [hereinafter cited as POSNER].

4. Posner defines "efficiency" as "a technical term: it means exploiting economic resources in such a way that human satisfaction as measured by aggregated consumer willingness to pay for goods and services is maximized." *Id.* at 4.

5. To Posner, efficiency is the basis for value, for he writes that "[v]alue too is defined by willingness to pay." *Id.*

book⁶ and which causes a potential for miseducation of American law students when the book is taught without extensive critical commentary.

This Review will consider the cause and justification of systematic study of the interrelation of law and economics to which *Economic Analysis of Law* is a response. The contents of the book will be critically reviewed. Finally, suggestions will be made involving alternative economic theories and the need to consider the broader elements of political and social theory of which economic analysis is only a part.

I. DEVELOPING INTEREST IN LAW AND ECONOMICS

Holmes' remarks reflect that even at the time of Langdell's efforts to develop a science of law rooted in rules, judicial opinions, and logical analysis,⁷ the economic significance of law was of concern to judges and commentators. However, the study of law as science minimized the consideration of external standards for criticizing legal decisions and emphasized instead the extraction of rules from legal opinions and no more.⁸ Legal realism delivered a death blow to the notion of an independent legal science and suggested the need to root legal decisions in empirical data and valid social theory.⁹ Nevertheless, the post-World War II legal scene has been dominated by a demand for

6. John Rawls has suggested, by implication, the limits of the view suggested by Posner: "Justice is the first virtue of social institutions [L]aws and institutions no matter how efficient or well-arranged must be reformed or abolished if they are unjust." J. RAWLS, *A THEORY OF JUSTICE* 3 (1971). "Justice," in this view, is a value which must find a basis in something other than "willingness to pay."

7. Langdell maintained that "law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility or certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer. . . . The only way of mastering the doctrine effectually is by studying the cases in which it is embodied." C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACT* vii (1871).

8. Langdell concluded, "It seemed to me, therefore, to be possible to take such a branch of the law as contract, for example, and without exceeding comparatively moderate limits to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development or establishment of any of its essential doctrines." *Id.* at iv.

9. See White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1020 (1972): "Pound, Llewellyn, and Frank shared a belief that the process of judicial decision-making could be improved by an abandonment of artificial logical concepts and an increased use of empirical data gleaned from 'scientific studies of contemporary social phenomena.'"

"reasoned elaboration," a search for "neutral principles," and an analysis of the "well-reasoned opinion."¹⁰

Increasingly, "reasoned elaboration" has been criticized as constituting little more than the formalism of the Langdell period;¹¹ the search for alternative foundations for legal decisions in humanistic values and in social science data has come to the fore. This search has helped to produce academic institutions whose objectives are to develop teaching and research skills by legal academics,¹² and to develop teaching materials for training future lawyers in these areas.¹³ Economics itself has been the subject of an annual summer institute for law professors,¹⁴ and Posner's book is an effort to provide materials for a course in law and economics in law schools.¹⁵

While legal scholarship in areas such as antitrust, regulated industries, labor, corporations, and taxation has concerned itself with economics to some degree since the 1930's,¹⁶ other areas of law, particu-

10. See generally White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973).

11. See Kennedy, *Legal Formality*, 2 J. LEGAL STUDIES 351, 398 (1973):

[T]he way is open to ask whether there may not be a conception of justice in which we demand of the judge, acting as a judge rather than as a legislator or administrator, that he decide the merits of disputes even though he is unable or unwilling to rationalize his action either in terms of the application of an existing rule or in terms of the formulation and application of a new one.

12. The humanities are the focus of study of the recently developed program at Harvard University, Fellowships in Law and the Humanities, funded in part by the National Endowment for the Humanities. The social sciences and research methods have been explored at Denver University in a series of Summer Institutes on Social Science Methodology and Legal Education, funded by the Walter E. Meyer Research Institute of Law, the Danforth Foundation, and the National Science Foundation.

13. The humanities provide the major substance of W. BISHIN & C. STONE, *LAW, LANGUAGE AND ETHICS* (1972), and J. WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973). The social sciences can be examined through L. FRIEDMAN & S. MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* (1969).

14. An annual program of study is provided at the University of Rochester in its Summer Institute in Economics for law professors.

15. Another book, more economically oriented and less suitable as a course textbook for teaching law and economics, is G. TULLOCK, *THE LOGIC OF THE LAW* (1971).

16. See Currie, *The Material of Law Study—Part III*, 8 J. LEGAL ED. 1 (1955). Currie gives an account of the curriculum development at Columbia University during the 1920's and describes the innovative texts, F. SAYER, *CASES ON LABOR LAW* (1922), and H. OLIPHANT, *CASES ON TRADE REGULATION* (1923), and the courses in which they were used: "Both courses proceeded on the assumption that certain nonlegal materials were directly and pointedly relevant. Oliphant's casebook opened with thirty-three pages of economic history. Sayre, besides referring to economic and sociological

larly the common law subjects, have only recently been subjected to sophisticated economic analysis. This latter development has been facilitated greatly by the establishment at the University of Chicago of two journals, the *Journal of Law and Economics* and the *Journal of Legal Studies*. Increasingly, major legal journals have published articles which employ highly sophisticated economic analysis.¹⁷ Generally, however, editors of journals have been concerned, correctly, about the level of comprehension of their readers and have restricted publication to common sense pieces which use economic terminology and methods in a very limited way.¹⁸ Study of a book like *Economic Analysis of Law* should result in a readership more receptive to economic scholarship involving law problems.

More importantly, however, there is a growing need to develop methods for determining the economic effects of legal decisions and an ability to understand the content and implication of proposed economic solutions to problems posed to lawyers and legal decision-makers¹⁹—a need which has resulted in law school courses in law and economics at major law schools.²⁰ *Economic Analysis of Law* is a re-

studies, printed as an appendix a report on minimum subsistence and comfort budgets." *Id.* at 7. Currie points out that these materials were a reflection of the recognition of economic evidence in court as it was presented in the so-called "Brandeis brief;" Currie observes, "A connection is traceable here which throws clear light on the purposes to be served by nonlegal studies. In his brief in *Muller v. Oregon*, fourteen years earlier, Brandeis had demonstrated how economic and sociological materials could be used to win a lawsuit; the significance of that development for the training of lawyers was beginning to be appreciated." *Id.*

17. See, e.g., Markovits, *Oligopolistic Pricing Suits, The Sherman Act, and Economic Welfare* (pts. 1-2), 26 *STAN. L. REV.* 493, 717 (1974).

18. See, e.g., Breit & Elzinga, *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis*, 86 *HARV. L. REV.* 693 (1973). The authors employ diagrams depicting indifference curves to reach the fairly obvious conclusion that "given the general risk aversion of American management, it is more efficient to deter antitrust violations by heavy reliance on the level of financial penalties than by heavy reliance on the probability of detection and conviction." *Id.* at 713.

19. See generally Woodward, *The Limits of Legal Realism: An Historical Perspective*, 54 *VA. L. REV.* 689 (1968). The author concludes, "Now economic theory, as economics, has long since become a separate discipline. But it is one that lawyers need, not only to serve the private but especially to serve the collective aspect of justice. The two disciplines must be brought together again . . ." *Id.* at 739.

20. See, e.g., Harvard Law School, 1972/3 *LXIX* (No. 11) Official Register of Harvard University 131-32 (1972). The course "Economics for Lawyers" carries the following catalog description:

This course provides an introduction to the economics of resource allocation, the part of economic analysis most relevant to lawyers. Consideration is given to conditions of efficient resource use, the role of the pricing system

sponse to the need of these courses for a systematic presentation of economic analysis and an assessment of the economic impact of legal doctrines.

Additional study of the relation of law and economics has occurred in such courses as environmental law and regulated industries, where the relevant economic materials, appropriately limited to a specialized analytic apparatus, either proceed on an assumption of previous study of economics or attempt to provide a quick survey of economic theory.²¹ Clearly, Posner's book is not meant to be a substitute for the more fully developed materials in these specialized areas, but it does provide a survey of legal problems (including these specialized areas) and thus can serve as an introduction to these problems and as a device for integrating previous study of disparate subject areas involving an interrelationship of legal and economic analysis.

II. AN ANALYSIS OF *Economic Analysis of Law*

Posner's analysis is developed under the fundamental postulates of neoclassical economics, which he describes as "the inverse relationship between price and output, alternative opportunity cost, and the tendency of resources to gravitate from lower valued to higher valued uses if voluntary exchange is permitted."²² Nevertheless, Posner relies most heavily on theories of economics represented chiefly by the work of adherents to the University of Chicago School of Economics—and particularly the work of Ronald Coase and his analysis of the problem of social cost.²³

in product and factor market failure, and criteria for corrective intervention by public policy. Emphasis is on developing and understanding of the relevant tools and modes of economic analysis, with application to policy issues as time permits.

Id. at B1-B2.

21. See, e.g., K. JONES, *REGULATED INDUSTRIES: CASES AND MATERIALS* (1967); J. KRIER, *ENVIRONMENTAL LAW AND POLICY: READINGS, MATERIALS AND NOTES IN AIR POLLUTION AND RELATED PROBLEMS* (1971).

22. POSNER 5. See also P. SAMUELSON, *ECONOMICS* 843 (9th ed. 1973). Samuelson describes the fundamental tenets of neoclassical economics as "utility, marginalism, and general equilibrium." *Id.* The significance of emphasis on these concepts is described by Samuelson: "The neoclassical revolution was important not merely because it discovered how to analyze demand and utility preferences. In addition, it generalized the marginal notions present in primitive form in Ricardo's theory of rent. Finally, particularly in the deep mathematical analysis of Leon Walras, the analysis of general equilibrium was achieved." *Id.*

23. See Coase, *The Problem of Social Cost*, 3 *J. LAW & ECON.* 1 (1960). See also

Briefly stated, the Coase thesis is that if transaction costs²⁴ were zero, the parties engaged in activities which were individually advantageous to each but mutually incompatible would at some point contract with one another with regard to the benefits and detriments of their two courses of action.²⁵ For instance, a railroad that emitted sparks which damaged crops would either pay the farmer for the right to emit sparks or would be paid by the farmer not to emit sparks, and the terms of the bargain would be determined by the relative values of railroading and farming.²⁶ The most significant aspect of the thesis is that it should not matter who held the initial right—in the example, the right to emit sparks or to be free from sparks. Without transaction costs, the market would “move” the right to the most highly valued use.²⁷ Of course, the real world is characterized by the existence of transaction costs, and this leads Coase to his conclusion that the legal assignment of rights should be one that will ultimately result in the same distribution of rights that would occur if the market could function properly.²⁸ Posner restates this conclusion in terms of efficiency resulting from the minimization of transaction costs: “Transaction costs are minimized when the law (1) assigns the right to the party who would buy it from the other party if it were assigned to the other party instead and if transaction costs were zero, or (2) alternatively, places liability on the party who, if he had the right and transaction costs were zero, would sell it to the other party.”²⁹ It is im-

Carrington, Book Review, 1974 U. ILL. L.F. 187, 188:

[W]hat Posner has done [in *Economic Analysis of Law*] is to capture in a single volume the rather distinctive ideology which has tended to reflect itself in the intellectual activity of the University of Chicago Law School for the last twenty years or so. . . . On the other hand, the analysis of controversial issues is often short of persuasive. One flaw in the analysis, as it seems to this reviewer, is a tendency of Posner to be doctrinaire. This tendency is fairly overt; Posner, with few exceptions, cites only his colleagues at the University of Chicago or their students and associates.

24. Transaction costs are the costs of contract or transfer, which include the cost of information, negotiation, agreement, and enforcement.

25. Coase, *supra* note 23, at 6.

26. Coase summarizes the result in a market without transaction costs: “[W]hen dealing with the problem of the rearrangement of legal rights through the market, it was argued that such a rearrangement would be made through the market whenever this could lead to an increase in the value of production.” *Id.* at 15.

27. *Id.*

28. *Id.* at 16.

29. POSNER 18 (emphasis omitted). This analysis, of course, ignores the distributional effects of the assignment of rights and runs counter to notions of historical right and to cultural notions of equity. For an analysis which argues for the recognition of

portant to note, however, that the Coasian analysis gives no consideration to the distributional effects of the original assignment of the right.

A second postulate of Posner's which is peculiarly associated with the University of Chicago School is his preference for market decisions over any collective or political decisions involving economic matters.³⁰ This position stands in contrast to the Cambridge School—the economic theories associated with Harvard University and the Massachusetts Institute of Technology—which is more critical of the structure of the existing economy and favors greater intervention of government to achieve both efficiency and equity.³¹ Equity, of course, involves the question of distribution; while Posner acknowledges the effect of existing income distribution on the choices which will be reflected in the market,³² he proceeds with an analysis which focuses on the efficient operation of the market and abandons any serious consideration of the question of distribution.³³ Maximized efficiency of production

traditional and cultural notions of right, see Fletcher, *Fairness and Liability in Tort Theory*, 85 HARV. L. REV. 537 (1972).

30. See POSNER 329: "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." Posner reflects the spirit of the more vehement defenders of the market system of the University of Chicago School, particularly Milton Friedman. See generally M. FRIEDMAN, *CAPITALISM AND FREEDOM* (1962). Friedman argues:

What the market does is to reduce greatly the range of issues that must be decided through political means, and thereby to minimize the extent to which government need participate directly in the game. The characteristic feature of action through political channels is that it tends to require or enforce substantial conformity. The great advantage of the market, on the other hand, is that it permits wide diversity. It is, in political terms, a system of proportional representation. Each man can vote, as it were, for the color of tie he wants and get it; he does not have to see what color the majority wants and then, if he is in the minority, submit.

Id. at 15.

31. See, e.g., J. GALBRAITH, *ECONOMICS AND THE PUBLIC INTEREST* 20 (1973): "Within the last half century the neoclassical view of the state has been amended to include among the state's functions the need to provide overall management for the economy. This management is also seen as being superior to particular economic interests. It too reflects the general public interest."

32. See POSNER 4: "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 economic resources."

33. See, e.g., *id.* at 220-21:

Our inability to come up with an operational concept of optimum distribution is a less serious problem than one might at first suppose. A great many policy matters can in practice be disposed of quite easily once the distributive

through market transactions or legal assignment of rights which mimic the market remains throughout the book his paramount concern. Distribution is generally beyond the scope of Posner's inquiry.

Posner's book can be separated into two major divisions: private law subjects, including business organizations; and common law concepts and public law, including taxation, constitutional liberties, and the legal process itself.³⁴ Generally, however, Posner limits himself to microeconomic analysis, emphasizing the relationship between price or cost and output or demand.³⁵ No attention is given to macroeconomic subjects such as public finance or monetary policy which themselves involve quite sophisticated legal institutions and activities.³⁶

Posner's analysis of the common law includes the fields of property, contracts, crimes, and torts. Property law, in a sense, is the common element of all areas of the common law; it provides the initial assignment of rights which can be transferred through agreement and protected through tort and criminal law. Posner emphasizes this "deep unity" in the common law, which, in his view, has developed to attain the objectives of economic efficiency: "The common law method is to allocate responsibilities between people engaged in interacting activities in such a way as to maximize the joint value, or, what amounts to the same thing, minimize the joint cost of activities."³⁷ Self-interest will motivate the parties to attain the most efficient or mutually advantageous exchange so that the function of the law itself is limited; it

effects are identified, which the economist can do. A policy is not likely to be supported today, at least explicitly, if it increases the inequality of income. And while the economist cannot offer reasons for seeking to attain more equal distribution of income, he can sometimes offer efficiency reasons for various redistributive policies.

34. Posner himself divides the book into six sections; these, however, can be grouped according to the private and public law character of the subject matter. The private law areas include "The Common Law" (Part I) and "Business Organizations" (Part III). The public law areas include "Public Regulation of the Market" (Part II), "Distribution of Income and Wealth" (Part IV), "The Constitution and Federalism" (Part V), and "The Legal Process" (Part VI).

35. Useful reference materials on the theories of microeconomics include E. MANSFIELD, *MICRO-ECONOMICS—THEORY AND APPLICATIONS* (1970); G. STIGLER, *THE THEORY OF PRICE* (3d ed. 1966).

36. For an intermediate survey of economic theory, see G. ACKLEY, *MACROECONOMIC THEORY* (1969). For a discussion of legal institutions in these areas, see F. MANN, *THE LEGAL ASPECT OF MONEY* (1971); J. PECHMAN, *FEDERAL TAX POLICY* (1966). See also D. HERMANN, *NATIONAL ECONOMIC POLICY: MATERIALS ON LAW, ECONOMICS AND PUBLIC POLICY* (1973).

37. POSNER 98.

thus "is important in order to minimize transaction costs and to avoid futility."³⁸

Posner asserts that the function of property law is to provide individuals an incentive to use resources efficiently³⁹—and this functional approach to property is in fact the favored view of modern jurisprudence, which eschews notions of "natural right" or historical claim.⁴⁰ Property, according to the economic view, requires that all resources be owned, that ownership constitute an exclusive right, and that this right be transferable; these characteristics give rise to the market, which is the central instrument for attaining efficiency.⁴¹

Reflecting his law training, Posner discusses property, as he does all the other subjects in the book, with a minimum of theoretical apparatus while attempting to analyze problems in each area of law which illustrate the operation of economic theory in legal doctrine. His discussion of property law, for example, is carried out with reference to problems of assigning broadcast frequencies,⁴² incompatible land use,⁴³ and pollution.⁴⁴

The law of contracts, according to the economic view, serves the function of providing "a method of moving resources from a lower valued to a higher valued use."⁴⁵ Again, the role of law is to minimize transaction costs by compelling parties to act in a manner that facilitates understanding and by "furnishing incentives to efficient conduct in exchange situations."⁴⁶ Legal doctrines such as consideration are ex-

38. *Id.* at 99.

39. *Id.* at 10.

40. See A TEXTBOOK OF JURISPRUDENCE 541-42 (G. Paton & D. Derham eds. 1972):

The increasing tendency in modern times is not to attempt to justify the institution of private property by an *a priori* theory, but to build doctrines on an analysis of the functioning and social effects of the institution. . . . The modern theory thus seeks a justification of private property in the results that it achieves and criticizes the institution so far as it fails to achieve those with a functional study of what property means in a legal sense. Today we see the effective working of the institution of property, not in a mere analysis of concepts borrowed from Roman law, but in a realistic study of what legislatures and courts are actually doing.

41. POSNER 11-12.

42. *Id.* at 13-16.

43. *Id.* at 16-24.

44. *Id.* at 24-27.

45. *Id.* at 41.

46. *Id.* at 44. Posner describes the function of the law of contracts as providing parties with incentives, simplification of method of agreement, and warning of contingencies:

plained by Posner as being necessary to produce efficient behavior; for instance, if "gratuitous promises were generally enforced . . . people would be very cautious about making any statement that could possibly be construed as promissory; they might go to considerable lengths to disclaim promising intentions whenever there was the slightest ambiguity."⁴⁷ Nevertheless, Posner objects that certain developments in the law of contracts may in fact reduce the level of efficiency that would otherwise occur. He expresses particular concern that the law of fraud, which has provided added protections for consumers, may be neglecting the fact that consumers are in the best position to evaluate certain products, that consumer information services may provide adequate information, and that competition by itself may sometimes provide adequate protection. Posner's concern is that unneeded protection of consumers results in higher prices which interfere with efficient consumer choice.⁴⁸ Nevertheless, he argues a preference for contract law, supplemented by the availability of class actions, over regulation by the Federal Trade Commission or other agencies as a device for achieving efficient protection of consumers.⁴⁹

The tone of Posner's book is well-illustrated by his use of marriage as an example of a contract that is best viewed in economic terms.⁵⁰ This view minimizes all the sentimental, moral, and cultural attitudes toward marriage to which we might intuitively subscribe. Posner, on the contrary, reflects a rather brutal market view of the marriage relationship: "The household is an important unit of production (child

[T]he law of contracts has two other economic functions besides the maintenance of appropriate incentives. The first is to reduce the complexity and hence cost of transactions by supplying a set of normal terms which, in the absence of a law of contracts, the parties would have to negotiate expressly. The second is to furnish prospective transacting parties with information concerning the many contingencies that may defeat an exchange, and hence to assist them in planning their exchange sensibly.

Id.

47. *Id.* at 45.

48. *Id.* at 50-55. Posner suggests that responsibility for evaluating a product should rest on the person who can do it most cheaply:

We have suggested a criterion for allocating liability for ignorance between seller and buyer: according to who can obtain the relevant information at lower cost. If a consumer product is simple, any defects in it are patent, and it is the type of product that the consumer buys frequently (so that he has ample opportunity to become acquainted with its qualities), then a rule of caveat emptor makes good economic sense.

Id. at 50-51.

49. *Id.* at 53.

50. *Id.* at 62-64.

care, food, etc.) in the economy. Marriages not undertaken for mutual advantage create inefficiency, just as in the market sector. This argues for treating marriage contracts like other contracts"⁵¹ This view leads Posner to the conclusion that efficient rules governing the dissolution of marriage should provide for termination at will, provision for damages, and the right to control by agreement the terms and conditions of dissolution.⁵²

The laws of crimes and torts are, in this view, simply devices to improve and assure the operation of the market. In a sense, there are, as Posner suggests, no accidents: "Most accidental injuries are intentional in the sense that the injurer knew that he could have reduced the probability of the accident by taking additional precautions."⁵³ According to this analysis, we could eliminate all automobile accidents simply by not driving; automobile accidents are one of the conscious costs we accept as a price of driving.⁵⁴ Posner proceeds to examine the law of negligence in terms of Judge Learned Hand's formula, which determines liability by comparing the loss incurred and its probability of occurring to the cost of accident prevention, and fixes liability where a greater cost could have been avoided by a smaller cost of precaution.⁵⁵ In considering the efficiency of such defenses

51. *Id.* at 63.

52. *Id.* at 63-64. Even children are treated as economic factors in the analysis of marriage, and their interests are subjected to the same bargaining that would occur with regard to award of possession of the family car. *Id.* at 64.

53. *Id.* at 66. It is interesting to note that from a completely different perspective the same conclusion has been reached. It is postulated by modern psychoanalytic theory that there are in fact no accidents; what appears as accidental behavior, slips of the tongue, or forgetfulness are considered manifestations of repressed feelings or subconscious wishes or desires. See generally S. FREUD, *THE PSYCHOPATHOLOGY OF EVERYDAY LIFE* (1901).

54. See G. CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 17-18 (1970):

Our society is not committed to preserving life at any cost. In the broadest sense, the rather unpleasant notion that we are willing to destroy lives should be obvious. . . . [L]ives are spent not only when the *quid pro quo* is some great moral principle, but also when it is a matter of convenience. Ventures are undertaken that, statistically at least, are certain to cost lives. . . . We take planes and cars rather than safer, slower means of travel and perhaps most telling, we use relatively safe equipment rather than the safest imaginable because—and it is not a bad reason—the safest costs too much.

55. POSNER 69. Posner describes the Hand formula as a device for achieving efficiency in the case of activity which is accompanied with the possibility of risk of loss: [T]he defendant is guilty of negligence if the loss caused by the accident, multiplied by the probability of the accident's occurring, exceeds the burden of the precautions that the defendant might have taken to avert it. This is

as contributory negligence and custom, Posner takes pains to suggest that doctrines which move away from careful consideration of particular activities and their costs and substitute broad legal solutions result in distortions of behavior and produce inefficiencies.⁵⁶ Particular concern is expressed about such policies as "no-fault automobile compensation plans" and strict liability of manufacturers for injuries caused by their products; no-fault insurance is said to result in a reduction in driver care and "[t]he effect of strict (or negligence) liability where disclaimers are barred in increasing the safety of a product sold mainly to risk preferers is to reduce rather than increase efficiency: it makes people pay for something [for example, added safety] that they would rather do without."⁵⁷

Criminal law, on the other hand, is viewed not as a device to punish intentional infliction of harm, since all activity which results in harm is in fact undertaken intentionally, but rather as a device to compel people to use the market.⁵⁸ For instance, Posner asserts that a thief may have a higher valued use for a car than does its nominal owner; yet we wish to compel the thief to resort to the market, since theft is a "taking [which] substitutes for an inexpensive market transaction a costly legal transaction, in which a court must measure the relative values of the automobile to the parties."⁵⁹

While the common law provides the opportunity "to maximize the joint value" of individual activities and provides for the achievement of economic efficiency, and has been so operated with some consciousness since the industrial period,⁶⁰ it is in the areas of law that

an economic test. The burden of precautions is the cost of avoiding the accident. The loss multiplied by the probability of the accident is the cost that the precautions would have averted. If a larger cost could have been avoided by incurring a smaller cost, efficiency requires that the smaller cost be incurred.

Id. (footnotes omitted).

56. *Id.* at 70-77.

57. *Id.* at 91. See also G. CALABRESI, *supra* note 54; Symposium, *Products Liability: Economic Analysis and the Law*, 38 U. CHI. L. REV. 1 (1971).

58. POSNER 68: "Theft is punished because it is inefficient to permit the market to be bypassed"

59. *Id.*

60. See Horowitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, in *LAW IN AMERICAN HISTORY* 287, 289 (D. Fleming & B. Barlyn eds. 1971):

During the last fifteen years of the eighteenth century, one can identify a gradual shift in the underlying assumptions about common law rules. For the first time, lawyers and judges can be found with some regularity to reason

deal with business activity that we find the most conscious concern with economic efficiency. The firm is viewed as an arrangement which reduces the transaction costs which would be entailed in achieving the same production efforts through a system of contracts and subcontracts. Nevertheless, the operation of the firm entails⁶¹ its own particular costs as time and money are devoted to control and supervision of an employed work force.⁶² The legal form of the firm, whether it be proprietorship, partnership, or corporation, should reflect the particular needs of the business and those engaged in it. Posner correctly points out that a need for capital often makes the corporate form most desirable; with limited liability, a desire for passive ownership and for easy transfer of the wealth involved in ownership of shares of stock compels the conclusion that "[i]n sum, the corporate form greatly broadens the market for investment capital."⁶³ Posner proceeds to examine a number of corporate legal problems which result from the broadening of stock ownership; for the most part, these can be described as the problems resulting from the separation of control and ownership,⁶⁴ which include the question of whether management foregoes the maximization of firm benefits in its "attempt to maximize sales growth, staff, perquisites, prestige, leisure, power,"⁶⁵ and problems associated with the transfer of corporate control.⁶⁶ Posner, of course, argues that the stimulation of the market for corporate control would cause non-maximizing profit managements to be subject to proxy fights and takeover bids.⁶⁷

about the social consequences of particular rules. . . . [J]urists began to frame legal arguments in terms of "the importance of the present decision to the commercial character of our country," or of the necessity of deciding whether adherence to a particular common law rule will result in improvement in our commercial code.

61. POSNER 174-75.

62. *Id.* at 175.

63. *Id.* at 177. Posner provides a short chapter, *id.* at 191, on capital markets, which can serve as an introduction for the future attorney who desires to become an investor. In another chapter Posner raises questions of the desirability of government control of the securities market. *Id.* at 172. Posner owes some debt to the controversial writings of Henry Manne, who has argued for elimination of government regulation of securities. See H. MANNE, *INSIDER TRADING AND THE STOCK MARKET* (1960); Manne, *The Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

64. POSNER 178-81.

65. *Id.* at 185. See generally Alchian, *The Basis of Some Recent Advances in the Theory of Management of the Firm*, 14 J. IND. ECON. 30 (1965).

66. POSNER 181-83.

67. *Id.* at 182. See generally Hindly, *Separation of Ownership and Control in the Modern Corporation*, 13 J. LAW & ECON. 185 (1970). Hindly concludes that the trans-

The existence of business and the desire to maximize profits raise questions of monopoly and antitrust regulation, which have long been concerns of both economists and lawyers.⁶⁸ Posner himself is best known for his significant but iconoclastic scholarship in the area of monopoly,⁶⁹ and this work characterizes his extensive treatment of the subject of monopoly in this book.⁷⁰ An analysis of rational monopoly production suggests that a higher rate of profit is obtained by reducing production and selling at higher than a competitive price, and this results in inefficiency as consumers move to less highly valued substitute products.⁷¹ Posner, however, urges that the operation of the market itself through new entry provides a mechanism preferable to government intervention;⁷² he particularly criticizes proposals to alter the degree of concentration by reshaping the market structure through dissolution of firms in highly concentrated industries.⁷³ Posner's examination of public utilities and common carriers compels him to conclude that here, too, government regulation is less efficient than arrangements which would permit market competition for the right to provide those services which are normally the subject of regulation.⁷⁴

As suggested before, Posner is reluctant to provide any conclusions about the desirability of redistribution or any guidelines for achieving

actional costs of proxy fights are probably too high to facilitate an efficient market for corporate control. However, takeover bids and mergers seem to facilitate the functioning of this market. Hindly questions the efficacy of too stringent an antitrust enforcement, which dampens activity in the market for corporate control.

68. See generally P. ASCH, *ECONOMIC THEORY AND THE ANTITRUST DILEMMA* (1970).

69. See, e.g., Posner, *Natural Monopoly and Its Regulation*, 21 *STAN. L. REV.* 548 (1969). Posner concludes that regulation even of "natural" monopolies is undesirable:

[T]his study has convinced me that in fact public utility regulation is probably not a useful exertion of government powers; that its benefits cannot be shown to outweigh its costs; and that even in markets where efficiency dictates monopoly we might do better to allow natural economic forces to determine business conduct and performance subject only to the constraints of antitrust policy.

Id. at 549.

70. Posner devotes four chapters to monopoly and public regulation of markets. POSNER 103-66.

71. *Id.* at 104-13.

72. *Id.* at 111-29.

73. *Id.* at 129-31. It has been argued by Yale Brozen of the University of Chicago that there is in fact no correlation between market concentration and monopoly profits. See Brozen, *The Antitrust Task Force Deconcentration Recommendation*, 13 *J. LAW & ECON.* 279 (1970).

74. POSNER 139-54. See generally Demsetz, *Why Regulate Utilities?*, 11 *J. LAW & ECON.* 55 (1968).

a desirable distributive arrangement.⁷⁵ This leads him to consider questions of taxation in terms limited to effects on allocation⁷⁶ and to the incentive⁷⁷ which results from particular tax policies. It appears to be Posner's desire to establish criteria for a tax which would have minimum allocative effects, in that it could not be pushed on to some other class, whether customers or employees, and which would have little or no effect on incentive. This desire compels his conclusion that "[w]e may define an optimum system of taxation as one that (1) has a large tax base . . . ; (2) taxes an activity the demand for which is highly inelastic . . . ; (3) does not increase inequality . . . ; and (4) is inexpensive to administer."⁷⁸ The tax which most closely approximates these criteria is the personal income tax,⁷⁹ but Posner finds that its progressiveness is inefficient since it favors parties with stable average incomes, has disincentive effects, may in fact create further inequalities, and, in its present form, requires excessive expenditures for accountants and tax advisors.⁸⁰

With regard to the general question of redistribution, Posner finds that efficiency (as it involves inheritance taxes) is a highly speculative matter, since any tax-incurred disincentive to amass a fortune to pass on to heirs must be balanced against the effect of the receipt of the inheritance, which may be a disincentive to work.⁸¹ Yet, with regard

75. POSNER 212-21. John Rawls has, in fact, developed a theoretical apparatus which permits a basis for analyzing any distribution of wealth. From a hypothetical situation, Rawls concludes that all would agree to a system of distribution which would provide that "social and economic inequalities are to be arranged so that they are . . . reasonably expected to be to everyone's advantage," J. RAWLS, *supra* note 6, at 60, and this in turn would require that "social and economic inequalities, for example, inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society," *id.* at 14-15. Posner objects to Rawls' hypothetical analysis, concluding that "[u]nfortunately, Rawls' theory of distributive justice has little operational content." POSNER 220. This criticism seems unfair, especially since Posner has no difficulty using Coase's hypothetical analysis of social cost which, likewise, has no "operational content." *See id.* at 16-21. Moreover, others have suggested quite practical implications of the Rawls standard for distribution. *See, e.g.,* Michelman, *In Pursuit of a Constitutional Welfare Right: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

76. POSNER 223-30.

77. *Id.* at 239-41.

78. *Id.* at 230 (footnote omitted).

79. *Id.* at 231.

80. *Id.* at 239-41. *See generally* Blum & Kalven, *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417 (1952) (concluding that little more than intuitive argument can be mustered to support or defeat the advisability of the progressive income tax).

81. POSNER 244-45. Posner expresses great skepticism about any "dead hand" con-

to redistribution itself, Posner finds that "the goal of equalizing income and wealth has little support in economic theory."⁸² While poverty has recognized inefficiency effects in that people are underemployed as a result of handicaps that follow from their depression,⁸³ Posner concludes that the disincentive effects on those taxed to pay for the distribution and the disincentive to work on the part of those who receive the transfer probably result in even greater inefficiency.⁸⁴ He offers an extended analysis of efforts at wealth-transfer through regulation, using the case of increased duties of landlords as an example, as evidence for the conclusion that the incidence of these burdens is often in fact on the poor—in the case of housing code enforcement, the postulated effect is higher rents and less low-income housing.⁸⁵

Posner attempts a theoretical explanation of constitutional law based on economic theory through an analysis of "economic due process,"⁸⁶ federal-state taxation,⁸⁷ civil rights,⁸⁸ and the first amendment.⁸⁹ Economic due process is discussed first in terms of the late-nineteenth century doctrine of freedom of contract and judicial invalidation (until the 1930's) of state statutes which were said to infringe that freedom. Posner characterizes the doctrine as one which struck at efforts of interest groups to gain monopoly power as a result of state regulation.⁹⁰ A second area of discussion involves the question of the poor as a constitutionally protected class. Posner correctly notes the problem of providing criteria for fundamental economic claims of the poor and the concomitant problem of deciding whether to provide

control of assets which creates inefficient use of resources given changing circumstances. *Id.* at 245-50.

82. *Id.* at 252.

83. *Id.* at 253.

84. *Id.* at 254-57. See also Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 85:

As a general proposition, equalization of income and helping the poor in an economic sense seem inconsistent objectives. The former seems counterproductive to the very growth and productivity of the economy, which is critical to the latter. As a result, a general and substantial redistribution of income can be taken only after equality has been chosen as a transcendent purpose overriding the material well-being of society.

85. POSNER 259-63.

86. *Id.* at 266-76.

87. *Id.* at 278-87, 290-92.

88. *Id.* at 294-306.

89. *Id.* at 308-16.

90. *Id.* at 267-71. Posner observes that "many of the statutes struck down by the Court in the period when it was guided by liberty of contract notions were attempts to suppress competition under the guise of promoting the general welfare." *Id.* at 271.

for the poor in kind or to provide cash payments.⁹¹

Federalism, discussed chiefly with respect to the problem of regulation of state taxation under the commerce clause, is viewed from the standpoint of state efforts to place a tax burden on non-residents and to protect state residents' business—obviously, both functions strike at interstate commerce and at a national market-operating efficiency.⁹² Related problems discussed by Posner are state regulation of pollution⁹³ and the effort by states to encourage indigents to migrate to states with better welfare assistance.⁹⁴ Both problems suggest the inefficiencies resulting from the present character and independence of state governments.

Posner argues that racial discrimination would be minimized if only the economy were competitive, since those who value monetary profit more than the satisfaction they obtain by discriminating would choose to do business with, sell their homes to, and work with the minorities who are otherwise discriminated against.⁹⁵ On the other hand, Posner argues that it is monopoly power such as that possessed by labor unions and the existence of regulated or state-controlled activities which encourage people to take part of their compensation in the form of satisfaction obtained from segregation.⁹⁶ Finally, it is the exercise of government power (that created the monopoly institutions which can discriminate) which creates the possibility and necessity of state intervention to prohibit discrimination.⁹⁷

The first amendment is considered in terms of Holmes' aphorism: "The market place of ideas."⁹⁸ Posner argues that it is the competition of ideas which creates the probability of the discovery of truth.⁹⁹ While he sees a basis for controlling incitement and regulating pornography,¹⁰⁰ he questions such policies as the "fairness doctrine," which he feels rests on a mistaken analysis of the nature of broadcast frequencies, and the regulation of advertising, which he claims rests

91. *Id.* at 272-76. See Winter, *supra* note 84.

92. POSNER 278.

93. *Id.* at 285-87.

94. *Id.* at 288-92.

95. *Id.* at 294-95. See generally G. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971).

96. POSNER 295-97.

97. *Id.* at 303-04.

98. *Id.* at 308.

99. *Id.* at 308-09.

100. *Id.* at 309-12.

on a dubious distinction between political and non-political speech.¹⁰¹

Finally, Posner considers the legal system itself as an institution reflecting the objective of economic efficiency.¹⁰² In turn, he analyzes the various parts of the system—courts, legislatures, and administrative agencies—to determine whether any perform particular functions more efficiently than others.¹⁰³ Generally, Posner favors the judicial process, finding it competitive as a result of the adversary process, impersonal (like the market) through the person of the judge, and, more generally, resting its decisions on efficiency rather than distributive grounds.¹⁰⁴ The legislative process is criticized for its emphasis on distributive goals, for the greater intrusion of political forces, and for its diminished emphasis on efficiency.¹⁰⁵ One might say that Posner favors the judicial process because it more closely mimics the market. While it is unclear whether the judicial process actually mimics the market, and while it is certainly disputable whether in fact the judiciary minimizes equity and the distributive effects of its decisions,¹⁰⁶ it is certainly the case that one must hesitate before concluding that the minimization of questions of equity and avoidance of problems of distribution constitute a socially desirable stance. And if the legislature is more capable of coping with these problems, it should cope with them; it is no argument that the judicial process is preferable because it may avoid consideration of these problems.

101. *Id.* at 315.

102. Civil procedure is discussed from the viewpoint of maximizing efficiency of the trial and encouraging settlement, thus reducing the overall cost of the judicial system. *Id.* at 337. Settlement is effected by the relative cost of settlement and litigation, the parties' attitude toward risk, and their evaluation of the likely outcome. *Id.* at 339. All of these are, of course, affected by the rules of pretrial procedure as well as the cost of litigation.

The criminal process is viewed in terms of efficiency: minimizing the likelihood of error and the costs of administration, and maximizing the deterrent effect of punishment. *Id.* at 357-59. Deterrence is seen as a result of the degree of punishment, the risk of detection, and the likelihood of punishment. *Id.* at 360-68. This leads Posner to consider questions of plea-bargaining, reduction of the bail requirement, and the effect of speeding up the criminal process. *Id.* at 369-74.

103. *Id.* at 320-72.

104. *Id.* at 320-26. The administrative process, as presently operated, is roundly criticized by Posner. *Id.* at 386-92.

105. *Id.* at 327-32.

106. See Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103 (1970). Professor Gilmore expresses grave reservations that economic analysis which argues for a particular efficient solution will not be compelling where our intuitive notions of "fairness," "equity," and "justice" suggest the contrary.

Posner concludes with a short analysis of his economic theory of law as one that aims at efficiency, and argues that it conforms to the requirements of positive analytical jurisprudence as summarized by John Rawls.¹⁰⁷ It is Posner's thesis that an economic analysis of law demonstrates that the objective of the promotion of efficiency results in law that satisfies the positivist criteria for law: it is to operate on incentives, it is to have a rational structure, it must be public to be effective, and it requires fact-finding machinery.¹⁰⁸ After demonstrating that a law functioning in conformity with the objectives of economic theory fulfills the positivist criteria, Posner concludes: "It would appear, therefore, that economic theory, although commonly viewed as an immoral principle of social order, has ethical implications."¹⁰⁹ Yet Posner draws too much from his argument that satisfying the positivist criteria results in a moral code. A positivist theory of law must be complemented with a theory of substantive value before one can argue for its morality, or even argue that law in the broadest sense exists.¹¹⁰ Even Rawls implicitly recognizes the consequence of the absence of consideration of substantive justice and value when he concludes that "because these [positivist procedural] precepts guaranteed only the impartial and regular administration of rules, whatever these are, they are compatible with injustice."¹¹¹

This results in the conclusion that while the positivist criteria of law are significant for achieving regularity and procedural justice, they must be complemented with notions of substantive value and justice. Moreover, one must further conclude that while an economic analysis provides a basis for achieving efficiency, legal analysis requires a movement beyond economics to questions of distribution and equity.

III. BEYOND POSNER AND ECONOMICS

Posner wanders back and forth in *Economic Analysis of Law* be-

107. Rawls identifies procedural precepts which should characterize the enactment of law and which create the rule of law: that laws be reasonable, that they be enacted in good faith, that there be public acceptance that laws are properly enacted and that their subject matter is proper, and that there be recognition of a defense of impossibility or mitigating circumstances. J. RAWLS, *supra* note 6, at 237.

108. POSNER 393-94.

109. *Id.* at 394.

110. See generally Hermann, *The Fallacy of Legal Procedure As Predominant over Substantive Justice: A Critique of "The Rule of Law" in John Rawls' A Theory of Justice*, 23 DEPAUL L. REV. — (1974).

111. J. RAWLS, *supra* note 6, at 236.

tween an attempt to describe rational profit-maximizing behavior and an effort to formulate normative standards for legal decisions. It is his effort at normative standards which makes his analysis more interesting to lawyers faced with decisions than the usual theoretical, empirical, and descriptive works of most economists. He aims, in a sense, to provide a book on political economy. However, it is the basis on which he chooses to support his normative theory that limits the value of his book and makes it, without supplement and criticism, a dangerously distorting and simplifying book in the hands of students.

Anyone using this book in a law school course should feel compelled to complement it with material which develops an analysis and argument in support of a greater role for the government in the economy.¹¹² This calls for some consideration of the forces which impair the functioning of the market in accordance with the theoretical postulates of microeconomics; these impairments include the lack of information on the part of some parties, the difficulty of cumulating consumer desires to influence production activity, and the inequality of bargaining power in general. Moreover, the whole question of planning as a complement to the market should be explored if students are to understand better the current state of the political economy and to be better able to evaluate Posner's unflinching dedication to a defense of the market as a superior and sufficient device to determine the character and level of economic production.¹¹³

A second, more profound, need is to consider the question of value and the considerations alternative to efficiency which are, or can be (or perhaps should be) pursued as objectives in economic decisions. Efficiency may be purchased at the price of community or equality, which may have greater political significance than increased production.¹¹⁴ Posner's deficiency is that he stops with economic analysis

112. *E.g.*, J. GALBRAITH, *supra* note 31. While Galbraith's work is subject to broad criticism, *see* Tobin, Book Review, 83 YALE L.J. 1291 (1974), it does provide the occasion for discussion of the proper role of government in the economy. A reading of Posner and Galbraith provides one with the polemical poles in the argument of the efficacy of government intervention in the market.

113. *See* W. FIREY, *LAW AND ECONOMY IN PLANNING* (1965); W. FRIEDMANN, *THE STATE AND THE RULE OF LAW IN A MIXED ECONOMY* (1971).

114. *See* Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617 (1973). "Instrumental rationality" predominates both economics and the related area of technological development; both disciplines must be considered as constrained by social, cultural, and historical values and beliefs. Professor Tribe makes this point when he writes:

and fails to move to political economy¹¹⁵ which is necessary for legal and social decision-making—this explains his failure to cope acceptably with the problem of distribution which is at the core of current legal and social concern.

Posner fails to deal effectively with the problem of distribution and questions of equity or even to point out the distributive effects of his proposed "efficient" solutions or to elaborate the arguments put forth by those who have proposed methods for accounting for and dealing with the problem of distribution.¹¹⁶ Only by developing criteria for distribution and by articulating standards of justice which reflect the sense of equity which forms a part of the system of shared values can the political and social constraints of economic analysis as a normative theory be determined. Thus economic analysis must be taught as political economy, with the result that it must be placed in its setting as part of social theory—then and only then does economic analysis provide a basis for normative judgments and contribute to the decision-making process, which is the function of legal actors and institutions.

DONALD H.J. HERMANN*

In a conception of "political process" that is rich enough to go beyond merely aggregating what people in fact *want*, so that it also considers what they should value, the task of addressing the issue of what value systems a community ought to embrace would, of course, be a paradigmatically "political" one. But so long as the conception of politics remains that of a neutral aggregator of conflicting wants, neither politics *nor* analytics can properly confront the issue paid here.

Id. at 656 (emphasis original).

115. See Woodward, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689 (1968). In calling for an infusion of economics into the legal curriculum, Woodward specifically calls for the reinstatement of the study of "political economy." *Id.* at 738. And it is to "collective" issues (that Posner ignores) that it is expected that the study of political economy will respond:

"The collective aspect" of justice concerns those problems which must be dealt with not in terms of individuals but rather "in the lump." I refer specifically to such so-called structural" problems as poverty, slum conditions, economic depression, and racial discrimination. Legislation and to a lesser extent administrative orders, rather than judge-made law, are the chief means by which the "collective aspect" of justice is and must be attained. In a law school curriculum dealing primarily with the problems of private parties before the courts, these broader collective issues are likely to be ignored or dealt with inadequately.

Id. at 737-38.

116. See Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39; Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

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