BOOK REVIEW

Posner's Symphony No. 3: Thinking About the Unthinkable

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ECONOMIC ANALYSIS OF LAW (3d ed.). By Richard A. Posner. Toronto: Little, Brown and Company. 1986. xxi + 666 pp. $29.00.

> To comprehend Liszt's greatness one needs a suspension of distaste, a momentary renunciation of musical scruples.
>
> —Charles Rosen†

In the 100th year following the death of Franz Liszt, Richard Posner has published the third edition of his own classic work, *The Economic Analysis of Law*.[1] This coincidence is in some sense fitting, for, in many respects, what Liszt was to the piano and musical composition, Posner is to legal scholarship and public policy. Just as Liszt was the dominant figure in the creation of the modern pianist, Posner has presided over the rise of law and economics in the domain of legal scholarship. Just as everyone concedes that Liszt demonstrated immense talent in performing his own and others' music, no one disputes Posner's abilities as an outstanding scholar and expositor of his own and others' economic analyses of legal issues.

But both Liszt and Posner have heard some dissent amidst the applause. Some music critics claim that, despite his technical brilliance, Liszt's obsession with virtuosity led him astray at times. Liszt's flashiness exceeded the bounds of the aesthetically pleasing, becoming at times unpleasant or even unlistenable. Even his most ardent supporters agree that a number of Liszt's compositions are marred by uneven-

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† Rosen, *The New Sound of Liszt*, N.Y. REV. BOOKS, Apr. 12, 1984, at 20.

1. R. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986).

ness, superficiality, or barren virtuosic ornamentation and would best be forgotten. At times Posner is also guilty of such lapses or excesses. His third edition provides ample new material to test this view: Posner has added more than twenty-five sections and 150 pages of new material to the work.

Cynics might speculate that the excesses of the third edition reflect an effort to curry presidential favor in hopes of a Supreme Court nomination.[2] While Posner's beliefs often converge remarkably with President Reagan's,[3] the third edition shows unmistakably that Posner is a man of deep intellectual conviction. His newly added analysis of rape illustrates this:

> Suppose a rapist derives extra pleasure from the coercive character of his act. Then there would be no market substitute for rape and it could be argued therefore that rape is not a pure coercive transfer and should not be punished criminally. But the argument would be weak:
>
> (a) . . . The prevention of rape is essential to protect the marriage market . . . and more generally to secure property rights in women's persons. Allowing rape would be the equivalent of communalizing property rights in women. . . .
>
> (b) Allowing rape would lead to heavy expenditures on protecting women, as well as expenditures on overcoming those protections. The expenditures would be largely offsetting, and to that extent socially wasted.
>
> (c) Given the economist's definition of value . . . the fact that the rapist cannot find a consensual substitute does not mean that he values the

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2. Posner is often mentioned as a candidate for Supreme Court appointment. *See, e.g.*, Macey, *Conservative Judgment Time*, Wall St. J., Aug. 23, 1985, at 14, col. 4 (to "get a promotion the boss must be happy with your work").

3. This convergence is dramatically reflected in Posner's newly added discussion of tax expenditures. Such tax expenditures are an issue of central importance in analyzing the government budget. P. 469; *see* Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 734-35, 738 (1970). When President Reagan's budget director, David Stockman, proposed eliminating a vast array of these tax expenditures, including the oil depletion allowance:

> the President became animated. [The] proposal unleashed a pent-up catechism on the virtues of the oil depletion allowance, followed by a lecture on how the whole idea of "tax expenditures" was a liberal myth.
>
> "The idea implies that the government owns all your income and has the right to decide what you can keep," said the President. "Well, we're not going to have any of that kind of thinking round here."

D. STOCKMAN, THE TRIUMPH OF POLITICS 131 (1986). Posner's recent discussion of tax expenditures mirrors the President's views:

> Although many income tax deductions are questionable, . . . to call them subsidies is implicitly to treat the government as the owner of all the personal income in the country. It is to say that by allowing deductions—or for that matter by setting the tax rate anywhere below 100 percent—the government is making a gift to the person whom it allows to keep some of the income that he earned through his own work or investment.

P. 469. Yet, as Stockman demonstrates, the refusal or inability to comprehend the value of tax expenditure analysis contributed significantly to the massive growth in governmental budget deficits under the Reagan Administration.

rape more than the victim disvalues it . . . .[4]

These are the words of a man driven by an intellectual vision, not by concerns with promotion. In a similar fashion Posner seems willing to dare opprobrium by questioning the prohibition against selling babies:

> Should the sale of babies be made legal? The idea strikes most people as bizarre and offensive. . . . However, economists like to think about the unthinkable, so let us examine in a scientific spirit the objections to permitting the sale of babies for adoption.[5]

While economics is a powerful and valuable tool in the analysis of legal and public policy issues, those who use it need an appreciation of its limitations. As the Nobel prize winner James Tobin noted, "Any good second year graduate student in economics could write a short examination paper proving that voluntary transactions in votes would increase the welfare of the sellers as well as the buyers."[6] In the vote-selling case, however, economic arguments must bow to democratic concerns. Posner, though, does not always manifest a proper appreciation of such limits on economic analysis. Unfortunately, this shortcoming may deter many from reading his otherwise valuable book or improperly discredit the entire realm of law and economics.

But while selected passages may infuriate some, the work as a whole continues to be the best exposition of the Chicago School's influential approach to law and economics.[7] Posner's willinguess and ability to canvass "in a scientific spirit" the entire domain of law is indeed praiseworthy. His attempts to give an economic account of legal doctrine ranging from the Rule Against Perpetuities to the regulation of pornography are both provocative and insightful.[8] Posner unites disparate

4. P. 202. Posner's economic analysis of rape is derived from an earlier work. Posner, *An Economic Theory of Criminal Law,* 85 COLUM. L. REV. 1193 (1985). There, Posner suggests that rape is an economic substitute for both marriage and sex, because in a "high fraction of rapes—approaching 50% in some surveys— . . . the rapist and the victim have a prior acquaintance." *Id.* at 1199 n.14. Rape should be deterred because "instead of furtively stalking women, [rapists] can obtain satisfaction from productive activities, that is, activities in which other people are compensated and thus derive benefits." *Id.* at 1199. For Posner, then, marriage and prostitution are similar productive activities in that women are compensated for sex. *See also* West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner,* 99 HARV. L. REV. 1449, 1449 (1986) (Posner views "the legal availability of prostitution, (along with other sex markets such as dating and marriage), as a reason for the wrongness of rape.").

Posner concludes: "All this may seem to be a hopelessly labored elucidation of the obvious, that rape is a bad thing; but I think it useful to point out that economic analysis need not break down in the face of such apparently noneconomic phenomena as rape." Posner, *supra,* at 1199.

5. P. 141.

6. Tobin, *On Limiting the Domain of Inequality,* 13 J. L. & ECON. 263, 269 (1970).

7. Earlier editions have already been cited three times by the Supreme Court. *See* United States v. 50 Acres of Land, 469 U.S. 24, 36 (1984)(criticizing effectiveness of cost/benefit analysis); Oliver v. United States, 466 U.S. 170, 183 n.15 (1984) (criticizing unlicensed use of property); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 650 (1981) (Blackmun, J., dissenting) (criticizing state severance taxes).

Many lower courts have also referred to the book. A recent LEXIS search uncovered 41 lower federal and 42 state citations to the work.

8. Pp. 486, 632-33.

legal disciplines with his over-arching hypothesis that: "[J]udge-made rules tend to be efficiency-promoting while those made by legislatures tend to be efficiency-reducing."[9] All in all, Posner sets forth an intelligent, well-written, and thought-provoking case that the "economic theory of law is the most promising positive theory of law extant."[10]

Nonetheless, the book reflects the nature of Posner's genius—more like the erratic Liszt than the consistent Mozart. While Posner provides a provocative brief for the Chicago School's platform, his early claim that subsequent chapters "create an economic theory of law with growing explanative power and empirical support"[11] is only sporadically fulfilled. Readers of *Economic Analysis of Law* who are new to economics might feel that rejecting many of Posner's policy recommendations entails rejecting the entire economic approach. Our purpose, however, is to provide an internal critique. Even if one accepts efficiency/wealth-maximization as the proper objective of the legal system, Posner's conclusions at times will not withstand analysis.[12] The first section of this review examines Posner's analysis of income distribution and its uniquely conservative intellectual foundation. The second and third sections then examine a variety of empirical and theoretical qualifications to Posner's work.

I. THE SUBTLE SUPERIORITY OF INCOME INEQUALITY

While most legal scholars devote relatively little attention to the issues of income inequality and poverty, Posner commendably offers an extended discussion of these topics in his book.[13] It is highly relevant and appropriate to address these matters. If the pattern of distribution of economic well-being in a society is relatively fixed, then much of what preoccupies lawyers and judges is sterile activity serving only to shuffle the positions of those in the fixed economic hierarchy, without fundamentally altering it or enhancing welfare.[14] At the turn of the

9. P. 495 (footnote omitted).

10. P. 24.

11. P. 21.

12. The third edition does correct some problems of the second edition. For example, in discussing the effects of labor market discrimination, Posner wrote in his second edition that the "reduction of commercial intercourse between blacks and whites brought about by discrimination reduces the money income of whites some but that of blacks greatly." R. POSNER, ECONOMIC ANALYSIS OF LAW 526 (2d ed. 1977). This statement is true only in special cases. Discrimination against black laborers may actually *increase* the money incomes of white employers by driving down the black wage. *See* Donohue, *Is Title VII Efficient?*, 134 U. PA. L. REV. —— (1986) (forthcoming). Posner deletes this sentence from his third edition. *See* P. 616.

13. Pp. 431-51.

14. Indeed, the Coase Theorem has already foreclosed an entire realm of cases in which judicial rules are incapable of enhancing economic efficiency. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. I, 19 (1960). When efficient and costless bribes are possible, judges cannot affect real economic activity. After Coase, the role of judges in the absence of transaction costs is limited to redistributing property rights. But if the overall distribution of wealth tends to be fixed, judges in the aggregate cannot systematically affect the distribution of property.

century, the renowned economist Vilfredo Pareto attempted to elevate the fixed income distribution principle into a fundamental natural law, arguing that income inevitably tends to be identically distributed, regardless of social and political institutions or tax structures.[15]

The greater degree of income inequality in underdeveloped countries compared to modern industrialized nations demonstrates that Pareto's law is incorrect.[16] Posner contends, however, that: "The distribution of income changes slowly and appears to be quite similar for different countries in the same state of economic development, such as Sweden and the United States, even though the former is more socialistic."[17] The unstated implication is that policymakers should ignore distributional questions and focus on expanding the total economic pie.[18]

But is Posner correct? Certainly, the distribution of income in the United States has varied only slightly in the last forty years. But is such slight variance universally true?[19] Can the counter-intuitive second part of Posner's assertion be correct that Sweden, a country that has largely eliminated poverty through an advanced welfare system, shows the same degree of economic inequality as the United States? In support of this proposition, Posner cites a 1967 article by Robert Solow indicating that from 1935 to 1954 income distribution was roughly similar in both Sweden and the United States.[20] Posner, however, presents no data for Sweden after 1954, when Swedish income distribution became far more equal than that of the United States.[21] In 1972, for example, the poorest 20% in the United States controlled only 4.9% of post-tax income, compared to 7.3% in Sweden—almost 50% more income in the hands of the Swedish poor.[22] This disparity is even more dramatic after accounting for government transfers.[23] In fact, the Gini measure of income inequality is 36% higher in the U.S. than in Sweden.[24] Thus, more recent evidence undermines Posner's assertion that Sweden and the United States have roughly the same income distribution. Moreover, the divergence in the relative distributions of income of Sweden and the United States from 1955 to 1972 suggests that dedi-

15. P. SAMUELSON & W. NORDHAUS, ECONOMICS 566 n.3 (12th ed. 1985).

16. *See* Sawyer, *Income Distribution in OECD Countries,* OECD ECONOMIC OUTLOOK, OCCASIONAL STUDIES (July 1976).

17. P. 431.

18. P. 436.

19. Kuznets has argued that a country's pattern of income inequality over time is u-shaped: Income inequality at first increases and then decreases with development. Kuznets, *Economic Growth and Income Inequality,* 45 AM. ECON. REV. 1 (1955).

20. P. 431 n.2 (citing Solow, *Income Inequality Since the War,* in INEQUALITY AND POVERTY 50, 60 (E. Budd ed. 1967)).

21. Solow, *supra* note 20, at 59 chart 4, 60 chart 5.

22. Sawyer, *supra* note 16, at 19 table 10.

23. In Sweden the post-transfer figure rose to 9.4% in 1972. *Id.* at 22, app. 3 at 24. Post-transfer U.S. data is not available for this year, but given that Sweden's transfer system is much larger than ours, accounting for transfers would likely increase the disparity.

24. *Id.* at 19 table 11 (.369 in the U.S. and .271 in Sweden). The Gini measure ranges from 0, indicating perfect equality, to 1, representing the highest degree of inequality.

cated efforts to pursue equality, such as those introduced in post-war Sweden, can change the distribution of income rapidly.[25]

Once one recognizes that the distribution of income can be influenced by policy, one must decide whether and to what extent it should be. Posner points out possible flaws in the arguments favoring redistribution. While noting that equalizing income will increase utility if different income groups have similar utility curves, he questions whether this premise is correct. He repeats the claim of his second edition that "[i]t seems at least as plausible . . . to assume that income and the marginal utility thereof are positively correlated—that the people who work hard to make money and succeed in making it are on average those who value money the most."[26] In his third edition, Posner buttresses this previously bald assertion by noting that the wealthy have "given up other things such as leisure" to get their money.[27] The argument is interesting and worth considering, but one should also consider its potential shortcomings. Certainly, if the only thing that determined income was how much leisure one had given up to obtain it, Posner's case would be greatly strengthened. Some wealth is obtained through inheritance, though, and when natural abilities differ widely, the connection between sacrifice and wealth becomes attenuated.[28] It seems to be

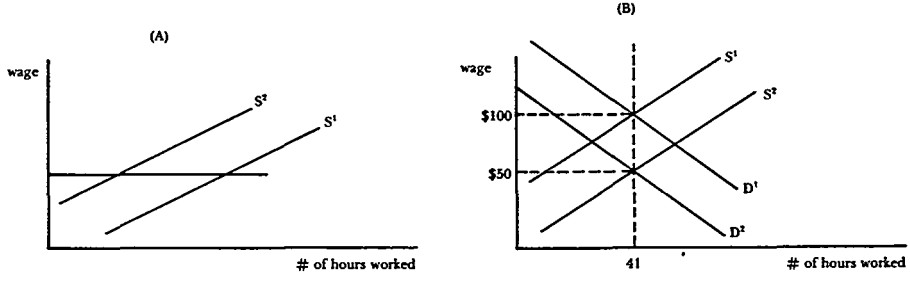
25. Sweden's dramatic success in equalizing income distribution has not been at the expense of total GNP. In fact, per capita income in Sweden and the United States are roughly equivalent. *See* OECD ECONOMIC SURVEYS: SWEDEN, table, *Basic Statistics: International Comparisons* (1981); *The World in Figures* 13 (compiled by The Economist) (4th ed. 1984).

26. P. 436. Posner does not mean to imply that the marginal utility of income rises as an individual's income rises. His statement instead suggests that, if one were to measure current income and the current marginal utility in a cross-section study, these two variables would be positively correlated.

27. *Id.*

28. If, due to differences in natural ability, one individual earns $100 for working the 41st hour in a week but another equally trained individual earns only $50, can one really say that the more talented individual values the money more? If they both choose to work 41 hours, the less talented has shown a willingness to give up one extra hour of leisure to obtain $50 while the more talented may not have been willing to make such a sacrifice for $50. In other words, the poorer individual in this case may have valued money more highly than the rich one.

Figure 1



This situation is depicted in Figures I(A) and (B). Figure (A) illustrates Posner's view that, where wages are the same for two individuals, the one who works more and earns more

a nonsequitur that the people who work hard to make money "and succeed in making it" are on average those who value money the most. The equation of success with desire seems unwarranted.

The third edition also presents a new argument against wealth redistribution. Even if all income groups had similar utility functions, in which case redistributing income more equally would increase aggregate happiness or utility, Posner reminds us that he is not concerned with utility, but rather with wealth maximization. He is indifferent to whether a dollar is held by a rich person or a poor one—a dollar is a dollar. Consequently, the act of transferring the dollar to the poor person does not increase the wealth of society; since redistribution cannot be achieved costlessly, efforts toward redistribution necessarily reduce societal wealth. Thus the goal of wealth maximization argues against redistribution. While the argument follows logically from its premises, many will find this argument a greater indictment of the principle of wealth maximization than of the concept of redistribution. Indeed, by rejecting the goal of utility maximization, Posner is completely at odds with the fundamental tenet of welfare economics. Virtually the entire economics profession would oppose Posner on this crucial element of his analysis.

In his first chapter, Posner appears to concede the normative limitations of the wealth maximization objective:

> Suppose that pituitary extract is . . . very expensive. A poor family has a child who will be a dwarf if he does not get some of the extract, but the family cannot afford the price. . . . A rich family has a child who will grow to normal height, but the extract will add a few inches more, and his parents decide to buy it for him. In the sense of value used in this book, the pituitary extract is more valuable to the rich than to the poor family, because value is measured by willingness to pay . . . .[29]

Posner then casually dismisses this issue, stating that such limitations are "perhaps not serious ones, as such examples are *very rare*."[30] He offers no authority for this absolutely pivotal empirical assertion. In a country where thousands of children are homeless and hungry,[31] while

money—worker 1—presumably places a higher value on money, since S^1 is below S^2. In case (B), however, where differences in money income are caused only by differences in wage rates, the situation is reversed. In this case, two individuals who work equally hard may not be equally successful in earning money, because of differences in innate abilities. The low income individual—worker 2—has the lower supply curve at all points. This implies that worker 2 values money more than worker 1, since he is willing to give up more leisure time to obtain it.

29. Pp. 11-12.

30. P. 12 (emphasis added).

31. Pear, *Homeless in U.S. Put at 250,000, Far Less than Previous Estimates*, N.Y. Times, May 2, 1984, at A1, col. 2; Rule, *Shelters Offer Street Youths Haven in City*, N.Y. Times, Feb. 26, 1984, at A37, col. 1 (20,000 homeless children in New York City alone in 1983). National estimates for the number of homeless persons range from 250,000 to three million. We restrict our attention to homeless children to counter any argument that homelessness is voluntary or results from a preference for leisure.

others spend hundreds of dollars for a single meal,[32] Posner's insistence upon measuring social welfare by ability to pay is, to say the least, problematic.

Emboldened by these new arguments, Posner makes possibly the most imperial pronouncement of the third edition: "Involuntary redistribution is a coerced transfer not justified by high market-transaction costs; it is, in efficiency terms, a form of theft."[33] This statement seems to imply that efforts to provide governmental assistance to the elderly and poor should be deemed criminal. But while involuntary redistribution may distress some, it remains inevitable in the United States as long as the government provides for public goods, such as the national defense. Unless the government can tax in such a fashion that all taxpayers pay exactly what the national defense is worth to them, the provision for the national defense via taxation—indeed the provision for any public good via taxation—will necessarily lead to redistributions of real income.[34]

Posner might respond that the involuntary redistribution associated with furnishing the national defense is justified by "high market-trans-

32. Carmody, *High Rent District: Room With a July 4 View*, N.Y. Times, June 5, 1986, at A1, col. 4 (some restaurants charged $700-$800 for a Statue of Liberty Centennial Fourth of July dinner). That such vast sums went to commemorate our sheltering the "tired and poor" is somewhat ironic.

33. P. 436.

34. The only exception to this statement is the unlikely situation in which every individual equally values the public good. Redistribution will occur even if the government can tax according to a Lindahl pricing scheme in which each individual pays an amount equal to the marginal benefit received from the public good. Lindahl, *Just Taxation—A Positive Solution*, in CLASSICS IN THE THEORY OF PUBLIC FINANCE 168 (R. Musgrave & A. Peacock 2d ed. 1962). Two individuals with the same Lindahl price will differ in terms of the consumer surplus enjoyed on the inframarginal units of the public good. Hence, redistribution of real income results when two individuals pay the same price and receive different total benefits.

Figure 2

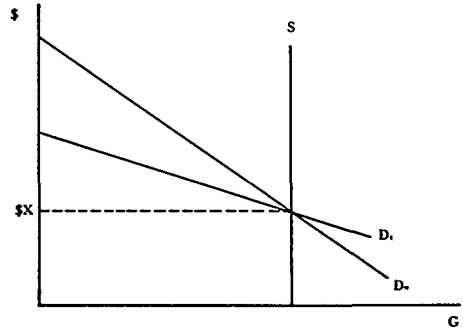


Figure 2 illustrates this type of redistribution, where *S* represents the amount of a public good *G* that is supplied by the government and *D1* and *D2* represent the individual demand curves of consumers 1 and 2 for *G*. Given these curves, both individuals will pay the same Lindahl price—$*X* per unit of *G*—but consumer 2 enjoys a far greater consumer surplus than consumer 1. Thus, the provision of the public good enhances the well-being of consumer 2 relative to that of consumer 1, even though they both pay the same tax and receive the same amount of *G*.

action costs." An equitable distribution of income, however, is a public good as surely as is national defense.[35] Unless the government is willing and able to ascertain precisely what each individual would spend to achieve this good, involuntary redistribution of the same sort that results from taxing to provide for the national defense will occur.

Realizing that his "redistribution is theft" argument is a bold one, Posner considers "[a]n exception to this harsh proposition."[36] When poverty hurts the rich—e.g., by increasing crime—there is an economic justification for "governmental efforts to reduce the gross inequality (in a wealthy society) that we call poverty."[37] In support of this position, Posner states that "[p]robably the major cost of poverty . . . is the disutility it imposes on affluent altruists."[38] Poverty is bad because it hurts the rich. Viewing the world from Posner's perspective, the statement is accurate—the rich are willing *and able* to pay more for the elimination of poverty. Since the rich pay more to eliminate poverty, poverty costs them more than it does those who cannot afford food or shelter. Economists generally view this as further evidence that wealth maximization is devoid of normative significance. This realization permits us to return to the fundamentally sounder notion that poverty is bad because it hurts the poor.

In one sense, Posner's lack of concern for income equality is not surprising. He is concerned instead with how incentives are arrayed for individuals, not with distributional outcomes. Thus, in the criminal sphere, Posner is indifferent between case *A*, where ten crimes are committed and each criminal is punished by one year in jail, and case *B*, where the same ten crimes are committed but only one criminal is apprehended and punished by ten years in jail.[39] The expected punishment,[40] and thus the level of deterrence, is the same in these two cases.[41] Such *ex ante* justice satisfies Posner since his primary concern is with the level of crime and the amount of societal resources required to deter crime to this level.[42] Indeed, this latter factor prompts Posner to

35. Posner acknowledges this public-good quality by recognizing the "free-rider problem" associated with private charity. Pp. 439-40. Since many benefit from expenditures that either increase defense or reduce poverty, autonomous individuals purchase an inefficiently small amount of such public goods.

36. P. 436 n.3.

37. P. 439.

38. *Id.*

39. *See* P. 212. Posner's analysis draws upon the work of Gary S. Becker. *See* Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). A more distant antecedent is J. BENTHAM, THE RATIONALE OF PUNISHMENT 19-41 (1830).

40. The expected punishment is the probability of apprehension multiplied by the duration of the prison sentence if caught.

41. If criminals were risk neutral, both schemes, *A* and *B*, would deter equally. But, if criminals were risk averse, the prospect of ten years in prison would loom larger in the economic actor's calculus, leading to less criminal activity in case *B*. For risk lovers, case *A* would lead to a lower amount of crime.

42. Posner enthusiastically endorses *ex post* inequality: "To object to this result, however, is like saying that all lotteries are unfair because, ex post, they create wealth differences

prefer case *B* because fewer societal resources are required to capture and try only one criminal.[43]

Notice the parallel to the income distribution sphere. In case *A*, society treats the wrongdoers equally. In case *B*, however, nine individuals reap the rewards of their criminal activity, while the tenth suffers an extremely severe punishment. Anyone who sees no implications for fairness or justice in allowing some murderers to go free while others are hanged is unlikely to worry much about whether the poorest 20% of the population earn 5% or 10% of the total income.

Posner's analysis of divorce provides another example of how his vision leads to greater disproportionality of results. Posner notes that:

> [F]orbidding divorce will induce more careful search for a marriage partner in the first place. The more costly a mistake is, the less likely it is to be committed; and a mistake in choosing a spouse is more costly in a system that forbids divorce (or makes it very difficult) than in one that permits it. So making divorce hard or impossible fosters happy marriages![44]

The cost/benefit analysis in this case, however, is seriously incomplete. Means exist of making the cost of a mistaken marriage even greater—such as cutting off the arms of divorcees—which, by Posner's reasoning, would foster even happier marriages. According to Posner, penalizing the mistake more harshly leads to the benefit of fewer bad marriages. But costs are also involved: (1) those who entered into bad marriages would suffer even more, and (2) individuals would expend more time and effort searching for a mate. Theory cannot locate the social optimum, which equates marginal costs and benefits. Once again, Posner is willing to tolerate the severely unhappy individual—the one forced to remain in an unhappy marriage—in order to improve the average quality of the family.

In sum, Judge Posner's analysis of wealth distribution has three se-

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among the players. . . . [B]oth the criminal justice system . . . and the lottery are fair so long as the ex ante costs and benefits are equalized among the participants." P. 212. Arguing for the moral legitimacy of his structuring of the criminal justice system by analogy to a game of chance seems rather curious and unpersuasive. Loading the punishment on an isolated defendant has particularly unfortunate consequences when the probability of error is not insignificant. *See* Block & Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?*, 68 GEO. L.J. 1130 (1980).

43. Interestingly, Posner's view of punishment is exactly the opposite of that of Beccaria, who clearly would have preferred case *A*. To Beccaria, "nothing so weakens the machinery of the law than the hope of going unpunished. . . . How can one link absolutely in the minds of men the idea of crime and the idea of punishment, if the reality of the punishment does not follow, in all cases, the reality of the offense?" M. FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 96-97 (1977).

The social science literature would appear to support Beccaria's rather than Posner's position. Since decisionmakers appear to underestimate systematically the risk of uncertain negative consequences, case *A* would seem to provide a greater amount of deterrence. *See* R. NISBETT & L. ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 17-192 (1980); Tversky & Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974).

44. P. 132.

rious defects. First, Posner doubts that a problem exists: Instances of inequitable distributions are, to use his own word, "rare." Second, he feels that even if there were a problem, law and social policy could not improve matters. After all, Posner mistakenly believes that even the strenuous efforts to promote greater equality in Sweden have failed to affect aggregate distribution. And finally, Posner believes that to the extent income inequality exists it tends to be efficient. Since economic actors respond to incentives, the bigger the carrots and sticks, the more efficient the responses.[45] But in making this argument Posner ignores the implications of his and Becker's theory of punishment, which holds that fines are a more efficient means of social control than incarceration because they merely transfer wealth while imprisonment imposes significant social costs. If this is an important consideration, however, then redistribution to enhance the wealth of the poor—thereby increasing the ability to rely on fines as a deterrent—will increase both equity *and* efficiency. Thus, by distorting facts, attributing normative significance to the wealth maximization objective, and overlooking the consequences of his own beliefs, Posner subtly promotes his vision of "efficient" income disparity.

II. An Empirical Critique

Posner's theoretical beliefs are so strong that he occasionally adapts the world to fit them, by distorting one side or the other of the cost/benefit balance to make his side prevail. This slanting of the empirics rises sometimes to theoretical proportions, as he ignores entire well-accepted categories of costs or benefits. What follows is a sampling of four such empirical distortions.

A. *The Truth in Lending Act*

Posner's analysis of the Truth in Lending Act[46] is a clear example of ignoring one side of the cost/benefit equation and distorting the other. Posner opines:

> The Truth in Lending Act requires uniform disclosure of . . . the interest rate. Yet it is unclear that an explicit interest rate is necessary or even useful information to lower income people (the well-to-do and educated borrowers should be able to protect themselves). . . . Every-

45. Unfortunately, extreme *ex ante* incentives lead to extreme *ex post* inequalities. Keynes' cogent summary of this issue, now one-half century old, remains apt:

> [T]here is social and psychological justification for significant inequalities of incomes and wealth, but not for such large disparities as exist to-day. There are valuable human activities which require the motive of money-making and the environment of private wealth-ownership for their full fruition. . . . But it is not necessary for the stimulation of these activities and the satisfaction of these proclivities that the game should be played for such high stakes as at present. Much lower stakes will serve the purpose equally well, as soon as the players are accustomed to them.

J. Keynes, The General Theory of Employment, Interest, and Money 374 (1936).

46. 15 U.S.C. §§ 1601-1604 (1982).

> one knows what his personal discount rate is (which doesn't mean he could attach a number to it if asked).[47]

Leaving aside Posner's questionable assertion that only poor people need such protection,[48] the analysis is doubly flawed. Nowhere does the author attempt to estimate the costs of disclosing the interest rate. These costs are minimal: Few institutions lend without knowing the annual interest rate, so the marginal cost of disclosure amounts to about the cost of the ink used in printing a 2-digit number.

Instead, Posner focuses on the benefits side; the regulation is unjustified if it produces no benefits. But do we really believe there are no benefits? Posner claims that "the purchaser can compare the burden of paying $20 a month for 40 months with that of paying $15 a month for 60 months (or $25 a month for 30 months) without being told what the annual percentage interest rates implied by these payment schedules are."[49] This argument conflates the concepts of liquidity and opportunity cost in the use of the term "burden." Admittedly, knowing the interest rate does not affect a liquidity-constrained borrower; disclosure is of no benefit if the borrower has no real choice. But when installment plans fall within the borrower's means, disclosing the interest rate reveals important information.[50] Indeed we invite the reader to take Posner's own example and compare the burden of paying:

$15 a month for 60 months,
$20 a month for 40 months, and
$25 a month for 30 months.

Which is least burdensome?[51] Wouldn't you want to know the interest rate? At least, it seems fair to say that the benefits of such disclosure outweigh the minimal costs.

B. *The Adultery Double Standard*

Posner frequently lapses into Procrustean analyses to support his efficiency theory of the common law. For example, he offers the following defense on efficiency grounds of the adultery double standard that historically made it harder for wives to divorce adulterous husbands than vice versa:

> The economic explanation for this rule is that a wife's adultery is more costly to the husband than the husband's adultery to the wife, even if

47. P. 350 (footnotes omitted).

48. Posner cites two articles as "corroborative evidence." P. 350 n.5.

49. P. 350.

50. Indeed, the widely advertised interest rate competition among car manufacturers is prima facie evidence of the informational value in disclosing interest rates.

51. For a loan of $650 the installment plans imply annual interest rates of 14.2%, 13.4%, and 12.3%. In general, the second installment plan is globally inferior, while the third (first) is best for personal discount rates below (above) 16.3%. Although the existence of such "switching points" weakens the informational value of disclosure, the fact that many manufacturers vigorously advertise their interest rate, *see* note 50 *supra*, suggests that this information is valuable to consumers.

> the purely emotional cost . . . is the same to both spouses. . . . If the wife is adulterous, she may conceive a child who is not the child of her husband, [so that] the benefits of the marriage to the husband will be distinctly impaired, assuming he wants to have children of his blood. But the husband's adultery need not reduce the number of children that his wife will bear or the support he will give each of them, so the benefits of the marriage to her, at least in terms of children, may not be impaired.[52]

Posner's casual empiricism overlooks a number of important factors which tend to undercut his argument.[53] For example, Posner ignores the externalities associated with adultery by husbands. The illegitimate children that husbands sire are likely to impair other marriages and/or become wards of the state. Indeed, there is absolutely no difference in social cost between the adultery of a husband with another married woman, and that of a wife with another married man. In the case where all parties to the adultery are married, the law can inhibit adultery by sanctioning either adulterous husbands or adulterous wives or both. Any of these different schemes could be efficient if properly calibrated. How then does economics explain why a disproportionate burden was placed on wives?

Posner might respond that some adulteries would involve unmarried partners, in which case the cost to a victimized husband would be greater than the cost to a victimized wife, because the adulterous wife may get pregnant. But there is clearly an offsetting *social* cost here—the illegitimate children sired by adulterous husbands will be raised by single mothers and perhaps become wards of the state.[54]

Moreover, adultery can only impair the fertility of a fecund wife. Many wives are not in this category.[55] Thus, Posner's justification for the adultery double standard disregards both the wife's fertility and the status of the third party. Only in the case of a fertile wife who is having an affair with an unmarried man is it possible that the costs of adultery by a wife are greater than the costs of her husband's adultery (when the husband has an affair with an unmarried woman). If the law were motivated by efficiency, as Posner claims, one would expect equal or greater sanctions against adulterous husbands in all other circumstances. The

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52. P. 133.

53. We feel that noneconomic causes (e.g., the impaired political power of women) would seem to provide a better explanation for the rule, but in a "scientific spirit" let us proceed.

54. Whether or not the illegitimate children become wards of the state, the adulterous father may contribute to their upbringing because of a moral or legal obligation. To the extent such payments are made, the adulterous father is burdening his own family by diminishing its resources. Moreover, Posner has failed to consider that husbands and wives may differ in their propensities to commit adultery. If husbands are more inclined than their wives to seek out unmarried sex partners, then the probability of the harm times the social cost may he *greater* for adulterous husbands. If this were the case, the law would want to sanction male adultery more harshly.

55. Besides sterility, wives' fertility is terminated by menopause or pregnancy and restrained by birth control.

information costs of determining the wife's fecundity would often be quite low, and, if one can determine that a husband has committed adultery, it would seem to be a simple matter to determine the partner's marital status. Posner's reductionist one-way theory of the common law that assumes that whatever *is* is efficient constitutes bad economics and bad science.[56] In this and many other cases, Posner's conclusory *ex post* efficiency rationales seem all too pat and convey the feeling that Posner could justify any rule on efficiency grounds.

C. *Public Lands*

While Posner often displays considerable acumen in discovering the hidden costs of various government actions, he is not equally ingenious in uncovering possible benefits. For example, Posner categorically announces: "[T]here is no economic case for government ownership [of timber land]."[57] "The exploitation of forests for timber, unlike the exploitation of the seas for fish, involves no externalities."[58] Thus, Posner claims that public ownership produces no benefits.

But a simple example can illustrate that there certainly are externalities associated with the "exploitation of forests for timber." Assume that a family owns a large tract of timber land around its house. The family decides to harvest ten acres of timber. Is it likely that the family will cut down the timber right up to the front doorstep or will it prefer to cut down the timber far from the house along the public road? If the family values the scenery and wildlife afforded by the trees, the choice is obvious. Since the family will have no incentive to consider the costs imposed on those who similarly enjoy the beauty of the trees as they drive along the highway, the efficient level of timbering will not be reached.[59]

Numerous other externalities are also associated with our national forests, which are not simply stores of lumber. Forests contain wildlife and flora just as seas contain fish. Thus, private ownership can lead to the tragedy of the commons.[60] Moreover, the scenic beauty of our public lands is valued by many Americans living at some distance. These resources are option goods for all Americans, and the urban dweller of New York might well be willing to pay something to preserve his option to traipse through the unspoiled wilderness at some future time.[61] A private forest owner could not simply sell future rights of access, how-

56. *See* Gould, *Cardboard Darwinism,* N.Y. REV. BOOKS, Sept. 25, 1986, at 47. Gould points out that similar Panglossian fallacies mar much of the sociobiological literature on gender differences. *Id.* at 53-54.

57. P. 75.

58. P. 74.

59. Note that the Coase Theorem will not apply in this example because the transaction costs of bribing the timber owner are too high.

60. *See* R. BOADWAY & D. WILDASIN, PUBLIC SECTOR ECONOMICS 127-34 (2d ed. 1984).

61. *See* Henry, *Option Values in the Economics of Irreplaceable Assets,* 89 REV. ECON. STUD. 104 (1974).

ever, since everyone will have an incentive to hold back and have others preserve the forest. Furthermore, some scientists have argued that reductions in the world's timber land may exacerbate the greenhouse effect that threatens the world's ecology.[62] The control of such free-rider effects and externalities are certainly factors to be considered in evaluating the need for government ownership. Posner might still argue that these elements justify public regulation rather than ownership, or that, since the government is so inefficient, any public role would tend to be worse than the inefficiencies of privitization. But the point here is that Posner stops this empirical inquiry before it starts, by declaring that there are no externalities. By alleging that a particular government action results in no benefits, he need not analyze the magnitude of the costs.

D. *The Exclusionary Rule*

Finally, in his analysis of the fourth amendment's exclusionary rule (added as a new chapter at the end of the book[63]), Posner glaringly distorts facts to justify his desired end. While claiming to tailor the exclusionary remedy on the basis of *social* costs and benefits,[64] Posner is only willing to consider the defendant's *private* cost of "impaired privacy"[65] as a justification for excluding evidence derived from an illegal search.

Posner's analysis completely ignores the social costs of future searches undertaken against innocent people. In other words, Posner fails to take account of how the exclusionary rule can reduce social costs by deterring future police misconduct. Yet avoiding the social costs of future police misconduct has been the cornerstone of the Supreme Court's cost/benefit analysis of the exclusionary rule. The Court emphasized this in *United States v. Calandra*:

> The purpose of the exclusionary rule . . . is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures. . . . In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.[66]

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62. The argument is that the greenhouse effect occurs when increasing levels of carbon dioxide in the atmosphere trap heat that warms the earth's environment. By absorbing carbon dioxide, trees serve to retard this effect. *See Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 99th Cong., 2d Sess. (1986) (report on the greenhouse effect by the National Academy of Sciences). Of course, we have no way of evaluating the opposing positions in this scientific controversy. But unless Posner has resolved it, his peremptory conclusion that no externalities exist is not a well-informed judgment.

63. Pp. 639-42.

64. Posner suggests that the court should not exclude evidence when the "cost to society of doing without the evidence . . . [exceeds] the social costs of the search." P. 641.

65. P. 640.

66. United States v. Calandra, 414 U.S. 338, 347-48 (1974).

Underestimating the costs of admitting unconstitutional evidence predictably leads Posner to suggest a diminished exclusionary rule. But the extent to which Posner is willing to emasculate the rule reflects an extreme antipathy. Posner argues that evidence should be admitted from a hypothetical search that was undertaken as "a shot in the dark."[67] Specifically, he justifies admitting such illegally seized evidence by assuming:

> Suppose that *B*, the cost to the defendant of the search in terms of damage to property or seizure of lawful private communications is $1,000; *P*, the probability that he could not be convicted without this search, was 1 percent at the time of the search; and *L*, the social cost (in reduced deterrence and prevention of crime) of not convicting him is $50,000. The search will therefore be illegal under the Hand Formula. But suppose the evidence obtained in the search is essential to conviction. . . . [E]ven though the social cost of the search is only $1,000, the exclusionary rule will impose a punishment cost of $50,000 on the society.[68]

Even in this hypothetical, weighing all of the social costs against the social benefits would lead to exclusion. Given that the prior probability that the defendant could not be convicted was 1 percent, because, according to Posner, "the police had no good reason to think the search would be productive," we can extrapolate that for every one search that uncovers evidence essential to conviction, ninety-nine will not uncover crucial evidence. The expected (future) social costs of allowing such searches is then $100,000 ($1,000 x 100)[69] while the social benefits are only $50,000. This indicates that for the exclusionary rule to be efficient, we must judge police action by *ex ante* probabilities.

This section has illustrated how Posner relies on questionable omissions of costs or benefits to attack the Truth in Lending Act, public lands, and the exclusionary rule, and to defend the double standard for adultery. The next section focuses on his arguments against unions and progressive taxation, and criticizes a number of his theoretical propositions.

III. A Theoretical Critique

A. *Unions*

Imagine that an anti-union economist and a pro-union economist are having a debate, but you can only see and hear the presentation of the former. You may hear some excellent and persuasive arguments,

67. P. 641.

68. *Id.*

69. Police and prosecutors face *de facto*, if not *de jure*, immunity for undertaking such illegal searches, Malley v. Briggs, 54 U.S.L.W. 4243, 4245 (U.S. Mar. 5, 1986) (No. 84-1586) (extending qualified immunity to officers who make "objectively reasonable" but unconstitutional requests for warrants). Thus, the exclusionary rule remains the only viable deterrent for unreasonable searches against innocent people.

although at times you are somewhat confused as you hear rebuttals to points you have not heard. Ultimately, you wonder whether the points you are hearing or the ones that you are not hearing are more persuasive. Reading Posner's analysis of unions creates a similar impression.

Posner begins his one-sided dialogue by noting that a union can act just as a monopolist (who happens to be selling labor) by restricting the supply of labor to increase its own wealth at the expense of the community at large. In response, the unseen, unheard opponent points out that at times a union can serve to enhance welfare—specifically when the union offsets the dominant power of employers (labor monopsony). Without presenting this argument, Posner responds to it:

> [E]ven if labor monopsonies were a problem (and no doubt they were to some extent), labor monopolies are not much of a solution, at least from an economist's standpoint. The situation is one of bilateral monopoly, and with both sides trying to limit the supply of labor, though for different reasons, there is no assurance that the supply will reach the competitive level . . . .[70]

This statement is then followed by a graphical demonstration of how a bilateral monopoly can lead to a situation that is socially worse than either pure monopoly or pure monopsony. Posner's demonstration relies on his assumption that the union acts first to cause an upward parallel shift in the supply curve for labor. The monopsonist, when acting independently in the face of this exogenous higher supply curve, will maximize profits by restricting its hiring of labor until the point at which the marginal product of labor (given by the demand curve) intersects the marginal factor cost of labor.[71]

Posner's analysis is correct if one assumes that the monopsonist takes the union-generated supply curve as exogenous. But why would it? The union and the monopsonist will realize that they can *both* do better than the Posnerian outcome if they cooperate to *raise* the level of labor hired. Indeed, if the union and monopsonist can agree to maximize their joint profits, then they will end up at the competitive (wealth-maximizing) outcome. True, bilateral monopoly will not assuredly generate the competitive outcome, but one would think Posner would be the last person to dispute that two parties who have come together to bargain as unions and employers do, would have an incentive to strike a bargain that made them both, and society, better off. Indeed, Posner's concluding remark suggests he realizes this: "Thus, if we set aside labor monopsony, which is probably not a serious problem in this country today, we can say with some confidence . . . that the effect of

70. P. 300.

71. In other words, the monopsonist realizes that by hiring more labor it is bidding up the price it must pay, not only for newly hired workers, but for current employees as well. Therefore, it can earn more by stopping short of hiring labor to the level given by the intersection of the new (shifted-up) supply curve and the demand curve.

unionization is to reduce the supply of labor in the unionized sector."[72]

Since Posner is probably correct that monopsony is rare, his failure to point out that in cases of bilateral monopoly, unions may be welfare enhancing is only a minor omission. But our unseen union advocate would undoubtedly point out that Posner's statement that unions reduce the supply of labor in the unionized sector also overlooks that unions commonly thrive where monopoly exists in product markets. If a monopolist is earning supracompetitive profits by restricting the quantity of its product, the union will have an incentive to try to garner some of these profits for itself. As Johnson and Mieszkowski note:

> If [the union] had sufficient power it might demand a profit-sharing plan under which it would receive, possibly in the form of a contribution to a union pension fund, a certain percentage of the monopoly profits earned in the industry. If the union chose the "tax base" correctly, the level of employment, output, and prices in a profit-maximizing monopoly would remain unchanged, and the union would gain at the expense of the stockholders.[73]

Thus if the union succeeds in "taxing" monopoly profits, no reduction in employment or production will occur, and positive distributional consequences may result.[74]

In analyzing the effects of unions, Posner also notes that the losers include "workers who cannot find employment because of the reduction in the demand for labor caused by union wage scales."[75] This is a common argument: The union drives up wages in the steel industry, and steel workers therefore languish in unemployment. But the situation is not quite as bleak as Posner's simple one-sector neoclassical model suggests: If the introduction of a union causes employment to drop in the union sector, it will increase employment in the nonunion sector.[76] All workers who are willing to work at nonunion wages will find work, according to the general equilibrium model. In other words, given that all markets clear, there is no reason to believe that there will be any "workers who cannot find employment" as a result of unionization.[77]

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72. P. 300.

73. Johnson & Mieszkowski, *The Effects of Unionization on the Distribution of Income: A General Equilibrium Approach*, 84 Q. J. ECON. 539, 559 (1970).

74. One study concluded that, in 1962, the wealthiest 20% of the U.S. population held 97% of corporate stock and the wealthiest 5% held 86% of the stock. E. BUDD, INEQUALITY AND POVERTY at xxii (1967). Thus, if we make the plausible assumption that union members are less wealthy than stockholders, then shifts in income to union members from stockholders will diminish income inequality.

75. P. 301.

76. For this reason, one study found the negative effect of unionization on aggregate levels of employment to be small. *See* Montgomery, *The Impact of Regional Difference in Unionism on Employment*, ECON. REV. 1st Quarter, 1986. The study concluded that "schooling, experience, and local labor market conditions have a much greater impact on the likelihood of being employed than does unionism." *Id.* at 10.

77. Of course, a lot more could be said about this issue. Posner's statement could be corrected to state that the losers from unionization include those who cannot find employ-

One of the implicit premises of Posner's book is that any legal or public policy question can be resolved by merely thinking through the issues involved with the aid of the introductory principles of microeconomics. Theoretical economics, however, has moved far beyond the simple level that Posner suggests is all one needs to know. One needs more complex models than Posner presents and information on a vast array of empirical questions that he ignores before one can evaluate the effects of unionization.[78]

B. *Progressive Taxation*

Another example of Posner treading on shaky theoretical ground is his statement that "[t]he progressive income tax reduces the amount of

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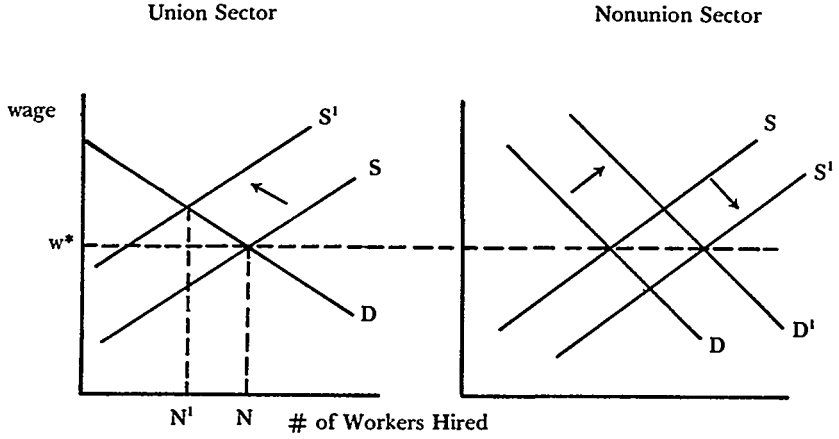
ment in the unionized sector *and who are unwilling to work in the nonunionized sector*. But this then becomes a case of the so-called voluntary unemployment that Chicago-school economists invariably contend is not a problem.

Those who are displaced by unionization and end up working in the nonunion sector will quite likely receive lower wages. But even this is not certain, for unionization can at times increase nonunion wages. If the union sector is capital intensive and the elasticity of demand for this sector's output is high, capital will flow into the nonunion sector, possibly increasing wages in the nonunion sector. Figure 3, which shows the initial supply ("*S*") and demand ("*D*") curves for labor in the union and nonunion sectors illustrates these effects. At first both sectors have the same wage *W**. The advent of the union causes an upward shift in the supply curve to *S*1. With labor costs rising in the union sector, the price of this sector's output will rise, generating the following consequences. First, employment in the union sector will shrink because of the substitution effect of capital replacing labor and the output effect of a lower quantity demanded of the union sector's now higher-priced output. Second, if the output effect dominates the substitution effect, relatively more capital than labor will be released from the union sector to the nonunion sector. As a result, both the supply and demand curves in the nonunion sector will shift out to *S*1 and *D*1; if *D*1 shifts further than *S*1, nonunion wages will rise.

Figure 3



78. Some of the important empirical questions are: which sector is more capital intensive, is the demand for the union product highly elastic, is there a high degree of substitutability between labor and capital in the two sectors, and does siguificant monopoly power exist in the product market of the union sector.

risk taking below the optimal level."[79] He probably means that progressive taxes will discourage risk taking, and that such discouragement is socially undesirable. Taking the second point first, it is very difficult to assess the criteria of optimality under uncertainty. While much of the public discussion presumes that discouraging risk taking is socially harmful, this should be proved rather than merely asserted. Even assuming that we know what the optimal level of risk taking is, we can still say with certainty that Posner's first point—that progressive taxation reduces risk taking—is incorrect as a general proposition.

The classic paper of Domar and Musgrave[80] demonstrated that taxation may actually encourage risk taking since the government shares the risk of loss. This proposition can be demonstrated with a simple example that assumes two assets—a safe asset, which has a zero real return and a risky asset, which yields an uncertain but expected return of 10 percent. If the individual begins with wealth of $100,000 and tries to maximize the expected utility of her wealth W in one year, then the size of W will depend on the fraction of initial wealth invested in the risky asset. If the individual invests more in the risky asset, expected wealth will rise but so will risk. The individual's choice will thus depend on her aversion to risk. Assume that in the no-tax world the individual would invest half of her income in the risky asset leaving her with expected wealth of $105,000 ([50,000 x 1] + [50,000 x 1.1]). Now assume the government imposes a 50% proportional tax. The individual will maintain the same level of risk, net of tax, if she simply invests all of her income in the risky asset. She will then earn an expected return of $10,000, half of which will be taxed away. Consequently, the individual will have the same expected wealth of $105,000 ([100,000 x 1.10] - 5,000). Total *social* risk has increased, however, since all of the individual's wealth is invested in a risky asset. The government is bearing the increased risk.

The individual's risk may seem greater because in the tax world she can lose all of her initial $100,000, while in the no-tax case she only risked losing $50,000. Yet if the tax scheme permits full loss offset and she loses everything, she will get a tax deduction of $100,000; worth $50,000 to her at a 50 percent tax rate. In other words, in both the tax and no-tax cases, she ends up with $50,000 if everything goes wrong.

If the individual cannot engage in full loss offset, private risk taking will be commensurately curtailed. Progressive taxation is tantamount to restricting the tax loss offsets since the individual pays a higher tax rate if she strikes it rich than if she loses everything. Thus, risk taking under a progressive scheme will be lower than with a proportional tax, but we have just seen that proportional tax *increases* risk taking above

79. P. 473.

80. Domar & Musgrave, *Proportional Income Taxation and Risk-Taking*, 58 Q. J. ECON. 388 (1944).

the no-tax level. By selecting the level of progressivity appropriately, one can reduce the level of risk taking from the level in the proportional tax case back to the level of risk that would exist in the no-tax case. If the level of risk in the no-tax case is what Posner considers to be optimal, he should favor progressive taxation.

Again, if one wants to assess the impact on risk taking of a particular progressive scheme, one must resolve a number of difficult empirical issues. In a 1965 study, Professor Arrow concluded from time-series evidence on the demand for money in the United States that the wealth elasticity of demand for risky assets is positive but less than unity. This implies that United States income taxation has increased social risk taking.[81] While other empirical studies using cross-section evidence have reached different conclusions,[82] this merely underscores the complexity of the empirical issues, the difficulty of the theoretical analysis, and the utter impossibility that clear thinking through simple economic models can resolve complex policy issues.

CONCLUSION

The third edition of *Economic Analysis of Law* is a bold and lucidly written brief for the Posnerian world. Readers will find few books that challenge and inform them on such a vast array of legal issues. When Posner is not operating under the weight of his self-imposed ideological burdens, his work constitutes legal scholarship of the highest rank. On the other hand, when his ideology drives his theoretical arguments and empirical assertions, the work becomes seriously flawed. Perhaps, it is this combination of the exceptional and the egregious that explains why Posner, like Liszt, has generated such "extremes of adulation and opprobrium."[83] As a result, Posner may have done more than any other single individual both to advance and set back the field of law and economics. While we have addressed a sizeable number of errors that exist in Posner's work, it is important that this discussion does not obscure the larger picture. Posner has been exceptionally ambitious in attempting to analyze the entire realm of law from an economic perspective. Less than complete success at such a grand endeavor remains quite a remarkable achievement.[84]

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81. K. ARROW, ASPECTS OF THE THEORY OF RISK-BEARING (1965); *see also* A. ATKINSON & J. STIGLITZ, LECTURES ON PUBLIC ECONOMICS 124 (1980).

82. D. Projector & G. Weiss, Survey of Financial Characteristics of Consumers, (Fed. Reserve Bd. 1966) (concluding that the elasticity of demand for risky assets is greater than unity).

83. R. TAYLOR, FRANZ LISZT, THE MAN AND THE MUSICIAN 258 (1986).

84. Moreover, as John Stuart Mill wrote:

> [Even if the] opinion be an error, it may, and very commonly does, contain a portion of the truth; and since the general . . . opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.

J.S. MILL, ON LIBERTY 50 (D. Spitz ed. 1975).

Through a number of examples, we have shown that many issues are not as simple as Posner would have us believe. Indeed, economic reductivism systematically favors Posner's conservative platform. In a world without externalities or public goods, in a world where income inequality is "rare" or exogenously determined, laissez-faire policies are efficient. When the "failings" of reality intrude, however, governmental intervention may be needed to promote both equity and efficiency. To the extent that Posner alerts readers to views or arguments that they have not considered, his book will continue to be of immense value. But it must always be recoguized that the strength of Posner's clean assumptions and clear results is in initiating legal discussions, not in resolving them.

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