BOOK REVIEW

ECONOMIC ANALYSIS OF LAW. By RICHARD A. POSNER.
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James E. Krier†

Richard Posner, Professor of Law at the University of Chicago Law School, once began a review of an earlier effort in law-and-economics—essentially an economic assessment of our system of tort law—by noting "Torts is not my field."¹ Nor is it mine, and I must enter the same disclaimer as to contracts, crimes, antitrust, regulated industries, corporations, taxation, constitutional law, civil procedure, and other of the areas covered in Economic Analysis of Law. (Of course, many of these are not Posner's "fields" either, wherein may lie a problem with his book—at least in the eyes of some.) A review of this book in the usual fashion of book reviews—were it to be done competently—would require the efforts of a committee, for its treatment is broad, if not uniformly deep. The committee, moreover, would need economists as well as legal scholars from diverse interests among its membership. Posner's command of economics, so far as I am able to judge, goes well beyond mere familiarity or competence, and his use of economic analysis in the book—despite efforts to simplify and reduce—² is hardly casual or undemanding.

† Professor of Law, University of California, Los Angeles. B.S. 1961, J.D. 1966, University of Wisconsin. Member, Wisconsin Bar. Though I acknowledge them specifically within, I want to give general thanks to my colleagues William Klein and Gary Schwartz for helpful comments on this review.


² There are efforts to simplify, for example, by presenting discussion "free from forbidding technical jargon or inappropriate detail," and in the context of "concrete application rather than abstract theory . . . " R. POSNER, ECONOMIC ANALYSIS OF LAW ix, x (1973) [hereinafter cited as POSNER]. In addition, the extensive use of examples—many of them numerical—is also probably intended to simplify, though "clarify" would be more apt. The effort to reduce (and thus, of course, to simplify as well) proceeds primarily by building the book on but a few basic economic constructs: the assumption that man is a rational maximizer of his self-interest; the inference from this assumption that man responds to incentives; the derivation from this latter of "three fundamental economic concepts." Id. 1. They are: "the inverse relationship between price and out-
There will, of course, be a committee review, but it will have to wait. With time, economists and legal scholars from various fields and persuasions will come to give their views, and the whole should reflect a more reliable judgment than the bits and pieces. Too, it will likely reflect controversy and strong differences of opinion. Economic analysis of central legal issues seems to foment storms where otherwise only mild breezes blow. This is hardly less the case when the analysis reveals the unstinting confidence that marks Posner’s book. My aim is to contribute to the ultimate committee report by presenting bits and pieces from the perspective of one who stands in the class likely to contain, as I see it, the greatest number of consumers of Posner’s product in the legal education market—whether (as students or teachers) they use it as the primary text for a course or employ it in any of the other ways he anticipates, a point to which I shall return.

The class I refer to is in the middle of a group of three classes which, I believe, cover the situation in legal education insofar as law-and-economics is concerned. The upper class includes a small handful of scholars, Posner most surely included, who have an excellent command of economics, a similar or at least competent command of law (its doctrine and method), and an active although not necessarily exclusive interest in applying the former to analysis of the latter. Most of these people probably have their greatest formal training in law, some in economics, and a few are thoroughly trained in both (the lawyer with the doctorate in economics). Similarly, most find primary refuge in law schools, some in departments of economics, and a few in both. All of them, however, share the upper-class attributes I mentioned above.

The lower class (an unfortunately inapt phrase) includes an unknown number, though one I shall later guess is growing smaller every year. It is made up of those in legal education

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4 My colleague Alison Anderson suggested the three classes should be called the aristocracy, the bourgeoisie, and the proletariat, but the suggestion misconstrues my intention: I do not mean the classification to be pejorative.
who are inclined, for a variety of reasons, to give little, no, or negative (that is, hostile) attention to relationships among law and economics—whether because these relationships have no relevance to their concerns; because some other discipline outside law is more revealing (there is only so much time in the day); because the study of law should be an exclusive preoccupation, she being a jealous mistress; because economics is too hard (or hardhearted); or because of a combination of these and other reasons.

I venture to speak here from the middle-class perspective. The middle class consists of those law teachers and students with a solid interest in learning what economics can reveal about law, and what it cannot. Unlike those few in the upper class, they claim no great command of economic theory, though generally they have some competence and in any event are struggling for more. Unlike those in the lower class, they employ economic analysis to a varying but usually significant extent in class work and research. This does not mean they are uniformly enamored of economics (or that to the extent they are, it is Posner's economics), but for those in the middle class any disaffection tends to come from study—it reflects attention and attempts at systematic criticism rather than the inattention and uninformed, unsupported, or undeveloped dismissals of hostile members of the lower class.5

The three classes are hardly meant to be mutually exclusive, perfectly descriptive, or even particularly interesting; they are, however, useful for my purposes. I am not equipped to speak to the upper class, and I assume those in the lower are uninterested, so I will try to address what Posner's book might hold for the rest of us in the law school world, students and teachers alike.

I

There can be little doubt that economics is in the law school; there can be none that this has not always been the case. It seems a safe guess that fifteen years ago the legal scholar who took much notice at all of economic theory in his teaching and research was a rarity. Probably the only notable exceptions, as Posner remarks, were in the fields of antitrust and regulated industries,6 and to lesser extent, perhaps, tax policy.

5 Thus I would put scholars such as Fletcher and Tribe in the middle class, though they are hardly awed by economic theory. See, e.g., Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972); Tribe, Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality, 46 S. Cal. L. Rev. 617 (1973).
6 Posner ix. See also Posner Review, supra note 1, at 637.
What was rare a decade or two ago is now, if not commonplace, becoming so. A great many law faculties have among their number at least a few middle-class practitioners of law and economics; more than several have upper-class experts, in some cases economists on exclusive or joint appointments. The standard law school curriculum is increasingly infused with economic analysis, not only through courses in law-and-economics, or courses (like antitrust and regulated industries) that beg for it, but others such as urban government, water law, environmental law, corporations, taxation, and even those resistant bastions of the traditional curriculum—torts, contracts, and property. The precise magnitude of the trend is difficult to determine, but its existence is clear. As one would expect, it is coming to be reflected in the course books and even more in book length studies and journal articles. The upper class is slowly gaining members; the middle class is growing rapidly.

Why and how did all this come about? The questions are worth considering, not only for their own sake but because they might help us to understand and assess the purposes and design of Economic Analysis of Law, and—in the concluding section of this review—to place it in larger perspective.

Undoubtedly a number of influences have worked to bring about the growing interest in law-and-economics, and probably too everyone has his own view of the intellectual history. Posner, for example, notes that "many law professors have lost interest in the traditional undertakings of legal research"—to determine, by careful attention to judicial and legislative materials, "what the law was and what it should be. . . . Legal scholarship consisted of the interpretation and logical elaboration of legal materials." Different approaches to thinking about law developed: Brandeis and others emphasized facts rather than logic, especially facts revealing conflict between legal premises and social realities. These were more anecdotes than the products of careful empiricism, however; hence the approach of the "fact-oriented legal reformers" has proved

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7 As to coursebooks and book length studies, I decline to cite examples lest I offend by exclusion (or inclusion); anyone remotely interested in law-and-economics can think of cases in point. As to journal articles (as well as books), if one wishes to rely upon more than his own exposure he might consult Samuels, Law and Economics: A Bibliographical Survey, 1965-1972, 66 L. LIBRARY J. 96 (1973). The survey requires rather careful reading, as Samuels' notion of the relevant literature is rather expansive, at least as regards the point I make in the text. See also Samuels, Legal-Economic Policy: A Bibliographical Survey, 58 L. LIBRARY J. 230 (1965).

8 Posner Review, supra note 1, at 636.

9 Id. 636-37

10 Id. 637.
little more satisfying than what came before. "The limitations of textual analysis, logic, and anecdote as tools of inquiry should be apparent." But the shortcomings of the old, Posner argues, cannot be seen as sufficient explanation for any rejection they may have suffered. Drawing upon Thomas Kuhn's influential restudy of the history of science, he observes that "they do not explain why the traditional approach has fallen into disfavor among a number of legal scholars. One replaces a scholarly approach not by showing that it has limitations but only by producing a better approach." Is economic analysis of law, then, a better approach?

Not necessarily. We can note first that no one claims that it has displaced anything in any sense other than that it is nudging other traditions over, crowding them in several ways. Posner himself was arguing only that "the theories and empirical procedures of the social sciences," not simply economics, were gaining use in conjunction with "the methods of traditional legal scholarship," as opposed to exclusive reliance on the latter. Even this might not suggest anything "better" than what existed before in Kuhn's sense that the new does a more satisfactory job of answering questions, of explaining observations, than the old. In an interesting review essay, for example, Bruce Ackerman has recently argued that the rise of Legal Realism in the law community can hardly be understood in these terms.

Still, there is much to what Posner says. Past approaches to legal scholarship have shed insufficient light on questions of obvious concern—how and why legal doctrines and institutions develop as they do; what law does as opposed to what it says; how well it serves the objectives it claims to seek; and the merit of those objectives in terms of the larger needs of society. The reasons for this, as Posner suggests, may be partly because past scholarship viewed law too much from within—too much in terms of law's own logical structure, and partly because when it stepped outside it took along no well developed theoretical or empirical apparatus with which to explore the new environment.

Stepping outside, to be sure, is not particularly new: "fact-oriented reformers" made the move; so too did the Realists

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11 Id.
13 Posner Review, supra note 1, at 637.
14 Id.
15 Ackerman, Book Review, 103 Daedalus 119, 129-30 n.34 (1974). Ackerman adds, "Of course, all this may only mean that, despite Langdell, law is not a science, and so its theoretical development does not display a structure similar to the one Kuhn discerns." Id. Posner cites the Realists as an example of his conclusion that "The history of legal scholarship is full of false starts." Posner Review, supra note 1, at 646.
and, in their own way, the later adherents to what Ackerman has called the Legal Process School.\textsuperscript{16} One can give explanations for these stages of development. To paraphrase Ackerman's conclusion without summarizing his argument, each of them reflected "a search for a new kind of order consistent with their attack upon the simpler conception of rationality held by their predecessors . . ."\textsuperscript{17} Increasing recourse to the social sciences can be seen in the same light. Once outside the law, one needs tools to study it that earlier traditions have not provided, and the social sciences seem to hold them out. If cumbersome and imperfect, they are nevertheless handier than no tools at all. Earlier recourse to the social sciences may not have occurred simply because their tools did not exist in any form useful to the legal scholar.\textsuperscript{18} In recent years, however, this situation has changed dramatically; for some time now, disciplines outside law increasingly have been bringing their insights to bear upon it.\textsuperscript{19}

Legal scholarship has been a beneficiary. The social sciences have had something to say to those concerned with law—not yet in terms of giving conclusively better answers, so much as in revealing the weaknesses of the old ones and suggesting better questions.\textsuperscript{20} In my judgment this is especially true of economic theory, perhaps because (for well or ill) economic factors are

\textsuperscript{16} Ackerman, \textit{supra} note 15, at 123. Ackerman says that with the appearance of the Legal Process School, "the law gave up its large aspirations of the 1920's [to develop a comprehensive vision of the good society], and turned inward upon itself in an effort to evaluate its own work product." \textit{Id.} The important point for my purposes is that this introspection proceeded in large measure by reference to other than the internal logic of "law."

\textsuperscript{17} \textit{Id.} 125.

\textsuperscript{18} Thus, for example, Ackerman observes that the Realists failed to develop a social philosophy to replace that which they debunked partly because they had no place to turn: They could not look to the new economics of Keynes because "Keynesian thinking, still in its developmental phase, was terribly vague on the all-important issues of how and where government intervention should take place. Academic philosophy was even less helpful . . . ." \textit{Id.} "Over the past decade, [in contrast] both social philosophy and welfare economics have taken a turn which seems promising to those who view law as a central mechanism for reconciling the values of liberal individualism with the realities of increasing social interdependence and demands for social justice." \textit{Id.} 126.

\textsuperscript{19} \textit{See}, \textit{e.g.}, the materials collected in \textit{L. Friedman \\& S. Macaulay, Law and the Behavioral Sciences} (1969).

\textsuperscript{20} As I understand Ackerman, he argues that this has been more or less the general course of development in legal scholarship. Thus, unlike the case with science, in legal scholarship a new approach may gradually gain the most adherents even though it does not yield better answers, better explanations, than the old. Ackerman argues further that, again unlike science, the new tends not to displace the old but to synthesize it as part of a larger perspective—an "Hegelian construct." Ackerman, \textit{supra} note 15, at 124, 129-30 n.94. \textit{See also} note 15 \textit{supra}. This seems a plausible view of where we are today.
tied up so tightly in the workings of our society, and thus in the legal institutions which order them.

A general influence, then, has probably been a gradually increasing sense of dissatisfaction with the old order, coupled with (and in part produced by) a growing availability of relevant social science material and a corresponding awareness of its utility. A particular influence, in our context, has been a disturbing demonstration of how powerful the material of economics can be when applied to law. This was revealed, first, as a number of economists began—why, I do not venture to say—to direct a large amount of their attention to legal doctrines and institutions in contexts reaching far beyond antitrust and regulated industries: crime, nuisance, and racial discrimination, for example. It was revealed, second, as a small handful of lawyers in academe discovered the products of these efforts and began exploring and expanding their applications. The products themselves were appealing because they offered the suggestion of a relevant and concrete body of knowledge to which to turn, at a time (as I sketched above) when legal scholars were beginning to search. They appealed too because they held promise of easing the frustration that grows from increasing observations of divergence between what we had hoped law would accomplish, and what in fact we could see, or were told, it achieved—as to low-income housing, minimum wages, safety regulation, and so forth.

I think the story from here is quite clear and simple. It would be natural for the few legal scholars initially working with economics to take their interests and insights into their research and classrooms. By the first they would awaken interest, not to mention provoke, other scholars—even if only a few. By the second they would leave similar impress on students—again, if only a few. (I take it not every student escapes his teacher's ardor.) Some of these, teachers and students (and especially students who become teachers), would each in turn influence a few others, and so on: an exponential growth in law and economics! This leverage theory seems the more plausible if one keeps in mind the curricular expansion that recent years have witnessed. I have in mind the courses in urban government, urban transportation, housing and urban development, poverty law, environmental law, communications law, and those of like kin, central concerns of which have long been treated and influenced by economic analysis, or what passed for it. It is difficult to take up these subjects in any thorough-

\footnote{Not local government law, or municipal corporations. See Schwartz, Book Review, 84 Harv. L. Rev. 516, 517-19 (1970).}
going manner without becoming involved in economics, or at least awfully curious about it, and thus actually learning a little. Once having done so, of course, some of the new knowledge will spill over into the traditional courses that one must teach, if nothing else, as the price for spreading the “soft” curriculum. Eventually one’s teaching and research are flavored more and more with economics.

The phenomenon may not be universal, but surely it is not uncommon. To take an example from my primary fields of interest—environmental law and property—it is virtually impossible to do anything approaching a respectable job on the former without considerable reckoning of economic theory; economists have been talking about and influencing environmental policy for years. But as one pursues the relevant literature, he finds much that bears at least indirectly and often directly on a number of areas of property law, and so he incorporates them. The process only builds from there.

II

The foregoing, if plausible, offers some explanation for what appears to be a suddenly growing interest in economic analysis of law. It should suggest, too, the need for a book on law-and-economics. Posner notes in his Preface the “growing importance of economics in legal education . . .”22 He adds:

Because economics is a technical discipline . . ., the introduction of economics into legal education and scholarship has created difficulties for those law students and teachers—the majority—who do not have a good grounding in the subject. Their difficulties are compounded by the absence of any textbook addressed to them.23

The need seems clear, and Economic Analysis of Law is intended to fill it. Thus the book appears to be primarily for those in the middle class, to be used “either as a textbook in a law school course in economic analysis of law or as supplementary reading for law students [and, I take it, teachers] who are interested in finding out what economics may have to add to their understanding of the legal process.”24 The second use, of

22 Posner ix.
23 Id.
24 Id. x. Posner also considers that the book may be useful to students of economics and business. He hopes too that “the book might attract an audience of lawyers and economists professionally interested in the relevance of economics to law, since . . . the book not only summarizes the literature of economic analysis of law, but also adds to it in some areas.” Id. But the purposes mentioned in the text are the main ones.
course, might take many forms, but in general terms the two are clear—use as a text in a law-and-economics course; use as a supplement to the more ordinary grist of law school.

The primary uses anticipated for *Economic Analysis of Law* follow naturally from the needs to which it seeks to respond; at the same time, they suggest some reasons for its design and perhaps some accompanying problems. The attempt to make the book useful for supplementary reading as well as for a coursebook in law-and-economics might have diminished to some extent its success as to both. To elaborate on this observation we must first consider the book's design—its organization and coverage.

*Economic Analysis of Law* is divided into six major parts that follow an introductory chapter on some fundamentals of economics and their relevance to law (altogether, the book has twenty-eight chapters). Part I, "The Common Law," presents an interesting, unified treatment of the mainstays of the first year curriculum—property, contracts, torts, and some aspects of criminal law. Parts II and III treat a number of subjects having to do with regulation of markets and the activities of business firms, and in doing so touch lightly on labor law and consumer protection. Thus Part II—"Public Regulation of the Market"—focuses primarily on what might be called control of market structure: business and labor monopolies, monopsony, antitrust, price controls, and public utility and common carrier regulation. Part III—"Regulation of Business Organizations and Financial Markets"—covers the subject areas ordinarily considered in courses on corporations and securities regulation.

Part IV, "Law and the Distribution of Income and Wealth," discusses a number of topics which, despite the common underlying theme (all of them do deal with interplays between law and distribution), some might be surprised to find clustered together. Thus Part IV's four chapters take up some issues of income inequality and distributive justice; income, excise, and real estate taxation; the transmission of wealth at death (including here death and gift taxes); and some aspects of poverty law. In Part V, "The Constitution and the Federal System," Posner deals with selected issues of constitutional law—what he calls "economic due process" (wherein he considers substantive and procedural due process, and equal protection); commerce-clause, right-to-travel, and other state-federal constitutional issues; racial discrimination; and free speech.

Part VI, "The Legal Process," may well strike many as the most interesting portion of Posner's book. Partly this is because it analyzes aspects of legal method and structure which some might have thought remote from economic theory: civil pro-
cEDURE, including stare decisis and res judicata; criminal sanctions; and criminal procedure, including exclusionary rules of evidence. More importantly, in my judgment, Part VI is of interest because it draws on and extends ideas expounded in earlier chapters to sketch a quite general theory covering important aspects of the structure of the legal system. I will return to the sketch later.

Even so cursory a description should reveal two important characteristics of *Economic Analysis of Law*. First, the book is in some senses quite obviously a tour de force. With almost utter confidence, it undertakes to be "a systematic (although necessarily incomplete) survey of the rules and institutions of the legal system." In a way, however, it is hardly incomplete at all, for it touches virtually every important pocket of American legal learning. My summary conveys this only partially, for it hides how rich the book is in topics; they range from cable television, transfer of water rights, and marriage and divorce to pollution, obscenity, and theories of justice. If there is incompleteness, it lies more in lightness of touch than breadth of analysis. More of this momentarily.

Second, the summary description should at least suggest the extent to which Posner has tried to fulfill his intention to present a "systematic survey," to treat more or less the entire realm of legal study by imposing an at times inventive structure, somewhat different and in many ways more revealing than the necessarily pigeon-holed approach of the law school. His design largely cuts across many of the traditional divisions of legal learning, organizes them according to prevailing and important (but often overlooked) themes, and orders them in a cumulative fashion such that the discussion is constantly being integrated, built upon, and expanded. In this regard, again, my description may hide nearly as much as it reveals. For example, there is apparently nothing particularly original about treating torts, property, and contracts as the essential core of the common law, but there is a good deal of originality in making the argument that

The differences among the law of property, the law of contracts, and the law of torts are primarily differences in vocabulary, detail, and specific subject matter rather than in method or policy. The common law method is to allocate responsibilities between people engaged in interacting activities in such a way as to maximize the joint value, or, what amounts to the same thing, minimize the joint cost of the activities.

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25 *Id.* ix.
It may do this by redefining a property right, by devising a new rule of liability, or by recognizing a contract right, but nothing fundamental turns on which device is used... Breaches of contract would look much the same if treated as torts. Of course, it is another matter to carry the argument, and I shall return to that. But a good deal lies simply in the provocative creativeness of the argument's conception.

Moreover, my description cannot adequately convey the cumulative nature of the book's discussion. For instance, the theme introduced in the quotation above—that the common law strives to minimize the sum of the costs of interacting activities—recurs throughout the book, and is greatly expanded and refined many pages after its initial appearance. As another example, important issues in the law of torts are discussed in many places other than the early chapter on the subject, and this is true too of property, contracts, criminal law, remedies, and other subject areas. In each instance there is a refinement of earlier discussion, an expansion, a caveat, or a new illustration—always aided by good cross-referencing. My subsequent discussion of pollution and property law should illustrate further the sort of cumulative treatment Posner presents. The point here is that the book is a coherent and systematic whole in the sense that few of its parts can be appreciated as fully as possible unless read in the context of the entire product.

I earlier made the rather obvious suggestion that the design of Economic Analysis of Law can be seen as a product of the uses anticipated for it—uses (as a coursebook and a supplementary reference) that follow quite naturally from the needs generated by the rapidly expanding interest in law-and-economics. For example, if a book is to find much of a market as supplementary material for those interested in economic analysis of law, it must be designed to cover considerable territory. Some readers will want to pursue its insights about torts, others about contracts or procedure, constitutional law or antitrust, criminal law or taxation, and so forth. The book's coverage, in short, must be as broad as the reach of legal study itself.

By the same token, a coursebook in law-and-economics should be designed to cover a number of typical subject areas in an order that reveals in cumulative fashion central issues

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26 Id. 98. For an earlier and admirably successful attempt to approach property and torts in a unified manner, and one acknowledged by Posner, see Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972).

27 See Posner 320-32.
raised by the legal system. It is difficult, in fact, to see how one could usefully proceed otherwise without much repetition. The problem is that it is difficult to handle the breadth required for the supplemental reader in any depth and still keep the total discussion within limits that are manageable in a systematic treatment of economic analysis of law—one, like Posner's, that views the major elements of the legal process, its doctrine, method, and actors, from a unified perspective that builds from beginning to end. If one's sole objective were a coursebook, he might not cover nearly the range that Posner has. The central contributions that economic analysis can make to the study of law—the importance of transaction costs, competition, voluntary exchange, opportunity cost, utility maximization, and the incentives of legal actors, for example—might as well be demonstrated by careful selection and probing study of just a handful of subjects. There might be losses—the reader would have to puzzle out some areas for himself. There might be gains as well, however, for the areas selected could be subjected to more far-reaching analysis. The idea would be to master fundamentals and their application, rather than to learn all the black letter rules of law-and-economics. But such a book, of course, would appeal to a much narrower audience as supplementary reading.

The decision to widen appeal by designing an encompassing treatise on the economic analysis of law, while still retaining a coherently organized systematic coursebook of manageable proportions, can be accompanied by losses of its own—and perhaps of a more substantial nature than those mentioned above. For almost necessarily, an expanded treatment in terms of subjects, in a limited space in terms of pages, must lead to a certain lightness of touch. (Just a few aspects of tort law, for example, have been the subject of an entire book, and even it Posner found partial in several important respects.) More particularly, can one really deal adequately with estates in land in two pages, personal income taxation in ten, freedom of speech in nine, exclusionary rules of evidence in three, restraints on alienation and the rule against perpetuities in one, or labor law in five? Each of these and the many other topics considered by Posner has been the subject of volumes, and

29 E.g., Posner Review, supra note 1.
30 As I mentioned earlier, the treatment of some subjects is integrated over a number of widely separated pages, but here I have selected instances—and there are others—where the brief discussion appears to be the only attention given the subject.
some compromises are necessary to deal with all of them at once.

Compromise could take several forms, none of them particularly satisfying. In any one subject area, just a few issues or doctrines could be selected for probing examination. Or, again in any one area, a large number of issues could be analyzed, but each only quite briefly. The first approach strikes me as least problematic from the standpoint of thorough scholarship, though it could result in disappointment for those looking for expanded treatment of some specific area—for many of those readers, that is, using the book as a supplementary reference. The second approach can present far more serious problems if brevity of analysis results in obscuring other plausible answers or pertinent issues than those discussed.

It may well be that Economic Analysis of Law suffers both kinds of shortcomings to some extent. I cast that observation in terms of conjecture because it is a guess. An apparent tour de force, unless it quite obviously falls flat on its face, is not all that susceptible to hard and final judgment. All one can do is sample from the treatment of one's own fields of interest—in my case, Posner's discussion of property and pollution. My impression is that as to each subject the book reveals both problems I noted above, but in slightly varying degrees. That is, Posner's examination of property strikes me for the most part as going a bit more in the direction of probing but also disappointingly narrow treatment, while the pollution problem tends to be explored more broadly and systematically, but—I think—with insufficient depth. I can do little more than sketch the basis for these conclusions, but if my impressions here are accurate, and the materials on which they are based more or less characteristic of the rest of the book, then it would seem somewhat burdened by the problems about which I speculated. But by the nature of things, on both counts readers will ultimately have to judge for themselves.

Let us look first at property. As earlier indicated, the book has a chapter on this subject, but it treats parts of what are ordinarily considered the property curriculum in many other places as well. Thus, some aspects of landlord-tenant law are discussed in the chapters on Contracts and on Law and Poverty. Portions of what might be called the "advanced" property curriculum—wills and trusts, the cy pres doctrine, restraints on alienation and the rule against perpetuities, the widow's share—are briefly examined in the chapter on The Transmis-

31 Posner 10-40.
32 See id. 58-59, 259-63.
sion of Wealth at Death. Issues of racial discrimination often raised in the basic property course are discussed in the same chapter as well as in a later one. Additionally, in many instances Posner discusses in other contexts concepts which are important to property law.

So the chapter on Property hardly contains the only pages devoted to the subject; moreover, in some ways that chapter is not really about property law at all, at least not according to the usual coverage of property courses. To be sure, some attention is given to land use problems, eminent domain, recording, restrictive covenants, and estates in land (wherein are discussed, but ever so briefly, a few aspects of present and future interests, waste, and concurrent ownership). But most of the chapter is devoted to sketching a theory of property rights (which has in many ways as much to do with the law of contracts, and especially torts and crimes, as it has to do with that of property, commonly understood), and then applying and illustrating it in contexts having very little to do with "property law" as we usually think of and experience it—broadcast frequencies, water rights, trespass and nuisance, privacy, patents and copyrights.

I personally care very little what Posner regards as the proper concern of property. The subject as ordinarily taught in law school has always struck me as a rather poorly rationalized amalgam that overlaps in many ways with other, better defined pockets of legal knowledge. Recent scholarship only makes this clearer. For if the hallmark of property is that a right (entitlement) "is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller," then the subject of property is hardly limited to the substance of property at all.

Still, however confused, the subject is what it is, and readers who go to Economic Analysis of Law for its insights about property may be disappointed that the usual content of the subject has not been more broadly treated—whether in the chapter on the subject or elsewhere. Although the brief de-

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33 Id. 244-51
34 See id. 246-47. The issues are also discussed in ch. 21, Racial Discrimination, id. 302-03.
35 E.g., the chapter on contracts discusses equality of bargaining power, penalties and liquidated damages, and specific performance—all commonly considered in the basic course on property. See id. 53-55, 59-60, 61.
36 Some very recent property coursebooks give brief attention to some of these subjects. See, e.g., C. BERGER, LAND OWNERSHIP AND USE 53-64, 81-91 (1968).
37 See Calabresi & Melamed, supra note 26, at 1092. See also Posner 21, 99-102.
scription I gave above may have indicated considerable breadth, it is well to remember what a boardinghouse reach property law possesses. Thus, to mention just a few important subject areas, there is in the book no discussion of bailments, fixtures, adverse possession, zoning, deeds, delivery, covenants for title, or mortgages.

Narrowness of another sort characterizes the property materials: often those subjects that are touched upon are not discussed very extensively, with the result that we are not enlightened as to what may be more interesting issues than those analyzed. To cite just several examples, the discussion of restrictive covenants is very helpful on the facets examined (I will return to several of these), but it ignores one particular maze that is, I suspect, ripe for economic analysis. Posner points out that because such restrictions ordinarily "run with the land," so as to mutually benefit and burden all purchasers of sites within the restricted area, they help overcome what would otherwise be difficult obstacles to maximizing the value of land held in many hands and not practicably subject to single ownership. But to "run with the land," whether as covenants at law or equitable servitudes, the restrictions must, among other things, "touch and concern" the land. Odd as it may seem, considerable effort has been devoted to divining the meaning of this requirement, but with very little evidence of success.

It was considered a breakthrough of sorts when Professor Bigelow suggested, some sixty years ago, the following test for the "touch and concern" requirement:

[1]f the promisor's legal interest in land is rendered less valuable by the promise's performance, then the burden of the promise satisfies the requirement that the promise touch and concern land. If, on the other hand, the promisee's legal interest in land is rendered more valuable by the promise's performance, then the benefit of the promise satisfies the requirement that the promise touch and concern land.

The test is still relied upon today. Its popularity is rather surprising inasmuch as the test seems so perfectly circular. For if the promise were enforced against one landowner (burden)

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38 Zoning is mentioned briefly in a footnote. See Posner 30 n.8.
and in favor of another (benefit), it would seem that the former's legal interest in his land would *always* be less valuable and the latter's *always* more valuable. How then does the test tell us which promises "touch and concern" the land?

An application of one of the general principles developed by Posner in this chapter might be more illuminating. Posner states that where there are incompatible property uses and high transaction costs, the courts or other regulators should resolve the conflict by assigning the property right to the party who would buy it from the other party if transaction costs were zero. The courts should, in other words, attempt to approximate the situation that would result in the absence of transaction costs.\(^\text{43}\) We would want covenants to run in situations where we would expect them to be adopted absent transaction costs. Suppose, for instance, that landowners enter into agreements restricting land use to the mutual advantage and disadvantage (benefit and burden) of their land; presumably they do so because they conclude this makes them better off. Presumably as well, many subsequent owners of the same land would find many such restrictions similarly advantageous. If benefits and burdens did not run, however, new negotiations among all the landowners in the restricted area would be necessary with the appearance of each subsequent purchaser. (How else could the subsequent purchaser be obligated to observe earlier restrictions, or be assured of taking their benefit?) Yet those negotiations would likely be very costly, not only because they would occur often and between many parties, but because the nonexclusive nature of the benefits and burdens would raise all the problems of freeriders and holdouts.\(^\text{44}\)

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\(^\text{43}\) *See* Posner 19, where the author discusses the assignment of a property right to a view from one's home. Posner's point there is that the courts assigned the right to a prospect based on their presumptions about the relative value of the right in various factual contexts.

\(^\text{44}\) For example, a new purchaser could in some instances greatly diminish the value of other properties in the area by the nature of his own use. Realizing this, he could hold out for payments from the other landowners the aggregate of which would far exceed the disutility to him of observing the restrictions. But the other landowners, aware that they would benefit from the new purchaser observing the restrictions whether or not they contributed to the inducement obligating him to do so, would have an incentive to take a freeride on payments by their neighbors. Beyond this, my colleague William Klein has suggested that if benefits and burdens did not run, it is unlikely the original promises would be contracted for in the first place, since whatever benefit the promisee purchased could be sold out from under him by the promisor the next day. Thus, all the advantages of restrictive covenants would be lost. The problem here, however, could perhaps be handled to some extent by extracting from the promisor an additional promise to similarly bind his grantees, and they theirs, and so on. The promisor's failure to observe this promise in a subsequent deed would mean his grantees would not be bound (for we are assuming promises do not run), but at least he would be liable to the initial promisee in damages.
Transaction costs, in short, would be high. Were they costless, however, it is probably safe to presume what the outcome would be—essentially the same restrictions would be negotiated. Why not then simply continue the restrictions even after the original parties change, and save the necessity of costly and usually fruitless negotiations? As to some promises, of course, we could not safely presume their survival in subsequent negotiations; in fact, we would presume quite the contrary. A vain landowner extracts from the grantee of one of his lots the promise that the grantee, a famous artist, will paint a portrait of him annually. It would be unlikely, if the party on either side changed, that a similar deal would be negotiated. Hence neither the benefit nor the burden would run—as to neither would we say (by our test) that the promise “touched and concerned” the land. This is exactly what the courts have consistently said of such arrangements under the old test; they are regarded as “personal” only. As to other promises, circumstances might have changed such that promises which would have been renegotiated a decade ago would not be today. Courts are sensitive to these changes in presumptions about relative values; as Posner notes, they sometimes refuse to enforce covenants that appear to have become obsolete.\(^4\)

While Posner says nothing about these interesting issues of “touch and concern,” his analysis does help us with another problem. Suppose a landowner wishes “to put his land to a use forbidden by a restrictive covenant”\(^4\) which, under our test, runs with the land. The court, that is, presumes that exactly such a promise would have survived renegotiation. It can presume, but it cannot be sure. If it enjoins the violation, there will likely be no test of that presumption, for the landowner “must obtain the consent of all the property owners in whose favor the covenant runs; if there are many of them, the costs of transacting may be prohibitive.”\(^4\) Posner continues:

There would be [a] . . . safety valve if courts refused to enjoin violations of restrictive covenants, instead limiting plaintiffs to the recovery of damages. Damages liability would not deter a breach of the covenant that increased the value of the breaching owner’s property by more than it diminished the value of the other properties in the tract, since, by hypothesis, his total liability in damages would be smaller than his gain from the breach. In contrast, the injunctive

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\(^{45}\) Posner 28.  
\(^{46}\) Id.  
\(^{47}\) Id.
remedy places the prospective violator in the . . . position . . . [where] he must negotiate with every right holder, may have to pay an exorbitant price to a few hold-outs, and—the most important point—may fail to complete the transaction.48

I do not represent my discussion of "touch and concern" as an exhaustive or conclusive analysis. At the least, however, it presents a plausible hypothesis, for it not only suggests a functional, meaningful test, but also explains judicial decisions which claim (though I cannot believe seriously) to apply an apparently meaningless one. Moreover, the hypothesis is consistent with Posner's own analysis, and may illustrate the point that a broader application of his powers could have been instructive.

There are other examples, though I cannot develop them at such length as the last. His discussion of the law of waste,49 though brief, succeeds in suggesting the doctrine's function as a device to promote efficiency where transactions among the relevant parties are very expensive (sometimes infinitely so, as in the case of unborn remaindermen). I am confident, however, that further discussion of the subject would have proved far more enlightening. The law of waste applies not only to life estates followed by remainders, but to many other instances

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48 Id. 28-29. This observation by Posner is a well-taken application of a larger point that "In conflicting-use situations where transaction costs are high [usually, that is, where there are many parties involved], the allocation of resources to their highest valued uses is facilitated by denying property right holders an injunctive remedy against invasions of their rights and instead limiting them to a remedy in damages . . . . Where transaction costs are low [e.g., few parties], injunctive relief should be allowed as a matter of course . . . ." Id. 29. The injunctive remedy is preferred where transaction costs are low because it permits the parties themselves to determine relative values in the course of negotiating over the injunction once it is granted. A damage remedy substitutes the court's judgment of values for the parties'; this judicial determination is likely to be more expensive and less accurate than that of the parties, so from the standpoint of efficiency it is least preferred. Where transaction costs are high, precisely the opposite conclusion holds: here the court's determination is the best one can hope for, and thus better than nothing. As Posner acknowledges, these points were first suggested in Michelman, Book Review, 80 Yale L.J. 647, 670-72 (1971), and expanded in Calabresi & Melamed, supra note 26.

It should be noted that if transaction costs are symmetrically low, if there is no basis for determining which party has the lowest problem-avoidance costs, and if the law has no distributional preference among the parties, then an injunction (and all other relief) could as well be denied, for denying the injunction would result in no greater transaction costs or other undesirable results than granting it. Indeed, if the law could, by denying all relief in circumstances like those assumed above, generate rules telling the parties involved not to bother coming to court, there would be considerable gains from denying all relief—an efficient and not unjust resolution could be reached without incurring the social cost of an unnecessary use of legal machinery. But perhaps appropriate rules could never be developed.

49 Posner 31-32.
where interests in land are held by more than one owner, whether simultaneous or successive in time—landlord and tenant, and concurrent ownership, for example. In many of these instances transaction costs are low, and one wonders (as Posner's discussion suggests) why a law of waste in these instances is even necessary, since the party wishing to engage in an allegedly wasteful act could simply be required to obtain the permission of the other owners. At the least, one wonders why, in such cases, the courts sometimes give damages as opposed to injunctive relief; our earlier analysis suggests the latter is appropriate. Are these cases simply wrong, or is there some efficiency rationale behind them? What of the doctrine of me- liorating waste, under which the party in possession may be liable in damages even though the result of his acts is an increase in the market value of the property? Is it the doctrine's purpose to serve as an assurance that market value (to the party in possession) will in fact increase by more than the damage liability? (And just what, in these instances, should be the measure of damages?) If transaction costs are low, why is market value even considered in these instances, rather than leaving it to the parties (through an injunction, for instance) to determine relative values to themselves by negotiating? What roles should be played by changing conditions, their relative foreseeability by the parties involved, the expected length of the interest presently in possession, and the remoteness of future interests—all factors considered by the courts? Does the proper role of any one of these vary as a function of transaction cost? I raise these questions only to suggest the possibility that the law of waste could have been much more richly explored and our understanding more greatly endowed than they have been.

A final example deals with the discussion of concurrent ownership. Here Posner draws on the economic theory of property rights sketched earlier in the chapter to illustrate the substantial possibilities of inefficiency inherent in joint or common tenancies:

B and C [the concurrent owners] are in much the same position as the inhabitants of a society in which there are no property rights. If B spends his money to improve the property, C will share equally in the improvement, and vice versa, so neither party will have an incentive to invest in improvements.²⁵²

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²⁵⁰ That "market value" increases does not necessarily mean that a reversioner or remainderman would consider himself better off. Cf. id. 22.

²⁵¹ Cf. id. 60-61.

²⁵² Id. 32.
Posner suggests that the absolute right of partition in any joint or common tenant is one solution to the problem of inefficiency. The law developed others as well, however. An elaborate set of rules governs the sharing of the benefits and burdens of ownership among the concurrent owners, but the rules reveal considerable differences of view as to the appropriate resolution of various problems. Most of them evolved in response to a common-law doctrine as marvelously uninformative as the test for "touch and concern": "Each tenant owns an equal interest in all of the fee and each has an equal right to possession of the whole. . . . Neither a joint tenant nor a tenant in common can do any act to the prejudice of his cotenants in their estate." These statements, of course, seem to tell us nothing. If A cannot do as he wishes because it would prejudice B, then B in having his way harms A. "By definition, each tenant is entitled to possession of the entire parcel of land yet he cannot exercise that possession without coming into conflict with the reciprocal right of his cotenant." More succinctly, "Two men cannot plow the same furrow." The reciprocal nature of the concurrent ownership problem is a feature especially vulnerable to effective economic analysis. One might wish some of its facets had been illuminated.

In sum, my point about the property materials in Economic Analysis of Law is that so much could have been explored that was not. What is done is generally done well; the few points pursued are pursued effectively. The discussion of an economic theory of property rights, the role of transaction costs, the bearing of efficiency considerations on the initial assignment of rights, the distributive effects of these assignments, strike me as excellent summaries and extensions of the existing literature. Applications of these considerations to concrete situations and legal doctrines—while one would like to have seen more of them—usually probe to sufficient depth, though there are a few exceptions. The discussion of eminent domain and the requirement of just compensation gives insufficient attention, I think, to when government action amounts to a "taking" and when it does not. Or in discussing damages in the land-
lord-tenant context, Posner poses a situation in which the tenant defaults and the landlord promptly rents the property to another tenant at a rental only slightly below the rental of the defaulting tenant. In a suit against the defaulting tenant for the rental due on the balance of the tenant's lease, should the landlord be required to deduct the rental of the substitute tenant?²⁶⁰

Posner states that "[t]he law answer[ed] yes . . ." and that this is "correct from an economic standpoint."²⁶¹

The good supplied by the landlord is fixed in the short run: he cannot add a room because one more family wants to lease from him. The rental that he receives from the substitute tenant . . . is a gain enabled by the breach of contract by the first tenant.²⁶²

I would have thought the correct answer might turn on whether the landlord owns an apartment building with several (identical) empty units. Here, even if he rents the defaulting tenant's unit to a new tenant, it is probably still the case that but for the default the landlord would have had two tenants, in which case the breach has not enabled a gain but occasioned a loss.²⁶³

The property materials pursue relatively few topics (and relatively few issues within topics), but usually the narrow line chosen is examined to a satisfactory point. I find the discussion of the pollution problem quite different: it is fairly broad and

²⁶⁰Posner 58-59.
²⁶¹Id. 59.
²⁶²Id. (Emphasis in original.)
²⁶³I have similar trouble with Posner's answer to a problem at the end of the Property chapter. He asks, "If the government auctioned off rights to use broadcast frequencies, would the amount bid by the high bidder be equal to the expected value of the use? Why not?" Id. 39. His answer, obviously, is no, but I fail to grasp his reasoning. He argues, see R. Posner, Teacher's Manual for Economic Analysis of Law 7-8 (1973), that if two risk-neutral applicants, each with a fifty percent chance of being the successful bidder, were seeking the license to a station with expected future earnings of $10 million, then the present worth to each would be only $5 million and neither would spend more than this. But I take it the unsuccessful bidder does not "spend" his bid if he loses; all he spends is the expense of bidding. On the facts posited, I agree that a bidder would incur no more than $5 million in bidding expenses, and if he incurred that amount in bidding expenses he would bid no more than $5 million. But I take it that while bidding expenses could be substantial (investigating expected value of the license, and so forth), they would hardly be that substantial! If they were zero, I would conclude the bid of each applicant would approach $10 million, and if they were positive I would conclude each bid would approach $10 million minus bidding expenses, with no bidder being willing to incur bidding expenses larger than $5 million. If these conclusions are incorrect, I fail to grasp how Posner's discussion explains why.
systematic, but it fails to inquire deeply enough to uncover some important considerations.

There is no chapter on pollution. In terms of legal doctrine, the problem is a functional one that cuts across many subject areas, and it is treated accordingly. In the following I try to draw together the core of Posner's discussion, indicating as I do so the points at which I find it wanting.

Pollution such as smoke imposes costs, but so does its avoidance. From an economic standpoint, the problem is "to allocate rights and liabilities in such a way as to minimize the sum of the costs of smoke damage and of avoiding smoke damage."\(^6^4\) The cost-avoiding adjustments by both polluters and receptors are so varied and numerous, however, and the costs of pollution to health and aesthetic interests so uncertain and difficult to measure, that the question of the appropriate resolution is extremely difficult. At the same time, judgments about the question could be critical. If the law embodies a conclusion that polluters can adjust to avoid the problem more cheaply than receptors in a rule assigning to the latter an unqualified right to stop factories from polluting, or if it embodies the opposite conclusion in a rule assigning an unqualified right to pollute, and if either conclusion is in fact wrong, "high transaction costs may make it impossible to rectify a mistaken initial assignment through subsequent market transactions."\(^6^5\) Transaction costs will likely be high under either assignment because of the many parties involved, and because of the presence of freerider and hold-out problems.\(^6^6\)

Under circumstances like these, "exclusive rights, whether to pollute or to be free from pollution, are likely to promote inefficiency."\(^6^7\) Where transaction costs are prohibitive, the party with the exclusive (unqualified) right cannot be brought to feel an incentive to adjust even where his adjustment costs would be lower than those of the other party. The common law, Posner argues, recognized the problem, and under such doctrines as nuisance followed a standard of reasonable use. Pollution was lawful if reasonable in the circumstances, which meant (but only approximately) if the benefit from continuing to pollute exceeded the cost to the victims of pol-


\(^6^5\) POSNER 24.

\(^6^6\) Id. 24-25.

\(^6^7\) Id. 25.
olution of either tolerating or eliminating it, whichever was cheaper. 68

If the pollution were found unlawful under this test, the appropriate remedy would usually be a damage award; because of high transaction costs, injunctive relief would generally be unwise from the viewpoint of efficiency. 69

But here a problem arises. The reasonable-use-damages approach

had little bite in practice, due primarily to the lack of a procedural device for aggregating small claims. If no single victim of a polluter suffered damage as great as the cost of bringing a lawsuit, no suit would be brought even if the aggregate harm to all of the victims exceeded the benefits of continued pollution. Recent developments in the class action . . . may help to overcome this procedural shortcoming. 70

In later discussion, Posner at least implies that measures to surmount obstacles to effective litigation could of themselves go far in resolving the pollution problem. 71

Granted that such measures are well worth undertaking, just how far would they carry us in the pollution context? The class action is a case in point. At present it is an ineffective means for litigating small claims. In the federal courts its use is hampered by judicial refusal to permit aggregation of individual claims to reach the minimum jurisdictional amount, resulting in a rather perverse denial of the technique in exactly

68 Id.
69 See note 48, supra. Though Posner does not make this point explicit in his specific discussion of the reasonable use approach, I take it he meant it to be implicit. See Posner 29.
70 Id. 26. As Posner points out, other possible approaches—forcing polluters to purchase pollution easements, or to buy up all the land in the fall-out area; relying on corporate social responsibility—are not viable responses to the pollution problem. See id. 26-28, 186-89. I accept his conclusions and do not discuss these approaches in this review.
71 Problems like pollution “are conventionally viewed as failures of the self-regulatory mechanisms of the market and, therefore, as appropriate occasions for public regulation. This way of looking at the matter is misleading. The failure is ordinarily a failure of the market and of the rules of the market prescribed by the common law. Pollution, for example, would not be considered a serious problem if the common law remedies . . . were efficient methods of minimizing the costs of pollution. The choice is rarely between the market and public regulation. Ordinarily, the choice is between two methods of public control, the common law system of privately enforced rights and the administrative system of direct public control. The choice between them should depend upon a weighing of their strengths and weaknesses in particular contexts.” Id. 156 (emphasis in original). In the context of the pollution problem, “improvements in the common law machinery are possible, but . . . the emphasis has been placed on public regulation instead.” Id. 159.
those situations where it is most needed. The class action on the state level is limited by the narrowness of many states' rules. But suppose these problems were overcome. Still, as Posner points out, the class action "device may have only limited utility in cases where it is most needed—where the individual claim is very small." This is because the costs of effecting compensation to a large class may be higher than the benefits of any deterrence achieved; and because the absence of any client with a substantial claim "impairs the incentive of the lawyer for the class to press the suit to a successful conclusion. . . . The lawyer for the class will be tempted to offer to settle with the defendant for a small judgment and a large legal fee, and such an offer will be attractive to the defendant." Another possible approach to the problem of small claims—requiring the losing party to reimburse the winner's litigation expenses—has disadvantages of its own.

In Posner's own terms, then, the case for strong reliance on reformed judicial machinery to resolve the pollution problem hardly seems overwhelming: the reforms themselves are problematic; moreover, many of them would probably induce cynicism and strenuous objection on the part of those enamored of the status quo, so that reform might come about only at unduly high cost. And we can go further, for Posner has left several important problems untouched. He recognizes, as we noted, that the pollution problem typically involves many polluters and receptors. The latter must initiate any litigation, yet it may not be at all clear whom to sue. Receptors inexorably have the burden of proof; moreover, the burden can be an exceedingly heavy one. This might well mean not only that

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74 Posner 349. This is quite typically the case in the pollution context.
76 Id. 350.
77 Posner discusses these. Id. 351. He nevertheless concludes that reimbursement would be a "sensible reform." Id. For its application in the pollution context, see Clean Air Act, § 304(d), 42 U.S.C. § 1857h-2(d) (1970). He also concludes that some of the problems raised by the class action "could be overcome by allowing the lawyer-entrepreneur to retain the damages (including any penalties) and his attorney's fee"—a provocative suggestion. See Posner 377. Awarding a penalty over and above compensatory damages might also be a partial response to the problem of small claims. Cf. McElwain v. Georgia-Pacific Corp., 245 Ore. 247, 421 P.2d 957 (1966) (punitive damages against air polluter); Posner 77-78, 157, 360.
79 For a discussion of some of the problems, see J. Krier, Environmental Law and Policy 213-16, 218-21 (1971).
suits fail which should ideally have succeeded, but that pollution receptors are effectively dissuaded from pressing well-grounded claims. If prospective filing of suits is not a real threat, polluters have at best a dampened incentive to make decisions that take into account the full social costs of their activities. Liability rules, in short, lose much of their desired deterrent effect.

What of those suits that do get to court? Posner's discussion of pollution leaves virtually untouched such issues as the limited competency of the courts (in terms of legitimacy as well as ability) to gather information about and deal effectively with the technical uncertainties and ambiguous value judgments inherent in the problem, as well as the courts' lack of tools and resources to devise, fund, and administer appropriate solutions.\(^8^0\) The foregoing is hardly meant to imply that the courts have no function, nor that within its limitations judicial machinery should not be designed to enhance the courts' effectiveness as part of a system of control. It is to suggest that Posner should have given more attention to the widely held conclusion that courts cannot be the central, much less the exclusive component of that system; that legislative and administrative bodies must bear the main burden of making and carrying out effective programs of pollution control.\(^8^1\)

Posner discusses legislative-administrative intervention in the pollution problem (although, it appears, somewhat grudgingly), but I think in doing so he leaves out several important points. He seems to suggest that there would be no allocative difference between prescribing the specific measures polluters must take to avoid sanctions, and subsidizing polluters who observe the specifications.\(^8^2\) Yet, because the latter approach involves

\(^{80}\) On the problem of legitimacy, see Comment, The Role of the Judiciary in the Confrontation With the Problems of Environmental Quality, 17 U.C.L.A.L. REV. 1070, 1074-75 (1970). On limitations of ability, see, e.g., Hines, Nor Any Drop to Drink: Public Regulation of Water Quality (I), 52 IOWA L. REV. 186, 199 (1966). On limitations of judicial tools and resources, see Calabresi & Melamed, supra note 26, at 1121, 1122 n.62 (discussing instances in which it would appear that legislative intervention would be the only or the preferable means satisfactorily to resolve pollution problems).


\(^{82}\) Posner says the legislature might "prescribe the specific measures that the polluter must take to avoid the sanctions of the law (or, what is the same thing, to entitle him to a subsidy)." Posner 159.
payments to a polluting firm while the former imposes a cost, profit levels of a firm under the two would differ. Recent work suggests that subsidies would result in more firms, larger output for the industry, lower prices for the commodities produced, and excessive production. There would be more pollution to control, and control would be more costly. The likely consequence would be a lower level of environmental quality.

Posner is, I believe, correct in his statement that "[specification of the particular method of pollution control discourages the search for the most efficient method]." But he goes too far in implying that it would always be "a better approach" to "establish the level of pollution emissions deemed tolerable, to compel the polluters, under penalty of injunction or fine, not to exceed that level, but to leave the choice of method to the industry"—generally called performance standards. The latter may or may not be a better (more efficient) approach than the former, depending upon the circumstances. In some instances (for example: many sources, sources with little capability to make reliable judgments among control alternatives) the administrative and enforcement costs of the more decentralized performance standards approach may be so large, and the allocative efficiency advantages so small, that the specification approach would be more sensible. It is especially surprising that Posner would make casual judgments about various legislative control schemes without at least mentioning that administrative costs might differ significantly among them.

In discussing pollution taxes (emission fees), Posner asserts that this approach would eliminate "private enforcement of pollution standards." He argues that this follows inasmuch as the tax is paid to the government rather than to injured receptors, so that the latter would see no gain in bringing private suits. But this assumes that injured receptors would have no private cause of action in tort so long as the polluter has paid the tax on all its uncontrolled pollution (so long, that is, as it is in compliance with the law). There are cases upon which one could base a contrary conclusion. Moreover, the contrary con-

84 Posner 159.
85 Id.
86 See Pollack, Legal Boundaries of Air Pollution Control-State and Local Legislative Purpose and Techniques, 33 Law & Contemp. Prob. 331, 343 (1968); Walker, Enforcement of Performance Requirements with Injunctive Procedure, 10 Ariz. L. Rev. 81, 86 (1968).
87 Posner 161.
clusion can find rationales—economic and otherwise—in addition to the one suggested by Posner (encouraging private enforcement).90

The discussion of pollution taxes generally could have benefited a great deal if it had been expanded even a small amount. The subject of such market surrogates as a means to control pollution and similar social problems is often badly misunderstood;91 but understanding is important in light of the almost revolutionary interest in the approach that recent years have witnessed.92 Yet Posner hardly makes clear to his readers (except, perhaps, the quite well-informed) how these surrogates promise, "at least in principle, to achieve decreases in pollution or other types of damage to the environment at minimum cost to society."93 As a result, he also does not reveal their chief advantage over the performance standard approach (and thus fails at the same time to reveal an important inefficiency of the latter): the performance standard encourages each source to reach the prescribed emission level at minimum cost, but neglects the fact that the marginal costs of abatement vary among sources. Efficiency dictates that the lower a source's marginal costs of control relative to other sources, the more it should be required to control. But achieving this result with the performance standard approach would necessitate an individual standard for each source. The administrative costs of such nonuniform standards would in most cases be enormous. Yet a uniform pollution tax automatically induces vari-

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90 For example, permitting compensation (at least to those seriously injured) even when all taxes due have been paid would help correct for the fact that some polluters probably escape their full tax liability; it would also serve to compensate those suffering unduly from the resulting level of pollution—something legislative programs by themselves rarely achieve. See Krier, The Pollution Problem and Legal Institutions: A Conceptual Overview, 18 U.C.L.A.L. REV. 429, 467 n.106, 474-75 n.131 (1971). On the first of these two points; see also POSNER 77-78.

91 For some examples of such misunderstanding, see the materials gathered in J. Krier, supra note 79, at 431-35, 437-42.


93 Baumol, On Taxation and the Control of Externalities, 62 AM. ECON. REV. 307, 319 (1973), cited by Posner for another proposition. POSNER 160 n.2. In strictest principle, these approaches do not promise damage avoidance at minimum cost because they fail to take into account, except grossly, the fact that in some instances receptors could have avoided damage at lower cost than the polluter. Id. 160. But the administrative expenses of this sort of fine tuning would probably outweigh any allocative gains it yielded. Baumol's point, I think, was that market surrogates like the pollution tax are, in principle, the cost-minimizing means to achieve reductions in pollution output. See Baumol, supra, at 319 n.15.
able output by sources, with each controlling to its cost-minimizing point.\textsuperscript{94} Lastly as to pollution taxes, Posner neglects to expose his readers to proposals for a market in pollution rights as an alternative approach.\textsuperscript{95} Some awareness of those proposals is important, for the rights system may have all the advantages of the tax, yet avoid some of its possible shortcomings.\textsuperscript{96} In sum, pollution taxes and rights systems could well have been given more attention; it is rather surprising they were not, since they simulate the market or price system in many advantageous ways.

A final few words on Posner's discussion of the pollution problem. He closes an excellent discussion of the ways in which a federal system "reduces the likelihood of an efficient solution"\textsuperscript{97} to a problem like pollution with the observation that "in practice it appears" such "solutions are unlikely . . . unless imposed by the federal government."\textsuperscript{98} That observation hardly stands up to scrutiny, at least regarding federal practices as to pollution. The response of the federal government has been to impose uniform quality standards across the nation, and these are enormously suspect in terms of allocative inefficiency because they ignore the varying costs and benefits of control that exist in each pollution shed. Perhaps the federal government takes this approach because nonuniform standards could be administratively (or politically) too costly to impose. The point is that while, all costs considered, uniform federal standards may be the least costly means of federal intervention, this best federal intervention might be an even less efficient solution than leaving the problem to the states.\textsuperscript{99} Just as one cannot justify government intervention in the market simply by noting the latter is less than perfect,\textsuperscript{100} one cannot justify federal intervention by mere reference to the inefficiencies of state control.

Perhaps I should close the discussion in this section by conceding that it might not be entirely fair to make general inferences about a book by reference only to the number of pages allotted some subjects plus a brief examination of the analysis

\textsuperscript{94} See Krier & Montgomery, supra note 92, at 97-99. Nevertheless, the administrative costs of a pollution tax might be higher than the gross (uniform) performance standard approach, and if high enough perhaps sufficient to wipe out any allocative efficiencies of the former. But this situation could change with time. See id. 99, 102.
\textsuperscript{95} See, e.g., J. Dales, Pollution, Property & Prices (1968).
\textsuperscript{96} Rose-Ackerman, Effluent Charges: A Critique, 6 CAN. J. Econ. 512, 527 n.22 (1973).
\textsuperscript{97} Posner 286. See generally id. 285-87.
\textsuperscript{98} Id. 287.
\textsuperscript{99} For discussion of these points, see Teller, Air-Pollution Abatement: Economic Rationality and Reality, 96 DAEDALUS 1082 (1967); Krier, The Irrational National Air Quality Standards: Macro- and Micro-Mistakes, forthcoming in U.C.L.A. Law Review.
\textsuperscript{100} See Posner 17-18 n.1.
of a few others with which I am most familiar. Nevertheless, it is the best I am able to do. Surely there are instances within Economic Analysis of Law of very thoroughgoing treatment.101 My impression is that these appear, as one would expect, in those fields in which Posner has both taught and done considerable research—primarily torts, antitrust, and regulated industries.102 Putting aside these subjects, I suspect that some readers—perhaps more than a few—will be critical of the handling of their fields, and thus a bit uneasy about (although also surely enlightened by) the rest of the book. But if this proves to be generally true, at the same time it should hardly be surprising. It would be remarkable indeed to find a single individual who could explore with uniformly satisfying thoroughness and insight all the areas mapped out by Posner, especially in an attention span measured by the pages of his book. Any shortcomings of the sorts I have noted could also owe in part to the fact that the literature of law-and-economics—which Pos-

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101 Surely, too, the whole of the book tends to build and integrate in the sense that explicit treatment of one subject can be brought to bear by the reader on explicit treatment of another. But one has to be quite careful to catch these analytic spillovers; if the book is being used for supplementary reading, rather than consumed entirely as a systematic whole, there is a danger such care will not be exercised (though it is reduced by the excellent cross-references and index). Even in the case of systematic use—even when, that is, the book is employed as the text for a law-and-economics course or otherwise read in its entirety—there are problems presented by lack of breadth and depth. Few teachers or students using the book will have such thorough knowledge of the many fields it touches that they will always be able even to recognize any gaps in Posner’s analysis, much less fill them in. Posner claims that in his text “little prior knowledge of law is presupposed. . . .” Posner x. Despite this, I can imagine that one trained primarily in economics would have to be both wary and diligent in teaching a course out of Economic Analysis of Law. The problem would not be in understanding Posner’s usually lucid text but in understanding what legal issues, doctrines, and so forth might be relevant but not discussed. Economists are not always well informed about law. See, e.g., O’Connell, Book Review, 1973 U. Ilt. L.F. 604. Even the law professor would probably have to do some heavy spade work on occasion. Whether these remarks properly extend to Posner’s economic (as opposed to legal) analysis I am not competent to judge.

102 Here too there might be occasional problems such as those noted in the property and pollution materials. As just one example, take Posner’s discussion of foreseeability in the context of Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). Posner argues that Palsgraf’s holding that defendants should not be liable for unforeseeable accidents is correct from the standpoint of economic analysis, because the expected accident costs of unforeseeable (freak) accidents are usually low and therefore would not generally justify requiring defendants to incur avoidance costs which exceed the expected accident costs. POSNER 75-76. But Posner may be mistaken in looking only at the expected accident costs to the party actually injured—in this instance, Mrs. Palsgraf. As my colleague Gary Schwartz has pointed out, both the majority and dissenting opinions in Palsgraf explicitly assumed that the railroad’s employee was negligent with respect to the passenger he was assisting. See 248 N.Y. at 341, 347, 162 N.E. at 99, 101. I take it this means the expected accident cost to the passenger was higher than the avoidance cost of the railroad. See POSNER 69-70. Why should such negligent (that is, not cost-justified) conduct not be deterred?
ner has set out to summarize—is itself still quite partial and incomplete in its development (a point to which I shall return). But more largely they probably owe to the somewhat competing uses for which the book was designed.

III

Economic Analysis of Law contains a number of large and fascinating themes. The particular one I want to comment upon very briefly here has already been introduced: "The common law method is to allocate responsibilities between people engaged in interacting activities in such a way as to maximize the joint value, or, what amounts to the same thing, minimize the joint cost of the activities." Much later in his book Posner undertakes to expand this observation into what amounts to a theory of government, or at least of legal institutions. Hopefully I am accurate in summarizing the high points of his argument as follows:

The ultimate question in many lawsuits concerns the efficient allocation of resources. While the market ordinarily answers the question, the adversary system takes over in instances where market resolution is unduly expensive. In doing so, it fashions remedies to create incentives very similar to those generated by market forces (damage awards, for example, generally mimic the concept of price equal to opportunity cost). Like the market, the adversary system relies heavily for its effective functioning on the actions of private, self-interested individuals (plaintiffs, defendants, lawyers). Again like the market, the adversary system is competitive—plaintiffs and defendants (producers) compete for the favor of courts (consumers). Finally, the adversary process "resembles the market in its impersonality, its subordination of distributive considerations. The invisible hand of the market has its counterpart in the aloof disinterest of the judge." The methods of compensating judges, the rules of ethics that govern their behavior, the constraints placed upon jurors, all function to assure the disinterest of tribunals. The rules of evidence are reinforcing: they "exclude as irrelevant considerations that go not to the conduct of the parties but to their relative deservedness."

Similarly reinforcing is the incentive structure of the judicial system. In many instances judges have life tenure and no

\[103\] At times he has extended it. See id. ix, x.
\[104\] Id. 98. See text accompanying note 26 supra.
\[105\] Posner 320-32. This is the chapter entitled "Allocation of Resources by the Market, the Adversary System, and the Legislative Process." See also id. 386-92, which is the chapter entitled "The Administrative Process."
\[106\] Id. 322.
\[107\] Id.
aspirations for higher office; as a result they are largely insulated from political control (the justices of the United States Supreme Court are the extreme example). Even in the absence of tenure or the presence of political ambitions, judges are likely to be "largely free from gross political influence" simply because society cares about efficient resource use, because the political consequences of any particular outcome are often unclear, and because litigants will tend to seek out jurisdictions with impartial forums. In addition, a judge’s future depends to some extent on public acceptance, which "is impaired if he is seen to be operating in the political arena." Judges, moreover, are unlikely to be strongly biased in favor of the classes or groups of which they are members, because such a bias would usually increase the judges' personal welfare only trivially while subjecting them to the likelihood of criticism and reversal.

For all of these reasons, judges are

[a]lmost by default . . . compelled to view the parties as representatives of activities—owning land, growing tulips, walking on railroad tracks, driving cars. And where a choice must be made between competing activities, it is natural, and comfortably objective and neutral, to ask which is more valuable in the economic sense.

In both the market and the adversary system, then, "it is primarily the criterion of efficiency rather than of distributional justice that guides decision." The legislative process stands in marked contrast: "[S]tatutes exhibit a less pervasive concern with efficiency and a much greater concern with wealth distribution." Posner suggests two central reasons for this difference (assuming it in fact exists). The first is largely procedural. No legislative rules of evidence exclude consideration of relative deservedness. "The adversary system, with its comparison of concrete interfering activities that assures that questions of relative costs are always close to the surface of the controversy, is not employed." Legislatives have more effective means than courts for redistributing wealth (and thus, I take it, are more prone to employ them).

108 Id. 325-26.
109 Id. 328.
110 Id.
111 Id. 322.
112 Id. 327.
113 Id. 328.
The second reason is more fundamental. It may be "inherent in the nature of political decision making" to downplay efficiency in favor of distributive considerations. Essentially because of freerider problems, large generalized interest groups (such as consumers) that would benefit from efficient markets have far more difficulty than compact single interest groups (such as trade associations) in organizing to influence legislative behavior. Majority rule does not respond to the problem, for effective coalitions can themselves coalesce into a majority that elects a favorable candidate whose program results in benefits to their special interests larger than the costs of the program to them as consumers. "Yet when the costs of the legislation to the majority, as consumers, are combined with the costs to the other 49 percent of the voting population, who are outside of the coalition altogether, it may turn out that the program is highly inefficient." As a result, large generalized interests who would benefit from efficient programs (or, for that matter, different distributions) tend to be underrepresented relative to special interest groups, who can often benefit most by securing inefficient programs the net costs of which are borne by the underrepresented.

I have paused to sketch Posner's arguments both because they strike me as elegant and provocative (and thus well worth passing on), and because I want at least to note several problems I have with them.

First, I find a perhaps trivial but nevertheless bothersome inconsistency concerning his argument that courts are guided primarily by efficiency criteria, that they are quite well insulated from politicization, and that, "The United States Supreme Court represents an extreme example of the severance of judicial decision making from political control." Earlier Posner criticized, on economic grounds, a number of Supreme Court decisions, and followed his criticisms with the question, "Do the Supreme Court cases discussed . . . suggest . . . that the Court simply mirrors the prevailing economic ideology, whatever it may be?" Posner's answer is yes; the Court's economics were laissez-faire when that ideology prevailed; its economics today reflect the dominant ideology of welfare socialism. I have trouble reconciling the answer with the theory.

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114 Id. 329-30.
116 POSNER 330.
117 Id. 326.
118 Id. 277.
119 R. Posner, Teacher's Manual for Economic Analysis of Law 62 (1973). In the same vein, I have similar difficulty reconciling his views regarding the important dif-

Second, it may be that Posner exaggerates the differing degrees to which courts and legislatures emphasize efficiency and distributional considerations. I take it that a citation of authorities is not necessary to remind one of many judicial decisions apparently giving heavy weight to distributional issues and the relative deservedness of the parties; similarly, I think we can presume that there are often instances of relatively efficient legislation. I would also argue that in some contexts the courts possess distributive tools more flexible than those of legislatures.\footnote{120}{See notes 89 & 90 supra.}

Of course, Posner has not maintained that courts are guided only by efficiency and legislatures only by distributional considerations. Even so, I am not convinced that he has not overstated any differences in emphasis that exist. Some of the factors he relies upon may cut in both directions. For example, those large, generalized interest groups that have difficulty in influencing legislation probably have similar difficulty in organizing effective litigation, with the result that their interests are underrepresented in the judicial as well as the legislative forum. Moreover, my own experience has been that the essence of the adversary system is employed far more extensively in the legislative process than Posner believes.\footnote{121}{See Posner 328. See also id. 321-22.}

Finally, I am struck that Posner has devoted so little attention to whether the legislative process could be effectively revamped in ways that would promote efficiency. Is the stress on distributional considerations and away from those concerning efficiency really "inherent in the nature of political decision making,"\footnote{122}{Id. 329-30.} or might it be, at least in part, a product of structural impediments that are subject to reform? Do the seniority and committee systems in legislative process play a role, and if so could they be suitably altered? What of political campaign financing? Might it be feasible to establish publicly funded lobbyists or advocates to represent those interests "systematically underrepresented in legislative decision making."\footnote{123}{Id. 330. Cf. Krier, Environmental Watchdogs: Some Lessons from a "Study" Council, 23 Stan. L. Rev. 623, 647-54, 662-66, 668-71 (1971).} I have the feeling Posner could have contributed much to such questions, had he considered them, for his suggestions for reforms responding to similar problems in the adversary and

\footnotesize{ferences of emphasis between legislatures and courts with his earlier statement that "[w]hether rules defining the circumstances under which an activity will be deemed negligent are formulated by courts in the decision of particular cases or by legislatures is surely a detail." Posner Review, supra note 1, at 641 (emphasis added).}

\footnote{120}{See notes 89 & 90 supra.}

\footnote{121}{See Posner 328. See also id. 321-22.}

\footnote{122}{Id. 329-30.}

administrative process seem so fruitful.\footnote{See, e.g., Posner 156-59, 346-51.} Perhaps he was led to ignore such issues as I have sketched by relegating legislative lawmaking to "politics."\footnote{See id. 329-30.} a realm he may regard as outside his expertise. But inasmuch as legislatures are a large, if not the largest, source of law today, such consignment seems neither necessary nor appropriate. These points aside, the theory of market, adversary, and legislative processes sketched by Posner strikes me as excellent, and in many ways one of the high points of his book.

IV

We have thus far considered something of the substantive coverage and themes of Economic Analysis of Law. The discussion should have at least implied a few of the book's strategies; I want here to examine several of them explicitly.

As we saw earlier, a central purpose in designing the book was to make it useful as a coursebook in law-and-economics. Posner was well aware that "many law teachers are not accustomed to teaching from textbooks . . . ."\footnote{Id. x.} Accordingly, he endeavored to make his text sufficiently clear in most places that the instructor will not be obligated to translate it into still simpler terms for his students. He should be able to use class time to probe the depths of the students' understanding, both by putting questions to them based on the text and by working through with them the problems that appear in footnotes and at the end of chapters; many of the problems carry the analysis into areas not covered by the text.\footnote{Id. x-xi.}

I have my doubts that there will be no need to devote class time to translation of Posner's analysis, though perhaps not always so much into simpler terms as into more complex ones—into more probing examination than he on occasion provides. Nevertheless, his almost relentless and generally provocative questioning should greatly enhance the book's value as a classroom tool.

And the questions are almost relentless! They appear everywhere, not only in the problems following the chapters and in some footnotes, but in the persistent placing of a parenthetical "(why?)" after many of the assertions in the text and footnotes.
I can imagine how pedagogically effective that one little word will be. It should force the student, time and time again, to think back over what he has already learned, to puzzle out the logic behind a statement, to apply an old idea in a new context, to read carefully and critically. To help the teacher employ the technique, there is a manual available (to teachers, not students) that discusses every problem and question, every bothersome "why?" Users of the manual will probably wish at times that its discussion carried further; Posner concedes that his "answers are often preliminary and incomplete rather than definitive. Indeed, I am quite sure that I do not myself understand all of the ramifications of all of the questions." But one can ask only so much, and by and large the manual strikes me as a complement to Economic Analysis of Law that should strengthen it as a coursebook.

At the same time, I can imagine how frustrating each "why?" will be to the reader using the book as a supplementary reference—those "law students who are interested in finding out what economics may have to add to their understanding of the legal process"; those "economics and business students interested in exploring the relevance of economics to law"; those "lawyers and economists professionally interested in the relevance of economics to law"; in short, all those looking for guidance outside the context of the classroom. I do not mean to belabor the point, but only to suggest that it illustrates in another small way how the book’s intended uses compete with each other.

Another of Posner’s strategies is to illustrate the utility of economics in normative analysis. He gives his readers early warning that he will do so:

Economics turns out to be a powerful tool of normative analysis of law and legal institutions—a source of criticism and reform. This statement is not inconsistent with the point stressed in the previous section that the economist is not the ultimate arbiter of social choice. He cannot tell society whether it should seek to limit theft, but he can show that it would be inefficient to allow unlimited theft. Or taking a goal of limiting theft as a given, the economist may be able to show that the means by which society has attempted

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129 Id. 1.
130 Posner x.
to attain that goal are inefficient—that society could obtain more prevention, at lower cost, using different methods. Since efficiency is a widely regarded value in our world of limited resources, a persuasive showing that one course of action is more efficient than the alternatives may be an important factor in shaping public choice.¹³¹

For Posner to stress normative analysis may strike some as surprising. He has, after all, said that “Economics is a positive science. The economist has an important contribution to make to the debate over [issues of public policy] . . . , but it is descriptive rather than normative.”¹³² In a sense, however, the contradiction is apparent rather than real. Posner was arguing that the economist can properly show the more efficient policy, but he cannot as an economist argue that it is therefore better; he can describe the distributional effects of a policy, but, he cannot as an economist argue that they are just or unjust.¹³³ As Posner sees it, “The economist’s competence in a discussion of the legal system is limited to predicting the effect of legal rules and arrangements on value and efficiency, in their strict technical senses, and on the existing distribution of income and wealth.”¹³⁴ In Economic Analysis of Law, he succeeds in sticking scrupulously to this vision. Effects of rules are described, without being explicitly evaluated in a normative sense. Legal rules and institutions are freely criticized, but with considerable pains taken to couch the criticisms in appropriate language—“from the standpoint of economic analysis”; “in terms of efficiency.”¹³⁵

Still, the technique can be seductive. As Ronald Coase has said, economists have claimed to abjure any special competence in making normative judgments, limiting themselves to such positive observations as “collectivization of agriculture will lead to mass starvation.”¹³⁶ If observations virtually amount to normative judgments, perhaps they should be set forth as such.¹³⁷ This would tend to encourage the presentation of full justifi-

¹³¹ Id. 6.
¹³³ Id. 112-13. See also Posner 4-5.
¹³⁴ Id. 5.
¹³⁵ See, e.g., id. 85, 129, 186, 271.
¹³⁶ Paraphrasing from an Address by Ronald Coase, Economists and Public Policy, U.C.L.A. Graduate School of Management, March 7, 1974.
¹³⁷ As examples, are the following merely nonnormative, positivist assertions? The analyses of “the outlawing of efficient but sometimes (or often) oppressive methods
cation for the implicit judgments, or at least a statement of competing considerations and points of view, including those that reach beyond descriptions and predictions about effects on efficiency and the pattern (as opposed to the fairness of the pattern) of distribution. I am not so much saying that Posner should have gone further in either making or avoiding explicit normative judgments, as I am suggesting that he might have better prepared readers to reach their own. He might, for example, have paid much more attention than he has to considerations of fairness, and the sorts of tensions that often exist between these and those of efficiency. He does not ignore such considerations entirely, but in my view he has hardly taken them into account as masterfully as have others—Calabresi in particular. Calabresi's great success has come in showing the interplay between fairness and efficiency, in illustrating how difficult that interplay can make the matter of ultimate choice, and in both helping prepare his readers for and leaving to them those final decisions. Posner strikes me as providing too little help, and as too often leaving the impression that the final choice is no choice at all.

Perhaps this is of especial concern inasmuch as Posner has made the strategic decision not "to explore the limitations of economic analysis, as both an interpretive and a normative tool. I have not," he explains, "emphasized these limitations in the text, in part to provoke student and instructor to challenge it by formulating and arguing those limitations. I predict that students will undertake the task with relish." But will they do so with rigor? Economics is a difficult technical discipline,

of enforcing debts" and of housing-code enforcement "support a general point that should be in the forefront of concern to a generation of socially conscious law students: the use of liability rules or other legal sanctions to redistribute income from wealthy to poor is likely to miscarry. . . . The result may be a capricious redistribution of income and wealth within the class of poor people themselves and an overall reduction in their welfare." POSNER 263. Or, on the subject of a quota system to enforce laws against discrimination in employment: "The problem of remedy becomes acute if the law is interpreted to require that the employer have some minimum number or percentage of black employees regardless of whether he or his white employees have been guilty of discrimination. To comply, the employer must lay off workers or, what amounts to the same thing, favor black over white job applicants for as long a period of time as is necessary to attain the quota. In either case white employees untainted by discrimination are made to bear a high cost in order to improve the condition of black workers. The result is a capricious and regressive tax on the working class." Id. 306.


Id. xi.
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not easily subject to casual criticism. Even the criticisms of some of its professionally trained practitioners seem rather unconvincing. I suspect that Posner could have done an excellent job in setting out and, where appropriate, destroying arguments and assertions having to do with the limitations of economic analysis. At the least, I am sure he could have done better than many users of his book. It seems almost unfair that he did not take on the task (if not the responsibility), especially if one agrees that "the value and meaningfulness of any analytical tool or principle are a function of both its strengths and weaknesses."141

V

I said earlier that some consideration of why and how economics has come into the law school might aid in concluding this review with an attempt to put Economic Analysis of Law into a larger perspective. I turn to that effort now.

My speculations about the evolution of law-and-economics suggested the nature of the need for a book on the subject and thus, hopefully, helped us to understand and assess the purposes and design of Posner’s product. They should have suggested, too, that law-and-economics has become a field of itself, but one still in fairly early stages of development—of

140 This particular assertion is based on O’Connell, Book Review, 1973 U. ILL. L.F. 604, reviewing B. Ward, What’s Wrong with Economics? (1972). In fairness to Prof. Ward, I should add that I have not studied her book.

141 Samuels, The Coase Theorem and the Study of Law and Economics, 14 NAT. RES. J. 1, 32 (1974). A related point has to do with Posner’s choice of literature. It is no great secret that there are “schools” of thought in economics, nor does it come as a surprise that most of the literature Posner has relied upon represents work of the so-called Chicago School, which is characterized by a rather skeptical view of the general merits of government intervention in the marketplace. Other schools of thought exist, and that Posner (or I) might happen to disagree with them does not mean he should not have exposed their views, if only to reveal their weaknesses. Perhaps this follows all the more if one agrees with Posner that it is in the highly competitive marketplace of ideas that the “truth” of ideas is determined. Posner 309. If the reply is that Posner is, consistent with this view, simply presenting his set of competing ideas, I would argue that approach is inconsistent with the functions of a textbook. On this point, see my discussion in Part V of this review, infra.

142 One can easily find other, perhaps more concrete evidence of the stature of law-and-economics as an independent field of study. Consider, for example, the Journal of Legal Studies, a first-rate legal periodical inspired (so far as I know) and edited by Posner, and published by the University of Chicago Law School. The Journal was first published in 1972; to date most of its pages, though not all, have been devoted to law-and-economics as compared to any other hyphenated concern, and probably as compared to all of them. The Journal of Law and Economics, also published by the University of Chicago Law School, appeared in 1958. It was edited first by Aaron Director, and then (and now) by Ronald Coase, both economists at the University of Chicago Law School. The Journal’s birthdate might suggest that law-and-economics is somewhat more mature than the discussion in the text would indicate, but my impression is that
elaboration, expansion, and refinement. In this light, might it be that despite the need, law-and-economics is not yet a field of inquiry ripe enough for fruitful textual exposition—the sort of exposition Posner has undertaken?

Textbooks as we ordinarily think of them are the culmination of a communal experience in scholarship; a sign of the emergence of widely held, basic agreement and understanding among the community of scholars. They succeed as concise and systematic treatments of basic principles precisely because, over a long course, that agreement and understanding have developed.\textsuperscript{143} I doubt that we are today at that point in economic analysis of law. The field is still too new, too rich in points of view, too little plowed in many areas, to enjoy the harmony and confidence in ideas upon which a broad text in the true sense depends.\textsuperscript{144} It may be for reasons such as these that in developing areas of inquiry we often see the book of readings—the collection of excerpts from the literature—precede the text.

Posner considered such a collection, but decided not to pursue it.\textsuperscript{145} Perhaps it would have been better, at this juncture, to have done otherwise. A book of readings, heavily supplemented by what I am sure would have been his own excellent textual discussion and questions, might have had several advantages. It could have revealed the existence of real debates over basic principle, rather than implying—as texts almost always do—their resolution by ultimately choosing a point of view.\textsuperscript{146} It could have examined analyses in depth and detail for some years, but not now, the \textit{Journal} was of primary interest only to economists and but a small handful of legal scholars.

As further evidence of the stature of law-and-economics as a separate discipline, consider such systematic efforts to teach economics to law professors as that organized by Prof. Henry Manne, described in Editorial, \textit{Economics Anyone?}, Wall St. J., June 24, 1971, at 8, col. 1; McDowell, \textit{Bringing Law Profs Up to Date on Economics}, \textit{id.}, July 23, 1973, at 8, col. 3; Bender, \textit{Lawyers and Economics}, N.Y. Times, July 11, 1971, § 3, at 1, col. 3. Finally, note that several legal scholars are beginning to apply economic analysis to law in such a manner as to cut across substantive areas. That is, a single writer produces one or a series of works treating various pockets of law uniformly from the economic perspective. This indicates that the "field" of the author is law-and-economics, not torts, contracts, etc. Posner's work—both his book and a series of earlier articles that ranged from torts to judicial administration—are the outstanding examples here.

\textsuperscript{143} Cf. T. \textit{KUHN}, \textit{THE STRUCTURE OF SCIENTIFIC REVOLUTIONS} 136-37, 144 (2d ed. 1970).

\textsuperscript{144} See \textit{id.} 165. For apparent agreement with my point of view, see Samuels, \textit{supra} note 141, at 32, suggesting that the field of law-and-economics has yet to generate its "own paradigms"—basic, widely held points of view.

\textsuperscript{145} Posner ix.

\textsuperscript{146} To cite just one example of such an implication, Posner summarizes the central insights of Prof. Ronald Coase's important article, \textit{The Problem of Social Cost}, 3 \textit{J. LAW \\& ECON.} 1 (1960), and adds one qualification developed by E. J. Mishan and having to do with the fact that the wealth effect of an initial assignment of rights might alter
by setting out quite fully the literature expounding them, rather than textually summarizing them so as almost necessarily to hide tensions, assumptions, and qualifications. The very selection of readings could have served to highlight the field's important gaps, gaps that can be too easily obscured by a broad but not always probing textual treatment. In the course of all the above, it could have suggested at least implicitly some of the limitations of economic theory. In sum, a book of readings could have displayed, in a way texts almost never do, the course of discovery, disagreement, and (where it exists) consensus that mark the development of a field—an important service in the case of a field still so much in its early stages. With such a book, the reader "has constantly before him a number of competing and incommensurable solutions . . . , solutions that he must ultimately evaluate for himself." The text can too easily imply that evaluation is unnecessary, that matters are settled when in fact they are not.

Law-and-economics is hardly a subject to be taken lightly. Economics is, as already mentioned, technical and difficult. At the same time it is—and Posner demonstrates this time and again—an exceedingly powerful tool of analysis, and one that can have heavy impact on important questions of legal policy. To take just one example, Professor Ackerman's recent article on the regulation of slum housing employed economic analysis to refute the commonly held idea that vigorous code enforcement will generally work to the detriment of slum tenants by reducing the supply of housing and raising rents. In Robinson v. Diamond Housing Corp., the Court of Appeals for the District of Columbia relied on the article's analysis. Of the adverse effect on the poor mentioned above, it said:

[T]he most recent scholarship on the subject indicates this danger is largely imagined. In fact, it appears that vigorous code enforcement plays little or no role in the decrease in low-cost housing stock. When code enforcement is seriously pursued, market forces gen-

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147 See T. Kuhn, supra note 143, at 137-38.
148 Id. 165.
149 Ackerman, Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy, 80 YALE L.J. 1093 (1971).
erally prevent landlords from passing on their increased costs through rent increases.\textsuperscript{151}

Yet a rebuttal to Ackerman, published after \textit{Robinson}, concluded that "his analysis is basically flawed and his conclusions suspect."\textsuperscript{152} His "conception of the housing market may be substantially erroneous and the effects of decisions based upon this conception may differ materially from those expected. It is important that the legal community be aware that not all recent scholarship can portray so manageable a housing market."\textsuperscript{153}

The author of the rebuttal goes on to make the point I want to leave here:

Economic analysis can make significant contributions to the legal literature. However, the complexity of the analysis and its unfamiliarity to many of the readers of legal journals require additional care on the part of the analyst. If the tools of economics are to realize their potential in the context of legal scholarship they must be carefully employed.\textsuperscript{154}

My purpose here is not to imply the resolution of the issue sketched above,\textsuperscript{155} but to illustrate the heavy sense of responsibility with which law-and-economics must be pursued. It could not be different with a set of tools at once so complex and powerful. The substantial dangers of misplaced analysis are not lessened by a text that might make matters seem more settled than they are. Analyzing legal problems with economic tools should often, I think, strike one as something like unravelling a sweater that grows larger the more yarn one pulls out. But too often Posner makes it appear that everything is unravelled with just a few tugs. For the most part his book is a triumph in demonstrating that economics can suggest better questions; my concern is that it overstates the existence of better answers.

It is mildly embarrassing for a reviewer to see that he has had criticism for a book he would well like to have been able to author himself. It is a rather graceless posture. It is also a quite typical one, however. We leave the good parts of books

\begin{footnotes}
\footnote{151} \textit{Id.} at 860 (citing Ackerman, supra note 149).
\footnote{152} Komesar, \textit{Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor}, 82 \textit{Yale L.J.} 1175, 1176 (1973). Komesar holds a law degree and doctorate in economics from the University of Chicago.
\footnote{153} \textit{Id.} 1176-77 & n.3. Posner also disagrees with Ackerman's analysis. \textit{Posner} 261-63.
\footnote{154} Komesar, \textit{supra} note 152, at 1177.
\footnote{155} The debate on the issue continues; for Ackerman's reply to Komesar, see \textit{More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar}, 82 \textit{Yale L.J.} 1194 (1973).
\end{footnotes}
pretty much to speak for themselves.\textsuperscript{156} There is a great deal that is good in \textit{Economic Analysis of Law}, a great deal that is excellent, and here it speaks well for itself indeed. Posner has vastly enriched our understanding of law-and-economics, not only with this book but with his prolific outpouring of articles. He has, I would venture, a mastery that many professional economists envy, and in number and quality his contributions have been remarkable. His book is no exception: it is an important landmark in the development of a new discipline. If that discipline were more fully developed in all the many areas Posner treats, perhaps the book could have better fulfilled what I have called its competing aims. But as things are today, I think we lack sufficient agreement on basic principles to consistently touch such breadth deeply, rigorously, and tersely. Thus, it may be that what many of my remarks come down to is simply that \textit{Economic Analysis of Law} is somewhat premature. But initial efforts often are, and it is worth remembering that without them the work that follows would almost always have begun on a less enlightened note.\textsuperscript{157}


\textsuperscript{157} In this regard, see Prof. Michelman's extensive reference to \textit{Economic Analysis of Law} in \textit{The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I}, 1973 Duke L.J. 1153 passim (1973).