Readings

The Price of Rights

Economic Analysis of Law (Third Edition), by Richard A. Posner (Little Brown and Company, 1986), 666 pp.

Reviewed by William D. Bishop

This is less a book than a report: the third (interim) report on law and economics by the most arresting phenomenon in legal scholarship in the present century, Professor Richard Posner.

The form is familiar from previous editions: a synoptic textbook on the economics of law. Considered simply as textbook this volume is impressive. The textbook writer's art consists of guiding the neophyte while doing justice to the complexities of a subject. Most writers fail; Posner succeeds triumphantly. He is a master of expository prose, as any randomly selected passage will confirm. In the short chapter on the theory of monopoly, for example, some of the most important technical concepts in the theory of monopoly pricing are expounded in just a few pages with beguiling lucidity.

The book contains excellent and thought provoking new material on crime, law enforcement, statutory interpretation, the choice between common law and regulation, employment law, antitrust, conflict of laws, economic due process, federalism, and free speech. Particularly good—and welcome—are the sections on corporations and financial markets. Whether it was wise to expand the sections on regulation, wealth and taxation, and the Constitution, as he has done, is not so clear. True, important issues are examined and illuminated. However, the characteristic virtue of this book is not merely that it instructs, but that it instructs *lawyers* about *law*. There is as much illumination on these subjects for non-lawyers as for lawyers.

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This edition is far more demanding than the celebrated first edition, published in 1973. It reflects 13 years of astounding growth in the field. Yet it also reveals that a number of important areas remain virtually unexplored in the law and economics literature. There has been very little serious analysis of "lawyers' law" on property—surprising since this is where it all began. All that complex law on what can and cannot be a property right, on "touching and concerning," on negative but not positive covenants is still largely *terra incognita*. Nor is there yet a great deal on commercial law. There is a theory of bankruptcy now, but still almost no theory of secured transactions, finance leasing, the various negotiable instruments, commercial agency, charterparties, or documentary credit. These legal devices are factors of production in a modern economy. One would have expected an economic approach to law to start from here. But no one has done the work and Posner's textbook remains largely silent. The total effect is odd: luxuriant development in areas such as family law, crime, and racial discrimination—where passion is warmest and calculation weakest—but no theory in the law of "truck, barter, and exchange." This is a little like finding a planet identical to the earth, except that it has jungles at the South Pole and no vegetation in the Amazon.

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This book has other weaknesses too, and they may be grouped under three headings:

First, Posner is too ready to assess intuitively the balance of economic costs and benefits. This or that rule is judged to be efficient on the grounds that it conforms to some model chosen

the reader expected to be familiar with "law + economics"?

from among several alternative models. But the basis of choice is nearly always contestable.

For example, he argues that American common law is correct in holding that, in the absence of specific contract terms to the contrary, the seller of a house is liable for latent defects since he is the superior cost avoider. Yet English common law has exactly the opposite rule. The usual justification for buyer liability, translated into economic terms, is that net costs are lower since buyers are likely to investigate carefully—often employing experts—and to find most such defects. Therefore, the value of a seller-liability rule is outweighed by the potential costs of uncertainty and litigation introduced by such a rule. Who knows whether American or English judicial economics is right?

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On anticipatory repudiation of a contract, the American rule requiring the "repudiatee" to mitigate his damages is again seen as efficient. But English common law, German law, and French law do not require mitigation, at least not until the time for performance has arrived. Justification is perfectly possible: it will often, perhaps usually, be sensible for the "repudiatee" to seek to persuade the repudiator to change his mind rather than embark on a search (at some expense) for attractive alternative employment. Who is to say that in an uncertain world European tenderness to the "repudiatee" is plainly inefficient?

The second weakness is that the evidence cited and the phenomena analyzed are drawn only from common law jurisdictions—and mainly from the United States. Thus the doctrine of consideration is shown to have efficiency properties, yet Germany, Japan and France get by without it. Comparative negligence is dismissed as inefficient. Yet Germany has always had comparative negligence, while England moved to it after the judiciary pressed the legislature for change, and French law developed from no defense, to a contributory negligence defense, and then to a comparative negligence defense—all by judicial selection of rules.

Several legal systems developed more or less independently, and all, in one way or another, adapted to the needs of a modern industrial economy. They can be studied and compared. Yet only one system gets much attention here. The fault is less Posner's than that of the law and economics community as a whole. Nonetheless this weakens Posner's claim that the economics of law can yet be said to be a systematic "policy science."

The third weakness is that Posner often refers to "the economist's view," thus suggesting to the reader that his approach to economics is universal, or at least broadly shared by professional economists. For example, he states that "the economist" would prefer to ration access to courts by price and not by queueing or some other non-price assessment of need. That would be true only of those economists who view adjudication of disputes as a good like anything else, with no special significance beyond its value to the litigants as measured by their willingness to pay. That would mean, *inter alia*, systematically easier access to "justice" for rich than for poor. Many economists would be loath to assert such a claim.

But the strengths of this new edition far outweigh its weaknesses. To its intellectual strengths may be added one other. Posner has been at the center of some of the most bitter controversies in modern legal scholarship. Yet there is no trace of rancor in his book. Like Edward Gibbon, another man who achieved eminence in the world of ideas, and who suffered much abuse for it from self-righteous critics, Posner has "become at length indifferent to the buzzing of the wasps."

Posner has rivals, living and dead, for the title "pre-eminent American legal scholar of the century." It seems to me that his claim is much the strongest. His work is more important than his rivals' because it is part of a continuing "research program," as my late colleague Imre Lakatos would have called it. Posner's theoretical and empirical work will, sooner or later, be superseded. But it will be the indispensable foundation on which all such future research is built.

Until as recently as the early 1980s, some old timers (and a few young fogeys) in law schools were inclined to label law and economics as just another fad. By now it must be plain even to them that its emergence was a revolution; it is here to stay. Astute lawyers have always recognized that the law of any age, though it may bow

politely to logic, nevertheless "in its substance corresponds with what is then thought to be convenient," as Justice Holmes observed. Only just what is convenient is not always obvious. Economics is designed to trace the effect in human affairs of doing one thing rather than another. It is the basic theory in modern social science of just what is and is not convenient. Holmes, again, put it better: "Economics teaches us that in order to get something we have to give up something else and to know what we are doing when we elect." There are legal issues which only a crank could now try to discuss without coming to terms with the relevant economics. In leading this revolution, Richard Posner has had numerous rivals and a good many outright enemies. Yet not even the latter would dare to dispute his preeminence in law and economics. That is dramatic testimony to his stature.

Handicapped Transit

Institutional Disability: The Saga of Transportation Policy for the Disabled, by Robert A. Katzmann (Brookings Institution, 1986), 211 pp.

Reviewed by Deborah A. Stone

Like any good book, this one has several stories to tell. Nominally, it is an attempt to account for an incoherent collection of legislative, administrative, and judicial initiatives that masquerade under the banner of "transportation policy for the disabled." At another level, it provides an analysis of political institutions and finds them poorly suited to their tasks. And, ultimately, it is about a fundamental political dilemma: to what extent can and should society be organized according to individual characteristics and needs instead of averages, norms, and majorities?

Federal responses to the problem of transportation for the handicapped can only be described as a lot of activity amounting to "uncertainty and vacillation," "inconstant action and indirection." The statutory bases for special transportation provisions all were added as seemingly minor amendments to other pieces of legislation with little, if any, deliberation. The most important of these, the Biaggi Amendment to the 1970 Urban Mass Transit Assistance Act, declared that elderly and handicapped people "have the same right as other persons to utilize mass transportation," and it mandated that transit programs receiving federal financial assistance must make "special efforts" to accommodate them in the design and planning of mass transportation.

This cornerstone of transportation policy for the handicapped shared many of the defects of the other statutory building blocks (notably, the Architectural Barriers Act of 1968 and Section 504 of the Rehabilitation Act of 1973). It was put on the congressional agenda without any preliminary analysis, by a legislator who was as interested in making a name for himself as in the merits of the policy. It was worded vaguely enough to sound "right-thinking" without offending anyone or implying unpleasant conflicts and sacrifices. Its sponsor's blunt assertions that it would entail "very little, if any, additional cost" went unchallenged. And it glossed over the issue of whether the transportation needs of the handicapped could be met more effectively by some means other than mass transit systems—means such as subsidized taxi services, a network of specialized door-to-door vans, or the development and subsidy of private automobiles tailored to the physical capacities of handicapped people.

The bits and pieces of often conflicting legislative guidance passed from a highly fragmented Congress to an equally fragmented administrative bureaucracy. Over the span of about a decade, the Department of Transportation first issued regulations granting communities "local options" to meet the transit needs of the handicapped by any appropriate means, then issued regulations saying that all mass transit systems had to become fully accessible to the handicapped, and then, under the Reagan administration, returned to the local option, the "effective mobility" approach. Elsewhere on the political stage, the Department of Health, Education and Welfare (HEW) and the courts were hashing out guidelines for Section 504, which generally prohibits discrimination against the handicapped in any federally assisted programs.

The result, of course, was policy confusion, and much of the book is devoted to analyzing the behavior of political institutions that could produce such confusion. Bureaucratic policy making is nicely portrayed by Katzmann as a resultant of many other forces: the career ambitions

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