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CONTINUING TRIBUTES TO THE HONORABLE RICHARD A. POSNER

PRIVATE CHOICES AND PUBLIC LAW: RICHARD A. POSNER’S CONTRIBUTIONS TO FAMILY LAW AND POLICY

Francesco Parisi and Ben W.F. Depoorter*

Judge Richard A. Posner’s academic writings touched several issues originating much debate and controversy, often not immediately for the conclusions reached, but for the methodology followed. Posner’s seminal work on the “market for adoptions,” the enforcement of surrogate motherhood and the economics of human sexuality are examples of the variety of economic analysis studying issues traditionally considered outside the domain of economics.

In this brief essay, we examine some of Posner’s representative writings on the economics of family law and some of his responses to the substantive objections and methodological criticisms moved by legal scholars to Posner’s work in the field. Most of the criticisms concern the proper role of economic analysis in the analysis of non-market realities such as the family. In considering this debate, Part I examines some representative samples of Posner’s rich research on the economics of family law and relates it to the state of legal and economic research on the issue. Part II discusses the limits of economic analysis in the field of family law and policy with special attention to Posner’s writings in relation to the critical issues of externalities and commodification. We underscore the importance of a clear understanding of the positive theory of law and economics and relate Judge Posner’s family law writings to his proposed normative theory of law. We conclude briefly, discussing the difficult boundaries of private autonomy and public intervention.

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I. RICHARD POSNER AND THE ECONOMIC APPROACH TO FAMILY LAW

Starting in the early 1970s, the pioneering work of Richard Posner and a handful of other scholars brought to light the pervasive relevance of economics in virtually all areas of substantive and procedural law. The work of Posner and other scholars, often identified as the "new" law and economics movement, applied economic analysis beyond the traditional domain of markets, showing that beyond the apparent fragmentation of legal rules and doctrines lies a coherent and unifying framework with which to approach legal problems.

The new law and economics movement brought about a true methodological revolution, applying economic models to study non-market phenomena, including areas such as family and health law. In the origin, traditional legal scholars were skeptical of the use of economic analysis in these areas of the law and criticized the new law and economics movement for challenging fundamental legal dogmas and encroaching upon the very core of traditional legal method.

But unquestionably, economic analysis proved to be a valuable instrument analyzing these issues and the analytical power of the economic tools was exponentially greater when new legal issues came to the attention of courts and policymakers. Economic analysis would provide a key to the understanding of the likely impact of alternative legal rules on human behavior and larger social realities.

Richard Posner's contribution to the field of law and economics is exceptional, not in the least for the boundless scope of its applications, ranging from the history and evolution of legal systems to the study of substantive, procedural, and constitutional doctrines. Richard Posner has written thirty books and more than 300 articles and review essays, standing, by a good measure, as the single most productive scholar in the law and economics discipline.

Since the early 1970s, Posner's writings demonstrate the analytical power of using microeconomics to understand relationships and phenomena beyond the explicit markets that had been considered by neoclassical economists. This rethinking of law and economics

methodology extended to several other related disciplines, such as the study of social norms and customs, long-term relationships, family, and other social institutions.

Posner's admirable intellectual mission is most remarkable in light of his 1981 appointment as a judge of the United States Court of Appeals for the Seventh Circuit. In spite of his most successful judicial career, and his administrative responsibilities as Chief Judge of the U.S. Court of Appeals for the Seventh Circuit, Posner's activity as an academic scholar has been extremely prolific and influential.

Under different circumstances it would be proper to review the relevant work of a celebrated scholar in a specific field. However, the large production of Richard Posner deters any such ambition for the present authors. Rather than attempting a summary review of his work on the subject, we shall comply with the task commissioned to us and confine our brief observations to the insights that Posner's work provides on the changing boundaries of family law, for an understanding of the uneasy tension between individual freedom and public values in family law.

A. The Insular Domain of Family Law

Both in law and in economics the family has traditionally been an isolated subject of study. Within legal science issues of the family were treated separately from other legal areas and concepts. At the same


3. A recent study on the most influential and cited legal scholars ranked Richard A. Posner as the single most cited of the legal scholar of our time, surpassing the cumulative citations (1956-to date) of jurisprudential giants such as Roscoe Pound and Oliver Wendell Holmes, Jr. The reported citations give Richard A. Posner a substantial lead, with approximately twice as many citations as his closest competitors. Fred R. Shapiro, The Most-Cited Legal Scholars, 29 J. LEGAL STUD. 409 (2000).


5. See Margaret Brinig, Parent and Child, in DE GEEST AND BOUCKEART, ENCYCLOPEDIA OF LAW AND ECONOMICS 253 (2000). Margaret Brinig ascribes
time, economic theory regarded issues of the family as insular from the market. In law, the boundary between the family and the market has traditionally been described as a conceptual separation between status and contract, where in economics a difference perceived between altruistic and self-interested motivations of behavior dominated views on, respectively, the family and the market.

Historically, the family as a study subject of economics has been limited to treating the family as a basic unit in studies of consumption behavior. More recently, new law and economics and new economic theory of the family has shifted its approach to focus on relationships within the family structure. For the past thirty years, economic analysis of law has been applied to a wide range of family issues, including fertility behavior among women, optimal divorce laws, divorce law and impact on child...

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6. Sir Henry Summer Maine, Ancient Law 165 (10th ed. 1884) ("The movement of the progressive societies has hitherto been a movement from Status to Contract.")


8. For an example, see Margaret G. Reid, Economics of Household Production (1934).

9. These studies relate the declining birth rate in Western society to technical but also legal changes such as expansion of the right of privacy with regard to the use of contraceptives and abortion choice. See Becker, supra note 7; Gary S. Becker & Gregg H. Lewis, On the Interaction between the Quantity and Quality of Children, 2 J. Pol. Econ. 297 (1973); Gary S. Becker & Nigel Tomes, Child Endowments Between the Quantity and the Quality of Children, 84 J. Pol. Econ. 143 (1988). Others have linked the trend of declining birth rates to no-fault divorce. See Margaret F. Brining & Steven M. Crafton, Marriage and Opportunism, 23 J. Legal Stud. 869, 885-86 (1994) (finding a negative and significant effect between no-fault divorce and birth rate and the increased economic costs in having children in combination with relaxed divorce laws and stigma); Gary S. Becker, Elisabeth M. Landes & Robert Michael, An Economic Analysis of Marital Instability, 85 J. Pol. Econ. 1157-76 (1977).

10. See, e.g., Elisabeth M. Landes, Economics of Alimony, 7 J. Legal Stud. 35 (1978); Ira Elman, The Theory of Alimony, 77 Cal. L. Rev. 1 (1990) (applying contract damages-theory to divorce law); Lloyd Cohen, Marriage, Divorce, and Quasi-Rents; Or "I Gave Him the Best Years of My Life", 16 J. Legal Stud. 167 (1987) (arguing against flexible divorce laws which may negate marriage-specific
upbringing, legal rules and their influence on birth rates, foster care, the impact of welfare subsidies for illegitimacy and single motherhood, the fiduciary role of parents, the effect of consent revocation legislation on adoption rates and many other topics.

In this manner, new economic theory of the family has extended our ways of thinking about and understanding family relationships. These applications of economic thinking to what was traditionally considered to be a self-contained field of law has often elicited opposition from various angles.

B. Richard A. Posner's Writings on the Economics of the Family

Much of Posner's work on the economics of private law can be viewed as an application of his well-known efficiency hypothesis of the common law. In most of his work, Posner contributes to economic analysis by

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15. See Brinig, *supra* note 10 (indicating the relationship between revocation statutes and adoption rates).
formulating and testing the hypothesis that the common law is best explained as the courts' attempt to promote economic efficiency. The common law of torts and contracts are natural areas for applying Posner's positive economic analysis, which focuses on what the law is and why it is shaped that way. In each area of jurisprudence, economics can provide powerful insight into what makes the legal rules beneficial, what the controversies are, and why various laws developed. For instance, the economic theory of torts explains why different rules are efficient, what effects they have on the behavior of parties, and how legislative interventions often affect the results produced by the common law. The economic theory of contracts provides similar insights.

Besides these classic applications, Posner's contribution to the field of law and economics should be singled out for its novel application of economic analysis to areas that were traditionally thought to be out of the reach of the discipline. Posner's work on family law serves as a good example. Posner convincingly has shown that economics can be applied to the market for adopting children in order to get a clearer understanding of the problematic issue of why few babies are currently put up for adoption. Having understood the market for babies, one quickly can grasp the impact of the current regulation on society and the goals we might have concerning adoption. Along similar lines, Posner unveils the analytical power of economics in his discussion of divorce, presenting an ethical and economic analysis of contracts of surrogate motherhood, rape, pornography, and the economic ramifications of

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20. POSNER, supra note 10, at Chapter 5.
23. RICHARD A. POSNER, SEX AND REASON 351-382 (1992) [hereinafter SEX
various tenets of the feminist movement; an essay on law and nature presenting an economic approach to homosexuality, sex preference, and family law; the demand for human cloning, a survey of cross-cultural differences in sexual and family relationships; and, with his engaging book on the relevance of economic logic in understanding human sexuality and family behavior. While recognizing that sexual drives and orientations have a strong biological origin, Posner contends that sexual behavior is rationally driven by an implicit calculation of the perceived costs and benefits of specific actions. Economics, in Posner's view, provides a unifying account of the various perspectives on the family and on sexuality, including biology, psychology, sociology, anthropology, and philosophy.

AND REASON].


28. SEX AND REASON, supra note 23.

Although Posner admits that economics might not be conclusive, as critical moral questions often stand in the way of a definitive resolution of all these issues, his analysis shows how economics can help streamline the debate and provide an objective common ground to evaluate the opposing claims.

In the following sections, we will consider some of Posner's most controversial applications of economic analysis to areas of family and sexuality.

1. The Regulation of the Market in Adoptions

In one of the most controversial articles in the whole field of law and economics, Landes and Posner apply the conceptual tools of economic analysis to the adoption process as an example of public regulation of non-market behavior. They develop a model of the supply and demand for adopting babies under the existing pattern of regulation, showing how it has created a baby shortage and a black market for adoptable infants by preventing the achievement of a more natural market equilibrium. If there were balance in the demand and the supply of babies for adoption, our society would have avoided the glut of unadopted children maintained in foster homes at public expense. But restrictions, the most significant of which is the regulation of the price at which adoption

Analysis of Sex, 5 CRIM. L.F. 733 (1994). Empirical surveys on the positive correlation between Posner's writing and employment in academic scholarship is not available as of yet.


31. Baby Shortage, supra note 19.
agencies may transact with the natural parents, prevent the natural functioning of the market.

While the "selling" of babies\textsuperscript{32} may seem highly objectionable, it already takes place—legally.\textsuperscript{33} Adoption agencies essentially "sell" babies to adoptive parents by making them incur costs, usually associated with the maze of regulations involved in adopting babies. This is especially true for healthy white babies, who are in short supply when compared to non-white, older, or disabled children. Given such reality, Landes and Posner advocate a partial deregulation of the existing adoption mechanisms, which would eliminate the shortage of babies.\textsuperscript{34} Like any other market, a market for adoption would reach a market clearing equilibrium with the number of babies demanded gradually approaching the number of babies supplied by society, a result currently impeded by existing government regulation.\textsuperscript{35} According to Landes and Posner, such a balance would be beneficial because it would mean that parents who place little value in their offspring would be more likely to give the child up for adoption, and adoptive parents who really want to have a child of their own would be able to get one. This market-driven adoption mechanism would much more effectively put babies in homes where the children are most valued than the current system.

One objection\textsuperscript{36} to deregulation is that it might result in such high prices

\begin{itemize}
  \item \textsuperscript{32} Posner repeatedly reminds us of the fact that the subject at hand is not the sale of the baby itself, but rather of the parental right with regard to the baby - a contract that lasts a maximum eighteen or twenty-one years. \textit{See Sex and Reason}, supra note 23, at 410. While both rights may seems interwoven, especially at a young age of the child, the difference becomes more apparent with the progress of years. Indeed, parents will be able to testify that in discussions on issues such as appropriate bed time hours, our own children go to great lengths to clarify that we do not "own" them.
  \item \textsuperscript{33} \textit{See} Christine Bachrach, \textit{Adoption as a Means of Family Formation: Data from the National Survey of Family Growth, 45 J. Marriage \\& Fam. 859} (1983). The analytical model of the present market of adoptions, as presented in Landes and Posner 's original offering has to this date stayed largely uncontested. \textit{Baby Shortage, supra note 19, at 327-339.}
  \item \textsuperscript{34} \textit{See Baby Shortage, supra note 19, at 339-41.}
  \item \textsuperscript{35} \textit{See id. at 327-39.}
  \item \textsuperscript{36} Ronald Cass examined the various types of objections to the proposal for a deregulated market for adoptions. He was able to infer the following categories: Disagreement over the practical effects of the proposal (consequential-internal), objections with regard to third-party effects not accounted for in the proposal (consequential-external), arguments that anticipate perverse effects from the symbolism of market choice (symbolic-consequential) and finally, principled objections against market vocabulary into issues such as adoption and abortion;
\end{itemize}
for babies that only the wealthy would be able to adopt. Posner argues that the natural forces of the market would yield lower prices as a result of competition, just like it does in any other market. A second objection to deregulation is that the welfare of the child should be the primary concern. While this concern is certainly valid, there is no reason that it cannot be taken into account in a deregulated process. Indeed, there are limitations to the deregulation that would take place under the proposal. For instance, Posner does not support specific performance in circumstances in which it appears that forcing the sale would harm the baby. In addition, the proposal would prohibit the sale of a child after infancy (i.e., after a bond has been established with the parents). Allowing the sale of non-infants might become an incentive to parents to sell their children after the young ones have already formed an attachment with them, which is certainly undesirable because of the traumatic effect it would have on the children involved. However, with regard to babies, there is no reason to believe that a market system would be any worse at finding good parents than the current system. In fact, there are a number of reasons to believe that it would be better.

The objection to deregulation of the adoption market on the grounds that it would occasion welfare losses for children is more convincing with regard to hard-to-place babies. To the extent that these babies are substitutes for white, healthy babies, the artificially created price increase by regulation may lead some couples to consider adopting the excess supply of hard-to-place babies. Although it is hard to estimate the precise effect, the price reduction for healthy, white babies can be expected to decrease the number of placements of difficult-to-place babies.

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37. See, e.g., Frankel and Tamar, supra note 30, at 99.
38. Baby Shortage, supra note 19, at 339-40. In fact the high prices are primarily a property of the black market for adoption. See Posner, Adoption Regulation, supra note 19, at 65. Furthermore, presently wealthy people fare better under the current system of adoption agency-controlled legal adoptions, since economic status of the prospective adopting couple is taken into account in the selection process of the agencies.
39. Adoption Regulation, supra note 19, at 67.
40. Id. at 66.
41. Id. Posner objects to this argument which he deems to be a “covert” method of encouraging the adoption of hard-to-place children. Posner writes: [If] society wants to subsidize these unfortunate children, the burden of the subsidies should be borne, if not by the natural parents of these
2. The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood

In surrogate motherhood contracts, a woman agrees to be impregnated through artificial insemination and gives up the child to the father for a fee. In an article published in this Journal, Posner focused on the question of whether such contracts should be legally enforceable. An analysis of social welfare leads one to an elementary conclusion: Parties contract only when they both believe that they will be made better off. This principle is no less true in contracts of surrogate motherhood than with any other contract. Parties to this kind of contract believe, at least beforehand, that they will both mutually benefit and these advantages depend on the legal enforcement of the contract. If it is not enforceable, either party can change his or her mind and deprive the other of the expected benefits. Freedom of contract suggests that women should be free to rent their reproductive systems if they like. If one wants to argue that surrogate mothers should not be allowed to do so, the only basis would be to say that surrogates do not have the objectivity to put a value on their services.

This view might have some validity if surrogates were all driven by extreme poverty to make the contract. It would suggest that society do something to ameliorate their situation beyond simply allowing them to sell their only marketable asset. However, this possible objection to surrogate contracts does not seem to be supported by the evidence, and therefore there is no good reason to bar the practice, at least if evaluated within the narrow confines of this analytical criterion. Also, regret over giving up the child is at least partially balanced by empathy for the father's infertile wife. In looking at alternative approaches, Posner notes that a rule which allows surrogate mothers to change their minds after the birth of the child might be acceptable, but it would lower the value of the service because the couple purchasing would have to be compensated for the uncertainty. For these reasons, it seems as though it would be in the

children, then by the taxpaying population at large—rather than by just the nation's childless white couples, who under the present unsystematic system bear the lion's share of the burden by being denied the benefits of an efficient method of allocating healthy white infants for adoption in the hope that this will induce them to adopt nonwhite, handicapped, or older children.

Id.

42. Posner, Surrogacy, supra note 21.
43. See Cohen, supra note 30; Carl E. Schneider, Surrogate Motherhood from the Perspective of Family Law, 13 HARV. J. L. & PUB. POL'Y 125 (1990).
best interest of the parties to make these agreements enforceable, just as with any other contract.  

Numerous objections have been raised to contracts of surrogate motherhood, including the detrimental effects on third parties, the supposed involuntary nature of such contracts, the "commodification" of motherhood, and the feminist argument that surrogacy is akin to prostitution. Posner anticipates and preempts each of these arguments. Children would not be worse off under a regime of enforcement of the surrogacy contract. Posner asks whether a half-adopted child derives a net disutility from life? Also, the lack of enforcement does not drive couples into the market of hard-to-place adoption children. Whether poor and desperate women would find themselves in a position where surrogacy is a final option for survival is doubtful. Empirical data on the present situation presents surrogate mothers as mature middle class women who already have children.

II. FAMILY, SEXUALITY, AND THE LIMITS OF ECONOMIC ANALYSIS

Due to the affinity and occasional methodological synergy between economic theory and liberal thinking, several criticisms of economic analysis of family law have been raised indistinctly against both strands of literature. In discussing the libertarian perspective on issues related to family and sex, such as abortion, surrogate motherhood, rape (including date rape and marital rape), incest, battered wives, divorce and pornography, much of the literature focuses on the ideal benchmark of freedom of contract. This benchmark provides a hypothetical guideline on what people should be free to do in the absence of uncompensated costs on third parties. When transactions costs are high, the law should


45. In the present section we will only address those objections that are consequentialist (see supra note 38). Objections of symbolic nature are discussed in Section 6.

46. For references to this data, see *Surrogacy*, supra note 21, at 25. Posner also briefly examines the opinion in the famous *Baby M* case, 109 N.J. 396 (1987). He maintains that the New Jersey Supreme Court's reasoning is highly deficient and indicates a hostility to markets.


48. For an important criticism of Posner's theory of sexuality in relation to the
try to impose the deal that parties would have struck in the absence of such costs. This approach offers clear answers for divorce and surrogate motherhood; it does not work as well with rape, incest and pornography, and it hardly provides any useful guideline for the case of abortion.

In economic terms, divorce can be analyzed as terminating the marital contract. The issue that the law seeks to solve is the determination of the conditions for such termination and the choice of proper remedy. Regarding the issue of divorce, hypothetical contractarian theories provide a viable framework for identifying the conditions for the termination of a marriage. Like most contractarian theories, however, this approach uses a hypothetical majoritarian criterion for the choice of default rules applicable to all members of a community.

In the specific context of marriage and divorce, however, the use of majoritarian default rules may appear problematic. The option of unilateral termination of marriage, while possibly congenial to the aspirations of the majority of individuals in society, may, in the view of others, empty the institution of the family of one essential attribute. The need to balance the aspirations of those who value long-term stability and view indissolubility as a necessary condition for mutual commitment and those who believe in the desirability of divorce remains a most contested matter.

According to Posner, the proper perspective is to look at marriage as a partnership and to reallocate the assets contributed by each partner. For example, courts should consider women who support their husbands through professional school as partial owners of the degree conferred, and thus award more alimony as an installment repayment. This principle results in a fair distribution of assets and a standard that judges can follow fairly easily.

While aware of the limits of economic analysis in formulating policy propositions on legal issues involving moral values, Posner further elaborates some interesting propositions concerning rape and pornography. In his view, these social problems are simple in theory, but they involve complicated issues that cannot be answered through economic analysis. In a simple economic analysis, rape parallels theft as a coerced taking with low transaction costs. In these cases, the law consequently requires consent, or bargaining. The difficulty arises from evidentiary problems in rape. It is often hard to know when consent has

Human and the non-instrumentalist perception of sexual relations in the Catholic and natural law approach, see George, supra note 29 (arguing that Posner fails to truly address the challenge of noninstrumental rationality).

49. SEX AND REASON, supra note 23, at 182-83, 393-94.
been given. In rape, there is much uncertainty about third party effects. Understanding what the actual issues are make the problems easier to analyze. It is interesting to note that even though feminists are skeptical of an economic analysis of these issues, many of them have implicitly adopted one. Feminists who suggest that obtaining sex by false pretense is like the crime of fraud and should be punished as such (but less than forcible rape) are implicitly embracing an economic model of social interaction.\textsuperscript{50} Posner further analogizes pornography to pollution - voluntary exchange that may have uncompensated third-party effects, such as gradual contamination of the norms of conduct in the general community or the possible unconscious incitement of consumers to commit rape or other sexual crimes.\textsuperscript{51}

While economics may pinpoint family and gender legal issues and provide some answers, abortion is one of those social dilemmas that cannot be solved through economic analysis.\textsuperscript{52} There is a simple libertarian solution to abortion only if one does not consider the fetus’s utility. Without considering the interest of the fetus, the mother should be entitled to abort, subject to the father’s permission if an implicit or explicit contract makes the fetus a joint asset. However, if the fetus is a member of society whose welfare counts, such a contract has third party effects and may not be presumed to be wealth maximizing. Likewise, if one recognizes the sanctity of life and the limits of any social policy in the face of such supreme value, no insight can be derived from economic analysis or libertarian ideologies.

Since the decision to believe in the supreme value of life from the time of conception and the decision to include the utility of the fetus in the social welfare calculation is a moral one, libertarians and economists have nothing to say on the matter of abortion.

A. Of Externalities and Privity in Contracts

One of the most commonly established objections against the application of economics to matters of family, as described in the previous section, is the fact that if affects non-parties. Third parties are not fully accounted for in the calculus of the individual decision-makers, or so it is argued. For instance, the proposed experiment for adoption deregulation is dismissed by some because the welfare of the babies to be sold is not

\textsuperscript{50} Id. at 425.

\textsuperscript{51} Id. at 351-382.

\textsuperscript{52} For an illustration of the magnitude of complexity of this issue, see id. at 271-90.
sufficiently guarded.\textsuperscript{53} In the previous section we addressed Posner's factual disagreement on this argument. This section takes a closer look at the theoretical premise of this externality argument.

In the first part of the nineteenth century, Anglo-American common law often relied on notions of privity to address the various issues of third-party effects in private contracts. The widespread belief of both economists and lawyers was that any contract which was in the interest of both parties had to be in the interest of society at large. The underlying confidence in such harmony of individual interests, was challenged by early-twentieth century welfare theorists. These thinkers argued that private agreements often have harmful effects on third parties, and that it is, therefore, consistent with economic theory to promote legal intervention for the regulation and possible prohibition of socially undesirable contracts. These ideological premises are the origin of much modern legislation purposefully interfering with freedom of contract.\textsuperscript{54}

According to the economic definition, negative externalities are Pareto-relevant costs imposed on non-consenting third parties outside of the voluntary mechanism of the marketplace. In the presence of externalities, third parties' preferences are not captured in the balance of costs and benefits of the individual transaction. This implies that, even if both parties to a particular contract benefit from it, the contract may impose external costs on individuals who had no opportunity to participate in the bargaining process. The economic notion of externalities is only partially addressed by the legal notion of privity, according to which no rights or obligations can be imposed on subjects who are not parties to the contract. A large number of economic externalities remain outside the grasp of legal issues of privity.\textsuperscript{55} Economic theory warns that, whenever the effects generated by private agreements fall on third parties who have not participated in the formation of the contract, the allocation of resources may diverge from the ideal equilibrium implied by a model where all benefits and costs are captured in the exchange.\textsuperscript{56} The relative

\textsuperscript{53} See, e.g., Cohen, \textit{supra} note 30.

\textsuperscript{54} This intellectual phenomenon did not escape Max Weber's sociological insight when he observed: "Freedom of contract once existed . . . in spheres in which it is no longer prevalent or in which it is far less prevalent than it used to be." \textsc{Max Weber}, \textsc{2 Economy and Society} 669 (1978) (Translation of \textsc{Max Weber}, \textsc{Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie}, 4th ed., 1956).

\textsuperscript{55} For an illuminating historical overview of the notion of privity in English law, see \textsc{Vernon V. Palmer}, \textsc{The Paths to Privity, The History of Third Party Beneficiary Contracts at English Law} (1992).

\textsuperscript{56} Known as "efficiency," this normative concept is often dismissed by
lack of reach of the Pareto criterion of welfare is most evident in this setting. According to its definition, the Pareto criterion will not be met if an exchange has made someone better off while making others worse off. Activities that may somehow offend a third party's sense of taste, or even agreements that arouse envy in others, may possibly qualify as activities that generate negative externalities. Pushing the Paretian logic to its extreme, the existence of externalities would provide a sweeping justification for banning or constraining private agreements, and freedom of contract would largely be at an end. There is equal reason for reservation with regard to the Kaldor-Hicks criterion of potential compensation, since it would entail balancing the external costs to third parties against the benefits to the immediate parties to the contract. While this criterion may enhance the individual autonomy of the parties by permitting them to exercise their choices within the limits allowed by a Kaldor-Hicks test of potential compensation, it may well diminish the negative freedom of third parties who suffer the external effects of the contract.

The problem is the elusiveness of the notion of externalities, one of the most ill-defined concepts in welfare economics, perhaps analogous to the equally ambiguous concept of harm in liberal political theory. According to Michael Trebilcock, the crucial task is that of distinguishing between relevant and irrelevant externalities in welfare terms, and to define, in liberal terms, the harm which one may justifiably impose on others. In economists taking a subjective or Austrian approach. See Jack Wiseman, General Equilibrium or Market Process: An Evaluation, in JACK WISEMAN, COST, CHOICE AND POLITICAL ECONOMY 221 (1989):

In contrast, the Austrian approaches normative judgement by way of methodological individualism and subjectivism. There is no objective entity called “output,” no way of measuring aggregate welfare, e.g. by ‘adding up’ observed prices (which are disequilibrium prices anyway). The social relevance of the market lies in its mobilization of scattered information, and the interesting normative issues concern such matters as individual plan-coordination, the modification of expectations by market experience, and the contribution of disequilibrium prices to improved anticipation by way of entrepreneurial discovery.

58. Id. at 58.
this setting, Trebilcock introduces the notion of Pareto-relevant externalities, which he defines as deviations from an attainable optimum. With an implied reference to a Coasian framework of bargaining, Trebilcock seems to allow for the conclusion that all Pareto-relevant externalities are self-curing in the market. Pareto-irrelevant externalities are those which impose costs which are lower than the expenditure that would be necessary for their removal. The point obviously raises public choice concerns as to the political difficulties of addressing externality problems through public remedies. Quoting from Carl J. Dahlman, Michael Trebilcock argues that, in the presence of Pareto-irrelevant externalities, legal intervention could only be justified on the basis of the rather formidable assumption that governments can reduce the transaction costs that inhibit exchanges, or miraculously find a better way than markets to achieve an optimal allocation of resources.

B. Of Commodities and Incommensurables

A different kind of claim heard in the debate on the literature described above, relates to the permissible limits to the extrapolation of economic concepts to so-called non-monetizable goods such as family values and the alleged detrimental effects of valuation on an economic basis. The objection of non-commensurability adopts the idea that not all goods and all values can be measured by some common yardstick. Although economists realize that many of the values inherent in family related matters are intangibles that have nonpecuniary importance, they treat these preferences as if they could be monetarized. Measurement and valuation of non-pecuniary goods under economic analysis would thus be imperfect and most likely to be undercompensatory.

63. On the claim that human values are plural, diverse and incommensurable, see Cass R. Sunstein, Incommensurability and Valuation in the Law, 92 Mich. L. Rev. 779 (1994). For other treatments of the issue of commensurability—the idea that all goods and all values can be measured by some common yardstick, see Margaret J. Radin, Compensation and Commensurability, 43 DUKE L.J. 56 (1993); Frederick Schauer, Commensurability and Its Constitutional Consequences, 45 HASTINGS L.J. 785 (1994).
As Wendy J. Gordon claims, "[O]ur morality has several, non-commensurable strains within it." The dichotomy within the self is one that needs to decided between choices of "consequential" or "deontologic nature." Gordon provides the example of being faced with the option of torturing a child in order to save the rest of the world of all harm. The consequential component of our moral thinking cares about the number of people that will be injured under each decision. By contrast, the "deontologic" component refers to the component that will have nothing to do with hurting the child.\textsuperscript{64}

While, according to some, the latter may override the former in many decisions of personhood, it must be argued that it is important to better understand the consequentialist factualities of the choices open to us. Furthermore, if one were to agree that social choice actually involves a trade off between both commensurable and intrinsic values, it becomes important to have a clear understanding of the consequences that are brought about under the decisions that we are called to make.\textsuperscript{65}

A different line of criticism stems from the fact that even if one measures all values along a single economic matrix, the consequences of such action would be unwanted. Commodification, attaching prices to all goods and values, would be degrading to humanity and would erode many of the moral values in society. According to these scholars, evaluation of all values on a pecuniary basis is \textit{a priori} intolerable and should be rejected regardless of its purpose.

The estimated impact of law on family norms is a centerpiece in this debate. Indeed some others, most notably Cass. R. Sunstein, have held that legal rules are preference shaping.\textsuperscript{66} From that it is of course just a


\textsuperscript{65} But see id. at 2339: "In Realms where nonmonetary and antimoneyary norms play a strong role, it is not the best use of scholarly energy to assume that a law which alters monetary payoffs will necessarily have significant behavioral effects."

\textsuperscript{66} Cass R. Sunstein, \textit{Legal Interference with Private Preferences}, 53 U. Chi. L. Rev. 1129 (1986). Sunstein discusses the preference shaping effect of legal rules, presenting them as a case against treatment of private preferences as the basis for social choice. Sunstein lists a number of distortions at the origin of private preferences (e.g., endowment effects, adaptive preferences, intra-personal collective action problems, etc.) that offer an opportunity for collective action that decides on ends rather than to simply implement all preferences, including these "distorted private preferences." See also MARGARET JANE RADIN, CONTESTED COMMODITIES 69 (1996) (discussing how context supposedly influences preference structures, arguing that value might vary according to the context of current
small step to the argument of commodification. Will the attachment of prices to all values and goods trigger a downward spiral of degradation of personhood and the sense community?\textsuperscript{67} Posner is skeptical of the alleged impact of legal rules on underlying norms and attitudes in society, such as the sense of community, altruism, etc.\textsuperscript{68} In the vision of Posner, a price increase for the seller will lead more mothers to put their babies up for adoption, without significantly altering social norms. As Posner puts it, social norms are a consequence of "millions of years of evolution rather than of such minor cultural details as the precise scope of the market principle in a particular society."\textsuperscript{69} The effect of legal rules on the values must be very limited. In the context of the enforceability of contract of surrogate motherhood, Posner refers to less countries with less commodification and notes that people in these societies do not appear to be less selfish than Americans.\textsuperscript{70}

C. The Uses and Criticisms of the Efficiency Criterion in Legal Analysis

Alternative approaches in the economic analysis of law can be distinguished by whether they are used positively or normatively. Having determined that law and economics is an effective tool for analysis of existing laws, many attorneys and judges are using economic analysis of the law to an increasing degree. If used correctly, this analysis can have a powerful effect in ensuring better judicial results. Critics of this analysis often cite problems in "law and economics" when their critiques should be more constructively redirected against the misuses of economics in the

\textsuperscript{67} Radin, 	extit{Contested Commodities}, supra note 66; Radin argues against combining a right to exclude with a right of alienability with regard to so-called "incommensurables," such as babies and body parts. According to Radin, such reductionist "commodification" conflicts with humanist values and degrades the notion of personhood, i.e., individuals will come to see themselves as simple commodities that can be bought and sold on the market. For a version of this argument with regard to children in a deregulated market for babies, see Frankel and Miller, \textit{supra} at note 30, 102-103 (explicit pricing will lead people to view children as commodities which will destroy the dignity and autonomy of infants).

\textsuperscript{68} Posner's response to these symbolic arguments can be found in \textit{Adoption Regulation}, supra note 19, 70-71 (puzzled by the willingness of the symbolic opponents to perpetuate or avoid discussion of the detrimental effects of the current system, simply on symbolic grounds).

\textsuperscript{69} Surrogacy, \textit{supra} note 21, at 26.

\textsuperscript{70} Id. at 26-27.
Posner endorses a scientific approach which uses economics to study objectively the legal system and the behavior it regulates. Posner believes that positive economic analysis is immune to most abuse and misuse because it is merely used to explain or predict the incentives which guide individuals and institutions under alternative legal rules.

Posner acknowledges that normative economic analysis, i.e., the use of economics to argue for what law should be, is susceptible to criticism. On the other hand, he notes that while economic analysis assesses the costs and benefits of a proposed rule, it is the non-economic weighting of the economic factors which is vulnerable to subjective ideology.

One common misperception about the economic analysis of law is that it always uses economic rhetoric. The primary hypothesis advanced by positive economic analysis of law is the notion that efficiency is the predominant factor shaping the rules, procedures and institutions of the common law. Posner contends that efficiency is a defensible criterion in the context of judicial decision-making because "justice" considerations, for which there is no social consensus, introduce unacceptable ambiguity into the judicial process. The mere fact that non-economic rhetoric dominates judicial opinions does not indicate that basic economic concepts such as profit maximization and marginal costs are not implicitly followed in judicial reasoning.  

In arguing for positive use of economics, Posner is not saying that there are no normative economic applications. In fact, law and economics often have many objective things to say that affect normative analysis of policy. Posner offers crime as an example. Positive law and economics can help explain and predict how various punishments will affect the behavior of criminals. It might determine that a certain sanction is more likely to deter a certain crime. While this analysis does not by itself mean that the law should be adopted, it can be used to influence normative analysis on

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72. Posner notes that the problem can also work the other way around. Judge Sneed's opinion in Union Oil Co. v. Oppen, 5-1 F.2d 558 (9th Cir. 1974) is an example of a judge misapplying economic analysis. The judge used economic rhetoric incorrectly. However, he still ended up reaching the correct decision. The important point to note is that economic rhetoric does not always reach the right reasons, and the intuition of judges is often supported by more detailed economic analysis. In this way, Oppen is an example of how efficiency is a powerful force molding the common law, even when described in different rhetoric. See Posner, supra note 71.
whether the law would be beneficial to society. Thus, the proper application of law and economics not only results in a better understanding of the law as it exists now, but it also creates an analytical framework that helps one make better normative choices of legal rules.

D. Efficiency, Morality and Posner’s Theory of Justice

Although adherence to any particular normative theory of law is not necessary to appreciate the potential added value of positive economic analysis, Posner has gone to great lengths to advocate his own preferred normative economic theory of law: The criterion of wealth maximization. Under wealth maximization principles a transaction is desirable if it increases the sum of all tangible and intangible goods and services available to society.\(^7\)

In spite of Posner’s defense of wealth maximization, he does not argue that it should replace morality. However, he does contend that wealth maximization is generally the most principled ground for allocating legal

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claims to society’s resources.

Legal scholars argued that Posner’s economic theory of justice promotes “disrespect for individuals,” is “indeterminative and elitist,” and “can hardly be viewed as anything other than amoral, if not immoral.”74 According to Posner, these critiques miss the mark, in that they treat the methodology of law and economics as a political theory.75 Indeed, Posner has argued that wealth maximization is the best normative and positive theory of common law rights and remedies, but never suggested that wealth maximization should be the only social value or principle of justice.

In this context, Posner describes himself as a “pragmatic economic libertarian.”76 He is libertarian in that he is suspicious of public intervention and favors small government. He uses economic theory to define what he sees as the appropriate role of the government to intervene and correct serious market failures. He is pragmatic in the sense that he does not derive these free-market views from dogmatic or philosophical underpinnings. Instead, he uses wealth maximization to operationalize his economic libertarianism. By stripping away “moral” distributive considerations and predispositions about the paternalistic role of government, wealth maximization provides a powerful analytical tool for deriving a system of optimal government. Posner does not contend that wealth maximization should override moral concerns, but he argues that it is especially useful for guiding common law adjudication in which judges are reluctant to decide controversies on a distributive basis.

Wealth maximization sometimes runs contrary to moral guides such as natural rights. The natural rights perspective views society as a compact in which people surrender just enough of their own natural liberties as is necessary to protect everyone else's equal natural liberties. Posner believes that because the notion of natural rights can be expanded so readily, it is too unstable a foundation to build upon. He also believes that it is fundamentally anti-democratic because it holds that the more rights people have, the smaller the permissible scope of public policy deliberation.

Many of the arguments made by natural rights proponents rely on examples for which there is moral consensus. Posner points out that the

power of natural rights' moral discourse runs out when one faces controversial moral issues. It is at this point that an analytical tool is needed to frame policy questions. For Posner, wealth maximization allows one to get to the costs and benefits of a proposed action, reduce factual uncertainty, and identify any remaining moral issue in a more rigorous fashion.

E. Private Autonomy in the Family Sphere

Notwithstanding the basic principle of freedom of contract, several generations of lawyers have been busy elaborating all sorts of legal doctrines that allow the courts to utilize normative criteria of fairness in their decision-making process. In these situations, judicial and statutory intervention is not justified by notions of technical externalities or lack of free consent. These doctrines address situations in which the parties freely entered into the agreement, and the relevant effects of the contract remain confined within their individual spheres. Many of these restrictions to the general freedom of contract have been created on grounds of fairness, equity and social welfare. In many of these instances, social intervention relies on elusive protectionist grounds. The patronizing is rationalized as an attempt to prevent people from harming themselves or as an encouragement to be more considerate of collective social values. The idea is that individuals should have less freedom to make mistakes than they currently have. 


The whole idea of protectionist judicial activism clearly abandons the premises of normative individualism, and introduces the opposite claim that voluntary and freely chosen contractual arrangements cannot be relied upon as conclusive indicia of Pareto-optimal exchanges. An *ex post facto* screening of fairness and social desirability becomes necessary for the protection of the contracting parties and society at large. In this setting, the requirement of valuable consideration, which renders informal gratuitous promises unenforceable; the doctrine of unconscionability, which is used to protect uninformed consumers from the consequences of their own bad bargains; and the judicial scrutiny of releases of personal liability, are prominent illustrations of such protectionist intervention in the law of contracts.

Law and economics scholars are quick to note that the justification of protectionist and social intervention gives rise to theoretical difficulties. Some of these difficulties are the long-term effects of prolonged governmental action, which may be perceived as creating vested rights and protected expectations for individual members of society. Paradoxically, if contract law is used inclusively to address distributional and social issues, the legal and social perception of property rights and individual privileges may be irreversibly altered. For example, if the introduction of rent control or minimum wage laws initially amounted to an imposition of not-bargained-for costs on homeowners and employers, the repeal of those statutes after many years might be perceived as infringing upon protected social expectations of tenants and workers alike. According to this logic, the public interest in the regulation of private contracts extends well beyond the problem of technical externalities. The limits imposed on freedom of contract become part of the broader set of governmental devices used to address social problems such as affordable housing and subsistence wages for indigent individuals. There is inherent in this a danger of undisciplined notions of externalities that provides a basis for constraining almost every

79. See Trebilcock, supra note 10.

80. See, e.g., Sunstein, supra note 68, at 1151 (on the preference shaping effect of legal rules, adaptive preferences and endowment effects).

Almost any market exchange could be challenged by governmental regulation, since in almost any situation there are potential externalities to the diffuse public interest. In too many situations, the response would, thus, amount to legislative or judicial interference with the contractual freedom of individuals. Contracts would no longer belong to the market, and every private agreement would be subject to the potential screening of a governmental or judicial authority.

CONCLUSION

Posner's various law and economics papers often unveil intriguing paradoxes and he convincingly shows the value of economics even in the context of alternative ideological conceptions of law. Whatever the normative goals pursued, economic analysis is valuable in determining how to best reach them. Posner's economic papers often expose some of the unintended consequences of legal intervention, revealing that the chosen rules may not necessarily produce the desired effects. Furthermore, the traditional debate over normative issues is often shown to ignore the underlying economic nature of human action. A searching eye towards these issues can help clarify the debate and point to a better resolution. Economic analysis of law has significant value for anyone who wants to view legal and political issues in a logical and informed way. Rather than scratching the surface, Posner shows that an economic approach can provide valuable insight into matters regardless of whether they are generally considered "economic" or not. In this vain, Posner has amply shown that rational choice models can explain much of the variance across time and cultures in the family norms and practices. The work of Posner in this field has, more than that of any other scholar in the discipline of economic analysis of law, opened up inquiry into subjects and issues that demand our attention and place it on the agenda of readers all over the world.


83. Id. at 268. The distorting effects of such restrictions of individual liberties are eloquently discussed in the final chapter entitled "Autonomy and Welfare," where Trebilcock advances the hope that the market be truly accepted "as an engine, not an enemy, of social as well as economic progress." Id.