Economic Analysis of Law by R. Posner (Little Brown & Co., Boston, Toronto, London, 1992), pages i–xx, 1–722, price $120.00, ISBN 0-316-71444-5.

In 1822, Jeremy Bentham wrote that an action or law conforms with a principle of utility when the tendency it has to augment the happiness of the community is greater than any it has to diminish it.[1] By 'utility', he meant any benefit, advantage, pleasure, good or happiness (treating these as roughly synonymous terms).[2] In 1972, Richard Posner wrote in the first edition of *Economic Analysis of Law*,[3] that an action or law conforms with a principle of efficiency when the tendency it has to augment the wealth of the community is greater than any it has to diminish it.[4] By 'wealth' he meant money or money's worth assessed in terms of a person's willingness (and ability) to pay.[5] Thus the standard adopted for wealth-maximisation was notably more restrictive than the broader, but more indeterminate, notion of benefit or advantage or happiness espoused by the classical utilitarians.

By 1992, and the fourth edition of his now famous book,[6] Posner has gradually elaborated his theory to become an over-arching principle for judging the entire legal system. The theory is treated as applicable not only to areas of law and the legal process with a clear economic aspect,[7] but to issues as diverse as drug addiction,[8] surrogate motherhood,[9] sexual regulation,[10] prior restraint (as a form of censorship),[11] and religious freedom.[12] The fourth edition has not added new chapters as such but, like the third edition,[13] has simply extended the discussion of some subject areas. Nevertheless, it is interesting that the issues which are new to the fourth edition fall largely into the now enlarged chapters on family law and sexual regulation, criminal law, and the protection of free markets in ideas and religion[14] — chapters which might normally be regarded as somewhat non-economic in nature.

With the extension of the application of the economic analysis to a new range of issues, the problem of scope and limits is thus raised more starkly than when

1 Bentham, *An Introduction to the Principles of Morals and Legislation*, in Warnock (ed.), *John Stuart Mill: Utilitarianism, On Liberty, Essays on Bentham together with selected writings of Jeremy Bentham and John Austin* (1962), 35.

2 *Ibid.* 34.

3 Posner, *Economic Analysis of Law* (1972).

4 *Ibid.* 4.

5 *Ibid.* 4, 5.

6 Posner, *Economic Analysis of Law* (1992).

7 Such as, in the fourth edition, the chapters on property law (chapter 3), contract rights and remedies (chapter 4), tort law (chapter 6), competition law (chapter 10), labour law (chapter 11), corporations law (chapters 14 and 15), civil and criminal procedure (chapter 22), and law enforcement and the administrative process (chapter 23).

8 Chapter 7 (criminal law), 244-7.

9 Chapter 5 (family law and sexual regulation), 154, 155.

10 *Ibid.* 157-61.

11 Chapter 27 (the protection of free markets in ideas and religion), 671-2.

12 *Ibid.* 677-8.

13 Posner, *Economic Analysis of Law* (1986).

14 Perhaps the enlargement of the chapter on family law and sexual regulation, in particular, reflects the fact that between the third and fourth editions Posner published a new book, *Sex and Reason* (Harvard University Press, 1992).

the focus was more limited. A particular example of this in the fourth edition is the treatment of surrogacy. Posner critically discusses the notorious *Baby M* case in which a New Jersey court refused to enforce a surrogate motherhood contract as being against public policy.[15] In particular, he responds to the court's statement that to enforce the contract would destroy the natural mother's rights in favour of the father's, by saying:

> An obvious point is being overlooked: no contract, no child. It is not as if there had been a baby in being when the contract was signed, and the mother was being asked to give up her rights in it.[16]

That Posner has never been a mother is perhaps reflected in this statement which appears to be totally oblivious to the fact that mothers may only bond with their children during pregnancy, or even after birth, rather than at some previous stage of planning — in other words that they still may have some valid and legitimate interests which go beyond the economic fact of contracting (in the same way, incidentally, as the father may).

Indeed one of the main criticisms that can be made of this book and Posner's theory in general, is the rather scant and superficial attention which is paid to the important question of whether there are some areas of law which are inherently non-economic or for which the economic analysis is only of marginal relevance — where notions such as rights, fairness and general welfare must prevail over any possible economic considerations. Posner suggests very little by way of guiding principle, even in the fourth edition where he apparently accepts the possibility of limits on the scope of the law and economics analysis more readily than in earlier editions (for instance modifying his much criticised comments in the third edition regarding the possible efficiency of decriminalising rape[17]). Thus, in his discussion of the *Baby M* case, Posner concludes by responding to the court's statement that 'there are values that society deems more important than granting to wealth whatever it can buy, be it labor, love or life', by saying:

> How, though, are those values served by refusing to enforce contracts of surrogate motherhood? The court does not explain.[18]

That statement reflects the debatable reality of Posner's acceptance that there are limits to the economic approach.

Similarly, Posner's discussion of the purpose and justification of economics of law in the introductory chapters of the fourth edition remains unelaborated as to what the possible limits of the approach might be. Indeed, Posner takes the view that many justice concerns are answered in a similar way by the economic analysis[19] (although some might argue that it is a very distorted economic analysis which produces the conclusion that, for instance, a doctrine of privacy is 'efficient').[20] More generally, Posner acknowledges that there are some subject areas

15 *In Re Baby M*, 109 NJ 396, 537 A.2d 1227 (1988).

16 *Supra* n.6, 154.

17 See, for instance, West, 'Submission, Choice, and Ethics: A Rejoinder to Judge Posner' (1986) 99 *Harvard Law Review* 1449. In the fourth edition Posner acknowledges that many readers would regard his suggestion as demonstrating 'a limitation on the usefulness of the [wealth maximisation] theory' (*supra* n.6, 218).

18 *Supra* n.6, 155.

19 *Supra* n.6, 27.

20 See the responses to Posner's elaborated arguments regarding the protection of privacy in 'The Right of Privacy' (1978) 12 *Georgia Law Review* 393 — in particular Bloustein, 'Privacy is Dear at

which may have to be determined by non-economic considerations because of society's sense of justice,[21] but adds:

> Always, however, economics can provide value clarification by showing the society what it must give up to achieve the noneconomic ideal of justice. The demand for justice is not independent of its price.[22]

The latter point is important in providing a justification for at least considering the economic analysis in every possible context — that is, that society must always be prepared to consider the economic costs of fairness, rights and welfare in a broad sense.[23] Yet, for Posner to simply acknowledge, and reluctantly, that there may be limits on the conclusiveness of the analysis does not answer the difficulty for those who need to find a balance between economic and non-economic interests, of how exactly that balance should be drawn. In theoretical and practical terms this may be regarded as a remaining flaw in the fourth edition.[24]

A related criticism concerns the narrow focus of Posner's wealth-maximisation principle in dealing with problems of pre-existing inequality in the distribution of wealth which may affect a person's ability to pay and therefore to compete in the market for desired resources. Donaghue and Ayres raised this concern in their review of Posner's third edition.[25] In particular, they criticised as unrealistic Posner's statement that the limitations of the wealth-maximisation principle as an ethical standard of social decisionmaking were 'perhaps not serious', actual examples of problem cases being 'very rare'.[26] Perhaps in deference to this criticism,[27]

any Price: A Response to Professor Posner's Economic Theory', to which Posner himself responds in 'Some Uses and Abuses of Economics in Law' (1979) 46 *The University of Chicago Law Review* 281, 301-6.

[21] *Supra* n.6, 27, adding, by way of examples:

> It is not obviously inefficient to allow suicide pacts; to allow private discrimination on racial, religious, or sexual grounds; to permit killing and eating the weakest passenger in the lifeboat in circumstances of genuine desperation, to force people to give self-incriminating testimony; to flog prisoners; to allow babies to be sold for adoption, to allow the use of deadly force in defence of a pure proprietary interest, to legalize blackmail; or to give convicted felons a choice between imprisonment and participation in dangerous medical experiments. Yet all these things offend the sense of justice of modern Americans, and all are to a greater or lesser (usually greater) extent illegal.

[22] *Ibid.*

[23] See, in a similar vein Richardson (Judge of the Court of Appeal, New Zealand), *Justice for All?* (a paper delivered at the Australian Legal Convention, Hobart, 1993) — giving as an example the possible impact that the rights determined in *Mabo v. State of Queensland* (1992) 107 A.L.R. 1 may have on the ownership and management of vital resources in Australia (drawing an analogy with the New Zealand experience of the operation of the Treaty of Waitangi and the Bill of Rights). The paper will be published in Joseph (ed.), *Essays on the Constitution* (Law Book Company, 1994).

[24] See, for instance, Wald (Chief Judge of the United States Court of Appeals for the District of Columbia), 'Limits on the Use of Economic Analysis in Judicial Decisionmaking' (1987) 50 *Law and Contemporary Problems* 225 and also Mason (Chief Justice of Australia), 'Law and Economics' (1991) 17 *Monash University Law Review* 167, adopting a cautious approach to the relevance of economic analysis to judicial decision-making.

[25] 'Posner's Symphony No 3: Thinking about the Unthinkable' (1987) 39 *Stanford Law Review* 791. Donaghue and Ayres both qualify as economic analysts of the law in their own right. See, for instance, Donaghue, 'Diverting the Coasean River Incentive Schemes to Reduce Unemployment Spells' (1989) 99 *Yale Law Journal* 549 and Ayres & Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 *Yale Law Journal* 87.

[26] *Supra* n.6, 12. The only example Posner could come up with was of a poor family who needed an expensive pituitary gland extract for their child, who would otherwise remain a dwarf, as compared to a rich family who wanted it to make their son a few inches taller. Donaghue and Ayres pointed out that in the United States, where thousands of children are homeless and hungry, others spend hundreds of dollars for a single meal: *supra* n.25, 797, 798.

[27] In the Preface to the fourth edition Posner expresses his thanks to Donaghue and Ayres for their 'perceptive criticisms' of his third edition in their review, adding, 'from which I have tried to learn'.

the statement no longer appears in the fourth edition.[28] However, whether Posner really has changed his views is debatable. For instance, in his discussion of surrogacy contracts Posner dismisses the argument made in the *Baby M* case that the enforcement of surrogacy contracts would only serve to reinforce the inequalities between those who are well off and those who are not, commenting:

> This is the jurisprudence of envy. Infertile low-income couples, even if one supposes incorrectly that they could never afford the price of a surrogate-motherhood contract, are not helped by policies that limit the options of infertile high-income couples.[29]

In reality, it would seem that Posner regards inequality as generally efficient and desirable: as providing a system of reward that creates the incentive for people to earn the things that they need and want. His views appear to have been little modified in the fourth edition. Thus, in his discussion of income inequities, distributive justice and poverty,[30] Posner still determines that liability rules are inefficient methods of redistributing wealth,[31] and that direct cash transfers 'involve a potentially serious incentive problem' not easily solved by more restricted transfers.[32] Again, the costs of redistribution are not, for Posner, answered by the possibility that differences in wealth may be caused by 'luck, health, brains or what have you' rather than simply desire for money and what it can buy.[33]

The assertions made as to the causes of inequality, which Donaghue and Ayres criticised in relation to the third edition,[34] are now more tentatively stated,[35] but are still central to Posner's thesis that there is only a very limited role for redistributional policies based on economic considerations.[36] Thus, Posner regards any broader redistribution, if justified at all, as beyond the economic analysis:

> Involuntary redistribution is a coerced transaction not justified by high market-transaction costs; it is, in efficiency terms, a form of theft. Its justification must be sought in ethics rather than in economics.[37]

However, this statement may itself be criticised, as in the case of Posner's statements regarding the subject matter scope of the economic analysis, for failing to articulate a basis for determining when such 'ethical considerations' may

28 See the discussion in Posner, *supra* n.6, 13.

29 *Ibid.* 155. Perhaps Posner could have said that, unlike the pituitary gland example, low-income infertile couples may benefit in welfare terms from the fact that high-income couples find their babies through surrogacy contracts, since that leaves more babies available through normal adoption processes. But that is not a point he is interested in making.

30 *Ibid.* chapter 16.

31 An example Posner discusses is legislation setting minimum standards for rental accommodation which, he argues, results in higher rentals and reduced supply of accommodation at the lower end of the market (*ibid.* 470-4.)

32 *Ibid.* 467, explaining that:

> If, for example, every family of four were guarenteed a minimum income of $5,000, the head of the family would have no incentive to take a job even if it paid more than that.

33 *Ibid.* 460.

34 Donaghue and Ayers point to the lack of empirical evidence to support such a bald statement (*supra* n.25, 796).

35 In the third edition Posner went as far as to suggest that the most 'plausible' assumption may be that:

> the people who work hard to make money and succeed in making it are on average those who value money the most, having given up other things such as leisure to get it (*supra* n.13, 436).

36 *Ibid.* 464 referring both to the harm suffered, particularly by the wealthy, through increased crime rates and to the 'disutility' imposed on 'affluent altruists' by free riders who do not donate to charity but benefit from seeing poverty alleviated.

37 *Supra* n.6, 461 — repeating a similar comment in the third edition.

predominate over purely economic concerns. Indeed, Posner explicitly rejects the possibility of a more general utilitarian policy providing the answer, on the basis that this would lead to too much uncertainty and subjectivity.[38] Posner is similarly dismissive of other 'familiar ethical criteria'.[39]

In the end, it may be that Posner's reluctance to fully acknowledge the limitations of his economic theory stems from his view that utilitarianism and other theories are simply not 'useful'. He articulates this view in the context of his discussion of the ability of the theories to explain existing laws (for which he accepts his own theory also has limited value).[40] However, the same comment can be made regarding their normative value in indicating a future direction for the law —

> The economic theory of law is the most promising positive theory of law extant. While anthropologists, sociologists, psychologists, political scientists and other social scientists besides economists also make positive analysis of the legal system, their work is insufficiently rich in theoretical or empirical content to create serious competition for the economists.[41]

The point that Posner makes is a worthwhile one. Unless and until we have better techniques for assessing welfare or happiness, general utilitarian and other theories suffer by comparison with the economic approach. That is, the problem they have is in being able to analyse with any degree of rigorous coherence the precise ends which they are striving to achieve. It is a large step from that point for Posner to suggest that utilitarian or other theories cannot provide a theoretically acceptable answer to the needs of society.[42] Nevertheless, for a theory to be of practical value it has to be at least to some degree workable, and the economic theory is, above all, a workable theory. The question, though, is whether an ability to be

[38] *Ibid.* 13:

> Utility in the utilitarian sense also has grave limitations, and not only because it is difficult to measure when willingness to pay is jettisoned as a metric. The fact that one person has a greater capacity for pleasure than another is not a very good reason for a forced transfer of wealth from the second to the first.

See for an elaboration, Posner, 'Utilitarianism, Economics and Legal Theory' (1979) 8 *The Journal of Legal Studies* 103.

[39] *Ibid.* stating that they have their own 'serious problems' — and see, for instance, his more elaborated dismissal of Bloustein's and Fried's liberal approaches to privacy interests in 'The Right of Privacy' (1978) 12 *Georgia Law Review* 393, 407-9.

[40] The acknowledgement is also more explicit in the fourth edition where Posner comments:

> Another recurrent criticism of the economic approach to law is that on the positive side it's a flop because it has failed to explain every important rule, doctrine, institution, and outcome of the legal system. *As yet it does not; that is true.*
>
> (*ibid.* 26, emphasis added).

[41] *Ibid.*

[42] Which presumably he means by the reference to 'rich in theoretical . . . content'. It is curious that in his book, *The Problems of Jurisprudence* (1990), Posner appeared to be more ready to align his theory with classical utilitarian theories in stating that:

> The strongest argument for wealth maximisation is not moral, but pragmatic. Such classic defences of the free market as chapter 4 of Mill's *On Liberty* can easily be given a pragmatic reading. We look around the world and see that in general people who live in societies in which markets are allowed to function more or less freely not only are wealthier than people in other societies but have more political rights, more liberty and dignity, are more content (as evidenced, for example, by their being less prone to emigrate) — so that wealth maximisation may be the most direct route to a variety of moral ends (*ibid.* 382).

Mill was, of course, a noted utilitarian who argued for a much broader utilitarianism than wealth maximisation — and who did not suggest anywhere in his writings that wealth maximisation could be the sole, or even the predominant, means to that end.

applied can ever be a complete substitute for broader considerations of rights, fairness or general welfare. Perhaps in Posner's view it is an issue for those who read his writings, whether in this book or elsewhere, to finally determine.

The new edition of *Economic Analysis of Law* remains a central tool for anyone wishing to analyse the law from an economic perspective — including not only academics and those engaged in legislative law-making, but lawyers and judges who must determine the future development of the common law (since no one can now really doubt that judges, at least to some degree, make law[43]). Its particular relevance in Australasia is indicated by the fact that that the subject Law and Economics (or Economics of Law) is now taught in several law schools,[44] that the writings of legal academics and commentators increasingly employ economic analysis,[45] that law reformers feel compelled to explicitly identify and analyse economic considerations,[46] and that the courts occasionally use economic arguments in their judgments.[47]

In conclusion, the fact that the economic approach, as elaborated by Posner, is both rigorous and coherent explains some of its appeal over more nebulous concepts of welfare, fairness and individual rights. The approach also has the advantage of providing a focus on economic efficiency which in times of scarcity is increasingly seen as relevant to everyday life. Moreover, the, at least apparently, greater acknowledgment by Posner in the fourth edition that there may be some real limits and constraints on the law and economic analysis gives the approach somewhat greater appeal both as a theoretical construct and as a practical tool for decision-making. Finally, the book is as important for its critics to read and consider as for those who subscribe, at least in part, to Posner's theory. In the end, it is only by reading and understanding Posner's particular brand of economic analysis that those who question the approach are in a position to respond and perhaps to learn from it as well.

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43 See, for instance, Lord Reid, 'The Judge as Lawmaker' (1972) 12 *Journal of Society of Public Teachers of Law* 22; Lord Devlin, 'Judges and Lawmakers' (1976) 39 *Modern Law 35 Review* 1; Richardson, 'Judges as Lawmakers in the 1990's' (1986) 12 *Monash University Law Review*; McHugh, 'The Law-making Function of the Judicial Process' (1988) 62 *Australian Law Journal* 15, 116 and also Mason, *supra* n.24 as well as, more explicitly, his recent address 'The Role of the Courts at the Turn of the Century' (Australian Institute of Judicial Administration, Melbourne, 1993). Note, however, that Lord Reid, Lord Devlin and Mason take a narrower view of the judge's ability to go beyond standards of 'justice' accepted by society.

44 For instance, the subject Law and Economics is a part of the History and Philosophy of Law course at the University of Melbourne Law School. A separate course on Law and Economics has been periodically offered at the graduate level and is being offered at the undergraduate level in 1994.

45 For instance, Duggan, Bryan and Hanks, *The Nondisclosure Puzzle: An Applied Study in Modern Contract Theory* (forthcoming).

46 For a recent example, see The Law Reform Commission of Australia, *Designs Issues Paper* (A.L.R.C. I.P. Number 11, 1993), 11-3. Duggan, however, has criticised the past treatment of economic considerations in the law reform process: Duggan, A.J., 'Some Reflections on Consumer Protection and the Law Reform Process' (1991) 17 *Monash University Law Review* 252.

47 This is even apart from the obvious area of trade practices law. See for instance the comments of Kaye J. in *City of Richmond v. Scantebury* [1991] 2 V.R. 38, 46, 47 and the comments of Kirby P. in *Cekan v. Haines* (1990) 21 NSWLR 296, 307. A recent New Zealand case where economic arguments were treated as relevant is *DHL International (NZ) Ltd v. Richmond Ltd* [1993] 3 NZLR 10.

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