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Mark M. Hager

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The Emperor's Clothes Are Not Efficient: Posner's Jurisprudence of Class

ARTICLES

THE EMPEROR'S CLOTHES ARE NOT EFFICIENT: POSNER'S JURISPRUDENCE OF CLASS*

MARK M. HAGER**

“The past isn't dead. It isn't even past.” William Faulkner

INTRODUCTION

People wonder how Judge Richard Posner writes so much. Though only at mid-career, Posner has produced more than a dozen books and well over a hundred articles. Part of the answer, apparently, is that Posner works incessantly and has few outside interests. The other part of the answer is that Posner's stuff is not that good.

To be sure, Posner's work is ambitious in scope and aspiration. At its best, it is also impressively critical, balanced, and multi-perspectival. Too often, however, Posner's thought is glib and shallow. His presentations cascade trippingly from issue to issue, seldom pausing to develop the complexities of any topic, or even the ramifications of his own best insights. Lapses in argument and deficiencies in knowledge show themselves throughout. These flaws, moreover, are not distributed randomly. On the contrary, they form a jurisprudence of zealous attack on challenges to private economic power.

These features manifest themselves in Posner's most recent book, provided there is not still another by the time this essay is published: *The Problems of Jurisprudence*.¹ In the space of less than five hundred

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** Associate Professor of Law, Washington College of Law, American University. B.A. Amherst College, 1977; M.A. Harvard University, 1982; J.D. Harvard Law School, 1983; Ph.D. Harvard University, 1990. I would like to thank James Boyle, Gerry Moohr, and Andy Lipsky for comments on earlier drafts.

1. R. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990) [hereinafter R. POSNER, *JURISPRUDENCE*].

pages, the book takes the reader on a whistle-stop tour of JurisprudeLand, from the ancient Greeks up through contemporary feminism and critical legal studies, with pit stops for “practical reason,”² “distributive justice,”³ and “scientific observation,”⁴ and side trips to view “ontological skepticism”⁵ and “interpretive theory.”⁶ The opening section, “A Short History of Jurisprudence,” exemplifies the way Posner likes to work, swooping from *Antigone* through Ronald Dworkin in only fifteen pages.⁷

Posner does provide some nice critical discussion along the way. He is sharp-eyed, for example, in unravelling Richard Epstein’s desperately-stitched quiltwork of Aristotelean corrective justice, libertarian property rights, utilitarianism, and socio-biology.⁸ Posner also highlights serious deficiencies in feminist “different voice” jurisprudence,⁹ though his implication that the “different voice” school exhausts the world of feminist jurisprudence is misleading. Posner also more cursorily points out difficulties in the more extravagant romantic communitarian strains of civic republicanism and critical legal studies, though again seems to mistake certain parts for the wholes.¹⁰ Much of Posner’s commentary is neither well-reasoned nor penetrating, although it is sometimes interesting and occasionally insightful. My own jurisprudential interests do not run strongly to many of the topics he takes up and I suspect that Posner’s don’t either. Posner’s current intent appears to be to establish himself as a broadly learned, conservative centrist jurist, appropriate perhaps for a Republican nomination to the Supreme Court. Perhaps because his reputation as an ideologue of the right could stand in the way of ascension to the Court, Posner goes to considerable lengths to disclaim identification as an ideologue of any sort.¹¹

2. See *id.* at 71-78 (analyzing how non-credulous observers form beliefs about law which cannot be verified by logic).

3. See *id.* at 334-38 (examining best means to agreed ends of Aristotle, Bruce Ackerman, Jürgen Habermas, Michael Walzer, and Richard Epstein).

4. See *id.* at 61-70 (reviewing use of scientific observation as method of inquiry).

5. See *id.* at 161-67 (outlining approaches to questions of existence).

6. See *id.* at 247-309 (comparing interpretive theories of common law, statutory law, and constitutional law).

7. *Id.* at 9-23.

8. See *id.* at 323-26 (outlining and critiquing Epstein’s argument in favor of expanding strict liability in tort law and citing Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 50 (1979) and Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974)); *id.* at 342-48 (discussing Epstein’s attempts to root law in combination of nature and utility and citing, e.g., Epstein, *Possession at the Root of Title*, 13 GA. L. REV. 1221 (1979)).

9. See *id.* at 404-13 (questioning coherence of feminist views on law as such, as distinct from heightened sensitivity to women’s issues).

10. See *id.* at 414-19 (highlighting difficulty of holding clear middle ground between liberal humanism and utopian communitarianism).

11. See *id.* at 32. Posner states:

Progressives would do well to think twice about a Bork-style campaign against Posner were he ever chosen. Although Posner's paper trail, with articles like "The Economics of The Baby Shortage,"¹² might make him a temptingly easy target, there are probably judges who would be much worse than Posner on many issues progressives hold dear. I see no reason to predict Posner would swing far to the right on many issues more often than would typical conservative centrist jurists. In fact, Posner's temperamental and intellectual contrariness might even take the form of some sharp progressive departures from conservative centrism.

There should be no mistake, however, about Posner's continuing allegiance to law and economics jurisprudence. Posner has labored long to extend economic metaphor into a wide range of issue areas, and though he disclaims any rigid viewpoint, he can be expected to maintain his efforts along these lines. Despite their apparent rigor, these excursions often lead to innocuous decision outcomes. In particular areas, however, Posner's law and economics sustains consistently regressive views and results. These are areas in which the nature and shape of economic institutions are most directly implicated: questions about the proper direction and control of economic power.

Little doubt exists that Posner will continue to stand for protecting and expanding the prerogatives of privately-owned productive wealth. The results of this viewpoint are devastating to social progress. In fact, I believe that the ideologies of private wealth are more damaging than any other feature of our social landscape because they place crippling limits on our capacities to remedy racism, sexism, health and education deficiencies, contempt for human rights, and environmental wastrelism. Yet the ideologies of private wealth are by far the most powerful and least questioned aspects of our ideological world. Because the sufferance for class-stratified private ownership is so total, little may be gained from keeping its zealous ideological champions, such as Judge Posner, off the Court. The incremental damage of his zealotry in this area should be weighed against the damage to various progressive interests which might be inflicted more heavily by other potential nominees than by Posner.

My position may seem boringly centrist, but it will provoke both the true centrists in the profession, who want very much to believe that law is autonomous and apolitical, and the political activists who want to move the law sharply to the left or to the right.

Id.

12. See Landes & Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 339 (1978) (arguing that "baby selling" should be regulated less stringently than it is at present).

With these considerations firmly in mind, I present here a critique of Posner's economic jurisprudence, in the course of commentary on *The Problems of Jurisprudence* and Posner's other work.¹³ It is worthwhile to explore Posnerian thought carefully, so as to undermine the plausibility of its ideologies, resurgent with the demise of party-state socialism.

I. JURISPRUDENCE WITHOUT FOUNDATIONS

As heirs to legal realism, adherents of the left-oriented critical legal studies school, the "crits," have long maintained that there is no distinct or correct legal way of analyzing and settling social issues.¹⁴ All legal disputes are social, moral, and political, driven by clashes of values and of interests.¹⁵ No legal—or for that matter, philosophical—methodology can remove such disputes to a separate plane and resolve them neutrally, without attending to and choosing among the values and interests at stake. The crits argue that we should focus intently on these clashing values and interests and ask ourselves directly how they should be weighted. Like the legal realists before them, the crits devote considerable energy to the critique of thought systems such as original intent, natural law, and neutral principles, which purport to wield some distinctive "legal" analysis that sidesteps the true value choices involved.¹⁶

In *The Problems of Jurisprudence*, Posner pitches his tent squarely in the crit camp. Posner debunks viewpoints which deny the element of active value-choice in legal decisionmaking. He emphatically rejects critiques of "judicial activism"¹⁷ and rebukes both "original meaning" constitutionalism¹⁸ and "formalism," which he usefully

13. W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987) [hereinafter W. LANDES & R. POSNER, *ECONOMIC STRUCTURE*]; R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986) [hereinafter R. POSNER, *ECONOMIC ANALYSIS*]; Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988 (1984) [hereinafter Posner, *Some Economics of Labor Law*]; R. POSNER, *THE ECONOMICS OF JUSTICE* (1981) [hereinafter R. POSNER, *JUSTICE*]; Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973) [hereinafter Posner, *Strict Liability*]; Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) [hereinafter Posner, *A Theory of Negligence*].

14. See Hutchinson & Monahan, *Law, Politics and the Critical Legal Scholars: The Unfolding Drama of Critical Legal Thought*, 36 STAN. L. REV. 199, 208-13 (1984) (examining reasoning by which critical legal scholars find discrete, doctrinal components, such as tort and constitutional law to be indeterminate and manipulable).

15. *Id.*; see also R. POSNER, *JURISPRUDENCE*, *supra* note 1, at 153 (maintaining that critical legal studies finds legal solutions indistinguishable from ethical or political ones).

16. See Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 567-602 (1983) (describing critical legal studies' critique of objectivism, formalism, and constructs that replace them).

17. See R. POSNER, *JURISPRUDENCE*, *supra* note 1, at 138-40 (setting forth his conception of optimal role of judges in implementing government policy).

18. See *id.* at 140-41 (stating that general principles in Constitution are "a compass, not a blueprint").

defines as the conception of law as a "system of relations among ideas rather than as a social practice."¹⁹ Posner implicitly and explicitly disparages the notions that there can be "autonomy of legal reasoning as a methodology of decision-making" and "objectivity"—meaning agreement as to correctness among people with differing values and interests—in legal outcomes.²⁰ A blind-folded crit hearing Posner's conclusion that "legal reasoning is not special" and "often does not yield determinate outcomes"²¹ could scarcely be blamed for thinking she was hearing one of her own.

Posner of course senses that he's flirting with some strange bedfellows, left-leaning legal realism and critical legal studies among them, but although having pitched his tent in their camp, he declines to curl up with them. Posner even amalgamates his viewpoint to legal realism, but emphasizes that his view is "shorn . . . of the left-of-center politics characteristic of that movement and its offspring."²² At no point, however, does Posner detail what he takes this "left-of-center politics" to embody or how or why he repudiates it. He seems to assume that rejecting something because it is "left-of-center" requires no further explanation or justification.²³

Although it is clear that Posner rejects left-of-center values, he does little to tell us which or why. We may assume that Posner sees left-of-center politics as frustrating to the realization of his own values. What those values are and how Posner thinks law must be arranged to achieve them, are explored below. Pausing to dwell, however, on Posner's brief but direct attacks on critical legal studies is revealing. In *The Problems of Jurisprudence* Posner asserts that:

Critical legal studies has not yet penetrated a single area of law, partly because of the confrontational, *épater les bourgeois* style of many of its practitioners, partly because its politics are extremely left-wing, but mainly because of its all-encompassing negativism about the possibility of either coherent doctrine or constructive reform. This negativism acts as a damper on useful proposals for changing or reconceptualizing legal doctrines.²⁴

Posner's point, apparently, is to explain why critical legal studies viewpoints are not significantly embodied in law. A common-sense

19. *Id.* at 454.

20. *Id.* at 454, 459-60.

21. *Id.* at 107.

22. *Id.* at xii.

23. Posner goes on to take some further swipes, trotting out the by-now-familiar and perfectly preposterous suggestion that crits are moral "nihilists." R. POSNER, JURISPRUDENCE, *supra* note 1, at 459. He also implies that because the crits are "left-wing," they must also be "hostile to legal doctrine" as such, and also hostile to "logic." *Id.* at 441.

24. *Id.* at 441.

explanation is that few legal decisionmakers have read, or care to read, crit literature. Furthermore, the legal order as a whole is ideologically hostile to crit values. Posner, however, ignores these obvious explanations and offers three of his own, giving himself a somewhat gratuitous opportunity for crit-bashing: the crits' confrontational style; left-wing politics; and "negativism" about "coherent doctrine" and "constructive reform."²⁵

These three points are essentially one. While I have my own stylistic differences with some of the crits, I fail to see how they could be other than "confrontational" when faced with a legal order they see as systematically hostile to their deeply-held values. Posner disparages these values with the label "left-wing" without either explaining what the values are or offering reasons for rejecting them. He goes on to complain of "negativism," but again fails to acknowledge that the legal order's rejection of crit values and viewpoints might be precisely what causes crits to view that legal order negatively. Posner's corollary charge, that crits refuse to deal with "doctrine" or "constructive reform"²⁶ is simply untrue. One of the signal characteristics of crit literature is its painstaking attempt to create cogently-reformulated legal doctrines to embody crit values.²⁷ Of course, as long as the legal order repudiates these ideas, they are easily disparaged as not being "constructive," which justifies the refusal to take them seriously.

Posner dutifully acknowledges crit claims of the interweaving of law and politics, as he must, given the fact that he vigorously defends that very point. Nevertheless, he rebukes the crits on precisely this issue, asserting that he has "tried to show" that the crits exaggerate the political element in law, "large as that element is."²⁸ This is curious, however, because, while there are two places in the book where Posner attempts to show that crits exaggerate law's

25. R. POSNER, JURISPRUDENCE, *supra* note 1, at 441.

26. *Id.*

27. To illustrate the point, I cite a sampling of crit articles in the single field of labor law. See generally Raskin, Book Review, 42 HASTINGS L.J. 1067 (1991) (reviewing P. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990)); Hyde, *A Theory of Labor Legislation*, 38 BUFFALO L. REV. 383 (1990); Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990); Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789 (1989); Beer-mann and Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911 (1989); Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U.L. REV. 1 (1988); Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 614 (1988); Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889 (1991).

28. R. POSNER, JURISPRUDENCE, *supra* note 1, at 441.

political element, his overall argument is driven by the view that law and politics cannot be separated.

One passage where Posner purportedly refutes the critics is a response to an article by James Boyle, "The Anatomy of a Torts Class."²⁹ Boyle's article illustrates the non-objective, indeterminate, and therefore implicitly political character of legal decisions.³⁰ Posner seems to believe that by refuting Boyle on particular points, he will have debunked the thoroughgoing critic, law-is-politics position. Posner's characterizations and refutations of Boyle are obtuse in numerous respects, only two of which I will highlight.

Posner takes Boyle to task, first, for his illustrative discussion of *Vosburg v. Putney*, the classic tort case wherein one boy kicks another who, as a result of a preexisting injury at the spot of the kick, sustains an unforeseeably severe injury.³¹ Boyle emphasizes the indeterminate and therefore implicitly political nature of *Vosburg's* status as precedent.³² Depending on how the "rule" in *Vosburg* is articulated, the case carries strikingly different consequences, or lack of consequences, for future cases. As Boyle indicates, a broad interpretation of *Vosburg* would hold all people liable for all unforeseeable consequences of their acts.³³ This implies the elimination of tort immunity for children, lunatics, the blind, and other less capable individuals, and might vindicate a universal principle of strict liability. A narrow reading of *Vosburg*, on the other hand, suggests that if one child hits another after class has been called to order, a presumption may be strengthened that the act was intentional and that any injury is therefore compensable with damages.³⁴ Boyle's point is that the question whether and how to apply *Vosburg* in subsequent cases involves implicitly political choices, as to both the values embodied in the case itself and those that press for recognition in subsequent cases.³⁵ The "meaning" of *Vosburg*, therefore, emerges only through processes of political choice and will vary with future

29. Boyle, *The Anatomy of a Torts Class*, 34 AM. U.L. REV. 1003 (1985); see R. POSNER, JURISPRUDENCE, *supra* note 1, at 255-59.

30. Boyle, *supra* note 29, at 1019-22 (describing political underpinning of legal argument).

31. 80 Wis. 523, 50 N.W. 403 (1891); see R. POSNER, JURISPRUDENCE, *supra* note 1, at 255 (discussing case).

32. See Boyle, *supra* note 29, at 1018-19 (finding purely legal analysis of decision in *Vosburg* inadequate).

33. See *id.* at 1054 (describing generation of both broad and narrow rules from same case as technique to serve any side of argument).

34. *Id.*

35. See *id.* at 1019 (contrasting outcome in *Vosburg* with failure to find liability in *Harley v. Eddingfield*, 156 Ind. 416, 59 N.E. 1058 (1901), where defendant physician refused to treat dying patient).

changes. This is true even where decisionmakers do not *experience* their choices as “political.”

Stuff and nonsense, says Posner. Boyle overlooks the fact that a definitive “thin skull” rule “has actually emerged from *Vosburg*” and “has been confirmed in hundreds of cases.”³⁶ The law is not indeterminate and inherently political, argues Posner. After all, judges use *Vosburg* as a legal rule every day. Boyle’s point, however, is not that legal rules do not emerge or constrain judges’ decisions. On the contrary, his point is that the accepted interpretations of a case emerge through a political process which involves ongoing choice, and are not determined in the future by the purely “legal” information extant at the outset of the process.³⁷

Posner’s second criticism of Boyle is as obtuse as the first. Here, Posner challenges Boyle’s discussion of the perennial rule/standard conundrum: whether to treat comparable cases similarly, so as to promote certainty and equality, or to distinguish them and accord different treatments, so as to effectuate particularized justice.³⁸ Boyle uses this conundrum to illustrate the ubiquity of indeterminacy and political choice in the law.³⁹ Posner rebukes Boyle for ignoring the scholarly literature that identifies the trade-offs between rules and standards. According to Posner, making these trade-offs involves “a process of reasoning and not, as Boyle appears to believe, a merely whimsical or ideological choice.”⁴⁰ Nowhere does Boyle deny, however, that rule/standard choices entail a species of reasoning, or that such reasoning is informed by legal materials. Boyle’s point, rather, is that legal materials do not provide determinative answers or methodology, but instead supply political considerations that are weighed in a political, but simultaneous “legal” process.⁴¹ Nowhere does Boyle suggest that these processes are in the least bit “whimsical.”

Posner’s other refute-the-crits passage⁴² is comparable in quality to the first, but is somewhat more revealing of the value dichotomy

36. R. POSNER, JURISPRUDENCE, *supra* note 1, at 255-56.

37. See Boyle, *supra* note 29, at 1034-46 (observing that classical legal doctrines are objectified social theory). Boyle notes that each period in legal thought has rested its authority on some notion of neutrality; however, preferences for particular rules may have consequences which are decidedly not neutral, having disparate impacts, for example, based on race, gender, or income. Development of such preferences is a political process which cannot help but influence accepted interpretations of legal theory. *Id.*

38. R. POSNER, JURISPRUDENCE, *supra* note 1, at 256.

39. See Boyle, *supra* note 29, at 1007-09 (describing contradictory views of law—one, that law is settled body of rules; the other, that law is “manipulable, grab bag of arguments”).

40. R. POSNER, JURISPRUDENCE, *supra* note 1, at 256.

41. See Boyle, *supra* note 29, at 1023-24 (suggesting impact on individuals of public and private laws depends on political choices with distributive consequences).

42. R. POSNER, JURISPRUDENCE, *supra* note 1, at 153-57.

he discerns between the crits and himself. Posner here characterizes the crit position as the view that "all law is politics in a narrow and disreputable sense and right-wing politics at that."⁴³ This statement is merely a caricature of actual crit positions. Posner is closer to the mark when he writes that crits view the legal order as "permeated by class bias" so as to be "subtly tilted in favor of the upper class."⁴⁴ Maybe this view of law is accurate, maybe it isn't, Posner indicates; but in any case, the crits fail to explain normatively why legal tilt in favor of the upper classes is "more disreputable" than tilt in favor of the downtrodden.⁴⁵ Posner is correct that crits by and large do not explain why legal tilt favoring the "haves" is bad. One might have thought this does not need much elucidation, but Posner implies a different view of the matter—bias toward the upper class may be good.⁴⁶ He hints elsewhere that there is nothing wrong with laws shaped by the interest of "dominant groups in society" because such laws may protect the interests of those who do not belong to the dominant classes.⁴⁷ This may be true sometimes, but Posner completely ignores the contrary possibility that laws shaped in the interests of dominant classes often frustrate the interests of those who do not belong. Posner seems untroubled by this latter possibility and is therefore doubly susceptible to legal and economic arguments favoring the interests of private productive wealth.

Because legal reasoning can attain neither autonomy nor objectivity, Posner holds that legal practitioners and decisionmakers must embrace a "jurisprudence without foundations."⁴⁸ This theory acknowledges the absence of any normative authority beyond the value and interest clashes constituting actual social and legal disputes. Posner does little, however, to define or describe "jurisprudence without foundations." To Posner, his "jurisprudence" is "pragmatist"⁴⁹ or "pragmatic,"⁵⁰ deploying "practical reason," which he explains as a "grab bag of informal methods of reasoning"⁵¹ and "an unstable class of disparate reasoning methods."⁵² Posner defines practical reason as "setting a goal . . . and choosing

43. *Id.* at 153.

44. R. POSNER, JURISPRUDENCE, *supra* note 1, at 153.

45. *Id.*

46. *See id.* (wondering why justice that favors upper class is thought to be worse than justice that favors lower class).

47. *See id.* at 127 (examining legitimacy of adjudication); *see also id.* at 319 (positing that dominant public opinion may promote justice).

48. *Id.* at 421.

49. *Id.* at 454.

50. *Id.* at 423.

51. *Id.* at 455.

52. *Id.* at 86.

the means best suited to reaching it.”⁵³ These formulas, however, do little more than convey the rhetorical impression that Posner stands for a jurisprudence that is scrupulously non-ideological.

Posner also reiterates paeans to economic analyses of law, which he clearly means to characterize as non-ideological. Posner explains the value—“wealth maximization”—he feels law and the economic analysis of law properly promotes. This value and its concomitant analytical methods and conclusions play a major role in his “non-ideological” practical reason.⁵⁴ If, however, wealth maximization is the goal which practical reason, by means/ends rationality, should strive to realize, there is ample reason for alarm over Posner’s “jurisprudence without foundations.”

II. WEALTH DISTRIBUTION AND WEALTH MAXIMIZATION

Although he accedes to the notion that legal reasoning lacks autonomy and objectivity, Posner characterizes economics as a science.⁵⁵ This implies that economic reasoning *can*, at least potentially, attain autonomy and objectivity. In several passages, Posner hints that economic analysis provides legal decisionmakers an escape from the world of value clash and controversy into a realm of clear answers and value-neutral conclusions.⁵⁶

One representative passage emanates from Posner’s contention, which he has made before, that the common law is best understood as an ongoing quest for wealth maximization. The dominant common law doctrines, Posner believes, are those most conducive to wealth maximization.⁵⁷ To understand this, he argues, is to grasp how the common law can embody both autonomy and objectivity, virtues attainable under no alternative approach:

Besides generating both predictions and prescriptions, the economic approach enables the common law to be reconceived in simple, coherent terms and to be applied more objectively than traditional lawyers would think possible. From the premise that the common law does and should seek to maximize society’s wealth, the economic analyst can deduce in logical—if you will,

53. *Id.* at 71.

54. R. POSNER, JURISPRUDENCE, *supra* note 1, at 423.

55. *See id.* at 63 (noting that while law cannot be considered scientific and will not be for some time, economics, including economic analysis of law, is science).

56. *See, e.g., id.* at 106-07 (commenting on economic reasoning’s inroads into law); *id.* at 360-62 (characterizing economic analysis as empirically verifiable); *id.* at 372 (stating economic analysis provides judges with “comfortable” and “socially useful” guide for deciding cases).

57. *See id.* at 360 (arguing that common law tends to become more efficient since efficient decisions involve lesser social costs than inefficient ones).

formalist—fashion (economic theory is formulated nowadays largely in mathematical terms) the set of legal doctrines that will express and perfect the inner nature of the common law, and can compare these doctrines with the actual doctrines of common law. After translating from the economic vocabulary back into the legal one, the analyst will find that most of the actual doctrines are tolerable approximations to the implications of economic theory and are formalistically valid. Where there are discrepancies, the path to reform is clear—yet the judge who takes the path cannot be accused of making rather than finding law, for he is merely contributing to the program of realizing the essential nature of the common law.⁵⁸

Posner's claims for law and economics contrast with his attacks on all legal aspirations toward autonomy and objectivity. Although logically inconsistent, Posner's presentation is rhetorically seductive. It may appeal mightily to those of power and sophistication, who manifest skepticism and embarrassment in the presence of "moral" arguments but engage themselves comfortably with the hard-headed "economic" aspect of issues. People of this stripe, who are often quick in their ascents toward power, typically find Posnerian approaches and conclusions most convincing. On the other hand, people of the opposite sensibility often find themselves frozen in the face of Posner-style economic arguments. Progressive scholars and activists typically suffer from an almost math-anxiety aversion to economics, yielding an insidious syndrome of self-doubt—the feeling that though progressive values are worthy and good, the real world of economic analysis tells us that such worthy values are not attainable. The progressives may have all the right values, but the conservatives have all the sound economic arguments. This syndrome is reinforced by the recent developments in Eastern Europe, which have been widely interpreted as reflecting the failure of socialism and the success of capitalism.⁵⁹ It is therefore crucial for progressives to look in detail at the economic arguments of someone like Posner, so as to comprehend their monumental hollowness.

A good example of Posner's economic analysis is a passage where

58. *Id.* at 361.

59. *See, e.g.*, L.A. Times, July 26, 1991, at 1, col. 5 (detailing President Mikhail Gorbachev's urging of Soviet Communist Party to abandon "ossified dogmas" of Marxist ideology and recognize failure of Soviet socialism); Wash. Times, July 1, 1991, at C4, col. 1 (quoting All-Union Center for Public Opinion survey of Soviet Union revealing minimal support for socialism and inverse relationship between support for socialism and level of education); Fukuyama, *The End of History?*, THE NAT'L INTEREST, Summer 1989, at 3 (arguing Western liberal democracy is final form of humane government and end-point of mankind's ideological evolution).

he defends his contention that the common law has long been dominated by a norm of efficiency. Posner argues that cases decided mistakenly from the standpoint of efficiency tend to generate more pressure for judicial or legislative reversal than do decisions decided "correctly" by efficiency standards. Hence, over time, efficiency-producing doctrines will prevail over alternatives.⁶⁰ One might ask, however, how it is that "inefficient" doctrines generate greater pressure for reversal than "efficient" ones. According to Posner, the losers in cases adopting "inefficient" rules lose more than do the losers in cases applying "efficient" rules. Application of "inefficient" rules, therefore, results in greater pressure for and probability of reversal.⁶¹

Posner's model realistically posits that strong, organized pressure on behalf of interests plays a key role in legal evolution. Posner's conclusion is unconvincing, however, because it fails to consider how disparities in wealth distribution affect the evolutionary process. When legal rules are determined, losers with less money are less likely to challenge them successfully than losers with more money, regardless of whether the challenged rule is "efficient" or "inefficient." The law's evolution will thus tend to favor wealthier interests over less wealthy, efficiency notwithstanding. Without first establishing a high degree of economic equality, therefore, it is impossible to sustain any strong assertion as to the law's proclivity toward efficiency. Despite this, economic equality is a legal goal which Posner emphatically repudiates.⁶²

Posner supplements his first argument with another. Cases litigated under inefficient rules, he argues, typically involve larger stakes than those litigated under efficient rules and are therefore more likely to be litigated fully rather than settled. This offers more chance for judicial reversal.⁶³ This argument is dubious, however, in at least two respects. First, Posner fails to explain why litigants in high-stakes cases are less likely to settle. In fact, precisely because the stakes are so high, the parties in such cases might be more likely to settle, rather than gamble all-or-nothing. More fundamentally, Posner fails to explain convincingly why he thinks that litigation under inefficient doctrines tends to involve higher stakes than litigation under efficient doctrines.

Posner does indicate that inefficient rules, by definition, generate

60. R. POSNER, JURISPRUDENCE, *supra* note 1, at 360.

61. *Id.*

62. *See id.* at 382 (stating each individual has no moral entitlement to share of world's wealth proportional to his or her contribution to it).

63. *Id.* at 360.

social waste.⁶⁴ I fail to see, however, why rules which generate social waste must also create higher-stakes disputes. Rather, the size of disputes seems to depend more on distributions of given sums of economic advantage and disadvantage among few or many potential litigants. For example, if the advantage of a particular inefficient doctrine is distributed on one side among a few entities, while the disadvantage is distributed on the other side among many, potential challengers would on average have less at stake than potential defenders of the existing doctrine. Under such conditions, the inefficient rule may be self-perpetuating. Perhaps Posner assumes an even spread of advantages and disadvantages, so that the average losers have more incentive to challenge inefficient rules than to challenge efficient ones. This assumption, however, merely converts Posner's second argument back into his first, with the obvious defect, highlighted above, of ignoring wealth distributions.

Ignoring wealth distribution issues is in fact the hallmark of Posner's economic jurisprudence. This is not to say that he never addresses himself to such issues. He exhibits, however, a curious and telling inability to sustain any confrontation with them. This inability has a twofold manifestation: first, Posner cannot seem to take wealth distribution seriously as a *moral* issue; and second, he repeatedly omits consideration of distributional factors relevant to his efficiency analyses and conclusions.

The first deficiency is well highlighted in a section of *The Problems of Jurisprudence* entitled "Distributive Justice."⁶⁵ One might expect that a section so titled would articulate and defend some conception of fair distributions in social wealth. Instead, Posner offers critiques of two legal philosophies of distributive justice: Bruce Ackerman's egalitarianism and Richard Epstein's anti-redistributionist libertarianism. Posner's criticisms, however, distance him from the entire problem.

Posner finds fault, on several grounds, with Epstein's position that the redistributive use of governmental regulatory, taxing, and spending authority violates the natural rights of those whose wealth is diminished. Posner first points out the practical difficulty of distinguishing illegitimate redistributive government action from legitimate non-redistributive action.⁶⁶ In addition to this practical objection, Posner further questions whether Epstein's anti-redistributionist stance is right in principle. Posner suggests that there

64. *Id.*

65. R. POSNER, *JURISPRUDENCE*, *supra* note 1, at 334-48.

66. *Id.* at 344.

may be valid and sound reasons for redistributive government. First, he says, if we “[s]uppose that because of malice or envy poor people find rich people deeply offensive,” we could conclude that the rich, because of the mere fact of their riches, are “hurting” the poor. If so, wealth redistribution might be justified as a means of “correcting negative externalities.”⁶⁷ Posner also argues that wealth redistribution may be warranted to head off revolution or violence by the “have-nots.” Because “envy and restlessness” among the poor are “brute facts,” according to Posner, redistribution of wealth may be needed precisely in order to protect unequal wealth.⁶⁸

Posner may view his critique of Epstein’s fanatic anti-redistributionism as an index of his own pragmatism, centrism, and non-radicalism. Posner’s “defense” of redistributive government, however, has a surreal and disturbing cast. He does not even mention, much less evaluate, any suggestion that redistribution may be morally desirable or mandatory because there are people in our midst with intolerable living conditions. It seems almost unimaginable that Posner could address the simple notion that the riches of some might be causally linked to the poverty of others, a circumstance which might raise discomfiting questions.

An inquiry which declines even to raise such issues cannot be considered a serious commentary on distributive justice. The disturbing character of Posner’s discussion goes beyond this, however. His defenses of redistribution focus on “envy” among the poor.⁶⁹ It is tendentious to characterize resentments among the poor as envy rather than as the products of victimization by injustice. His focus on envy, moreover, identifies the problem as a defective state of mind among the poor, rather than as the social order which perpetuates poverty and yields such a state of mind. Posner seems to defend redistribution, yet readers who accept his premises will easily conclude that envy is a moral flaw among the poor for which a response of redistribution is not warranted. Though Posner hints that his position may make him a defender of the “modern welfare state,”⁷⁰ the welfare state is better off without his kind of friendship.

Posner’s critique of Ackerman’s argument that justice demands

67. R. POSNER, JURISPRUDENCE, *supra* note 1, at 344.

68. *Id.*

69. *Id.*

70. *See id.* (defending redistribution as means for wealthy to protect their personal property against violence or trespass by poor).

essentially egalitarian income patterns⁷¹ also illustrates his discomfort with the moral dimensions of wealth distribution. Posner labels Ackerman's preference for equal distribution "arbitrary," as if this label alone rebuts the moral claim of egalitarianism.⁷² Posner simply cannot confront the actual nature of Ackerman's egalitarianism as a *moral value*. To do so would require some answer to the moral claim posed; Posner's dismissal of the claim as arbitrary facilitates evasion. Posner quarrels with Ackerman's notion that wealth is a form of social power which warrants equal distribution for the same reasons the power to vote is equally distributed.⁷³ He offers no reason, however, why wealth should *not* be analyzed as a species of social power. Posner quickly terminates his discussion of distributive justice, apparently concluding that justice or injustice is not attributable to any pattern of wealth distribution. "Distributive justice seems quite hopeless . . .," Posner writes.⁷⁴ He also indicates that he has no objection in principle to forcible wealth redistribution.⁷⁵ Posner's failure to address the fundamental issues of distributive justice suggests that it is he, not the critics, who could rightly be reproached as a moral nihilist.⁷⁶

There is more, however, to Posner's position on wealth distribution than this apparent agnosticism. In *The Problems of Jurisprudence*, as in previous works, Posner emphasizes the difference between wealth maximization, which seeks to maximize "wealth," and utilitarianism, which seeks to maximize utility or happiness.⁷⁷ In a utilitarian world, a legal decisionmaker is supposed to seek to maximize the net additive sum of happiness over unhappiness.⁷⁸ The desire for happiness of each person affected is legitimately counted in the decision. This egalitarian treatment of all affected persons contributes to whatever moral plausibility utilitarianism may have. The norm of wealth maximization, however, does not carry this egalita-

71. *Id.* at 336-37 (examining B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980)).

72. *Id.* at 337.

73. R. POSNER, *JURISPRUDENCE*, *supra* note 1, at 337 (disputing Ackerman's contention that individuals must make equal sacrifice of their rights).

74. *Id.* at 460.

75. *See id.* at 381 (stating that "[i]f redistribution is desirable, some involuntary redistribution may be justifiable, depending on the costs, of course, but not on the principle of the thing").

76. *See id.* at 459 (criticizing legal nihilism as no more tenable than moral realism or legal formalism).

77. *See id.* at 391 (arguing that what most judges believe to be utilitarianism is probably wealth-maximization); R. POSNER, *JUSTICE*, *supra* note 13, at 48-81 (developing concept of justice based on wealth maximization, not utility maximization).

78. *See* R. POSNER, *JURISPRUDENCE*, *supra* note 1, at 346 (discussing Epstein's marriage of utilitarianism and libertarianism).

rian thrust. Posner defines the wealth which is to be maximized as, roughly, willingness and ability to pay. Hence when legal decisionmakers proceed under a norm of wealth maximization, they should weigh the interests of the affected parties only insofar as those parties are willing and able to pay for the goods at stake.⁷⁹

Many legal disputes can be described as contests over which party has the superior claim of "entitlement" as to the values or goods at stake. Wealth should be maximized in resolving such disputes, Posner argues, by assigning each entitlement to whatever party is most willing and able to pay for it. The straightforward implication of this argument is that under wealth maximization the interests of the wealthy count for more than the interests of the poor in legal decisionmaking. Posner is in no way abashed about acknowledging this point. A person who wants or needs a good very badly but is "unwilling or unable" to pay for it, "perhaps because he is destitute," simply does not count in a jurisprudence of wealth maximization.⁸⁰ As Posner vividly puts it, "[a]nother implication of the wealth-maximization approach, however, is that people who lack sufficient earning power to support even a minimum decent standard of living are entitled to no say in the allocation of resources unless they are part of the utility function of someone who has wealth."⁸¹

Utilitarianism, like Posner's jurisprudence, often works from the notion that goods should go to those who value them most. The passage quoted above reveals, however, the crucial difference between Posner's and the utilitarian's view of what it means to say that someone "values" a good. This difference is between value as "utility"—how much good something will do for someone—and value as "wealth"—how much someone is willing/able to pay for something. The law should seek to maximize wealth, Posner argues, not utility.

Posner uses this distinction between utility and wealth to attack the classic utilitarian argument in favor of wealth redistribution from wealthy to poor. The utilitarian argument assumes that the marginal utility one draws from a given sum of wealth diminishes the more wealth one has.⁸² Restating this argument in homespun terms, one hundred dollars means far more to a pauper than to a millionaire. There is a net gain in utility, therefore, if the hundred

79. See *id.* at 357 (distinguishing wealth maximization from utilitarianism).

80. R. POSNER, *JUSTICE*, *supra* note 13, at 61 (defining "value" in terms of willingness to pay, not happiness derived); see R. POSNER, *JURISPRUDENCE*, *supra* note 1, at 357 (noting that desire or need without ability to pay has no standing).

81. R. POSNER, *JUSTICE*, *supra* note 13, at 76.

82. See W. JERONS, *THE THEORY OF POLITICAL ECONOMY* 39-49 (1911) (echoing Jeremy Bentham's calculus of pleasure and pain in developing theory of consumption of wealth).

dollars, and many hundreds more, are taken from the millionaire and given to the (former) pauper. Posner rejects this utilitarian argument for wealth transfers because, although such transfers may augment utility, they do not augment wealth.⁸³ His norm of wealth maximization, therefore, requires that he oppose them.

Posner's conception of wealth maximization may favor an upward rather than downward redistribution of wealth. According to Posner, legal decisions should seek to maximize wealth, defined as willingness and ability to pay. It follows, therefore, that decisions and the rules established by them should favor the parties most willing and able to pay for the goods at stake. The surreal twist is that the parties most willing or able to pay for the goods at stake get them by virtue of Posner's method without *actually* having to pay for them. There is no one to whom payment can be made, since the issue is who should have the goods in question to start with.

The internal incoherence of such a decisionmaking method is explored further below. Meanwhile, however, we do well to focus on the dynamic consequences of Posner's approach. Parties favored by legal decisions gain wealth by virtue of those decisions as compared with disfavored parties. Hence, those favored by past decisions will also be favored in future ones, precisely because they have more wealth and thus a higher willingness/ability to pay. The wealth maximization norm, therefore, creates an order in which legal rules and wealth are continually distributed more and more in favor of the wealthy. This process could conceivably continue until one person owned everything, the law having given it to him because he was most able to pay for it, even though he did not actually have to pay for things because the law gave them to him. Justice maximized! Posner is himself intrigued by this scenario. He acknowledges that ownership of all goods by one person would not violate the norm of wealth maximization.⁸⁴ In this light Posner modestly admits that wealth maximization looks like a "truncated concept of justice."⁸⁵ No kidding. The problem, however, is that Posner refuses to acknowledge the force of any principle of distributive justice which might check the skewed wealth patterns likely to emerge from his jurisprudential methodology.

How does Posner not deem it monstrous to disparage the interests of parties unable to pay? His answer is that the law is right to

83. See R. POSNER, JURISPRUDENCE, *supra* note 1, at 391 (proposing that under utilitarianism, thief ought to be able to defend himself on ground that he derived greater pleasure from stolen item than pain suffered by owner).

84. *Id.* at 375.

85. *Id.*

favor people in accordance with their productivity. The wealthy are more productive and have therefore conferred more benefit on society than the poor, hence meriting society's reward. The poor are poor because they are not productive.⁸⁶

This line of thought ignores a multitude of considerations. First, it ignores the moral problems which arise when one asks why the wealthy are more productive than the poor—perhaps because the wealthy have more wealth. Second, it presumes that the wealthy *are* the more productive because they would not be wealthier were they not more productive. While there may be correlations between increased productivity and increased wealth, there are strong reasons to doubt that wealth ownership is a good general index of productivity. Too many extra-legal non-productivity factors such as racism, sexism, luck, inheritance, education, integrity, generosity, greed, and unscrupulousness can affect wealth levels. Although Posner acknowledges some of these problems, this does not seem to dampen his enthusiasm for the wealth maximization approach.⁸⁷

Less obvious, though nonetheless critical, are the ways in which legal rules themselves favor the accumulation of wealth in some hands and not in others. A party's wealth reflects not only its productivity but also the degree to which the legal regime has favored its interests. It is, in fact, a core tenet of Marxist economics that legal regimes allow some parties to accumulate wealth in disproportion to their own productivity by capturing the productivity of others.⁸⁸ Posner's method of basing legal rules explicitly on ability to pay provides an excellent opportunity for this to occur. While Posner might contend that the problem vanishes if legal favoritism is calibrated to real productivity, this does not resolve the problem if productivity is naively equated with wealth.

The wealth favoritism of Posner's jurisprudence is intrinsic, not incidental. It manifests itself throughout Posner's conception of the legal/political process. Posner treats the notion that legislation yields any true "public interest" with skepticism.⁸⁹ On the contrary, he maintains, legislation typically represents wealth transfers to or-

86. See R. POSNER, *JUSTICE*, *supra* note 13, at 81 (stating that in system of wealth maximization, distributional considerations are resolved without need for any just distribution of wealth).

87. See R. POSNER, *JURISPRUDENCE*, *supra* note 1, at 391-92 (conceding wealth maximization is not "pure ethic of productivity").

88. See F. ENGELS, *THE CONDITION OF THE WORKING CLASS IN ENGLAND* 317-24 (B. Blackwell 2d ed. 1971) (1st ed. 1845) (examining legal framework of capitalist oppression).

89. See R. POSNER, *JURISPRUDENCE*, *supra* note 1, at 354 (assuming legislators maximize their own satisfaction like everyone else).

ganized interest groups at the expense of the unorganized.⁹⁰ Posner betrays no misgivings over this situation, insisting that, among the various branches of government, distributive decisions are properly left for the legislature.⁹¹ He also offers no criticisms or suggestions for reform of an order in which the strong and well-organized can secure wealth transfers in their favor.

In Posner's world, the weak, poor, and unorganized—victims of the legislative cat fight—also find no solace in the courts. Posner sees the judge's role as essentially two-fold—the resolution of disputes in accord with the norm of wealth maximization, and the interpretation and enforcement of legislative decisions.⁹² These roles overlap, of course, insofar as legislative enactments govern routine legal disputes. Hence, in Posner's view, courts merely implement legislative distributional mandates within the norms of wealth maximization.⁹³ Posner's vision takes the minimalized "night watchman" state of classical capitalist libertarianism, as its utopian vision.⁹⁴ No hyperbole or satire could outdo Posner in manifesting the ideological proclivities progressives always fear from such a utopia.

III. DECISIONS, RULES, ENTITLEMENTS

Posner's argument that judges should resolve disputes so as to maximize wealth⁹⁵ contains multiple overlapping and interwoven incoherences. One trail into the swamp is to recall that Posner identifies wealth maximization with outcomes articulated by nineteenth-century common law doctrine, which he in turn equates with a *laissez-faire* market economy.⁹⁶ Posner's wealth maximization jurisprudence is therefore a dream of the unregulated market and an implicit reproach to latter-day departures from free-market common law wisdom.

Posner's anachronistic vision is remarkable for its utter failure to absorb the implosion of the very idea of an unregulated market.⁹⁷

90. *Id.* at 354-55.

91. *Id.* at 388.

92. R. POSNER, JURISPRUDENCE, *supra* note 1, at 388. (finding judicial wealth maximization and legislative distribution of entitlements to be sensible division of labor).

93. *Id.* at 387-88.

94. *Id.* at 387.

95. *See id.* at 356-57 (arguing that wealth in wealth maximization is measured by price people are willing to pay for goods if they have ability to pay that price).

96. *See id.* at 359 (arguing judges decide common law cases according to dictates of wealth maximization).

97. *See* Vandall, *Judge Posner's Negligence-Efficiency Theory: A Critique*, 35 EMORY L.J. 83, 99 (1986) (maintaining that Posner's efficiency theory fails because it rests on incorrect assumptions about markets).

Legal realists and critics, among others, have emphasized that all markets require property and contract rules to define respective rights over wealth and the conditions for their legitimate transfer. There are therefore no natural or unregulated markets, because every existing market is an artifact of the legal regulations that constitute it. Discourse which distinguishes regulation from unregulated markets is therefore nonsense, strictly speaking. Markets differ in the forms and structures of their definitive regulatory constitutions, but the unregulated market with its assumed efficiency advantages cannot be found, because the idea itself is internally self-contradictory.⁹⁸ This point is by now so well-established in mainstream legal literature that Posner's failure to consider it is nothing short of astonishing.

The collapse of the "unregulated market" idea deals a deathblow to Posner's jurisprudence. Posner acknowledges, as he must, that property and contract rules may be drawn and redrawn in countless different ways, such that no "natural" or preferred configuration of rights can plausibly be identified.⁹⁹ This further undermines the authority of common law jurisprudence, with its implicit and often explicit orientations toward "natural" legal structures.

The problem of articulating a proper scheme of economic rights and rules, or entitlements, is thoroughly insoluble within Posner's framework. There are perhaps four paradigms available for approaching the problem: (1) natural rights; (2) distributive justice; (3) legislative enactments; and (4) wealth maximization. Posner's bearings grow hopelessly confused as he tries to navigate through these possibilities.

Posner's own legal sophistication, and his sense of what contemporary minds will entertain as plausible, compels him to forsake the natural rights approach as understood by nineteenth-century common law jurists.¹⁰⁰ Posner falls back on natural law notions only implicitly and covertly, at moments when his argument would founder without them.¹⁰¹ As to distributive justice, Posner's attitude is deeply equivocal. There are moments in *The Problems of Jurisprudence*, as in Posner's other works, where he seems to acknowledge that the problems of entitlement definition are problems of distribu-

98. See Unger, *supra* note 16, at 625 (insisting that contract law essentially defines market).

99. See R. POSNER, JURISPRUDENCE, *supra* note 1, at 38 (conceding that many important legal questions have indeterminate answers).

100. See *id.* at 457 (stating that judges "make rather than find law," and that only ethical and policy preferences of judges themselves are what remains of "natural law").

101. See *id.* at 197-201 (attacking critical legal studies belief that moral issues have correct answers).

tive justice.¹⁰² Unfortunately, as highlighted above, Posner recoils from the implications of distributive justice inquiry and strongly suggests that such inquiry is superfluous and lacking in both validity and value.¹⁰³

Posner engenders this contradiction, positing a scheme of distributive justice and simultaneously repudiating it, because he fears overly-searching judicial inquiry into configurations of entitlements.¹⁰⁴ On the one hand, judges should apply and enforce entitlements established by non-judicial bodies according to considerations of distributive justice.¹⁰⁵ Thus, the judicial role includes "corrective justice"—the protection from invasion of rights defined in some scheme of distributive justice—but does not embrace attention to the large social considerations pertinent in articulating the distributive scheme itself.¹⁰⁶ Despite this admonition, however, judges may be uncomfortable with defending or believing in certain schemes of "distributive justice" elucidated elsewhere. Even more disturbingly, judges may recognize that their decisions carry distributional consequences, so that society's actual scheme of distributive justice is what emerges from those very decisions. Either or both of these factors might drive judges toward their own inquiries into distributive justice. Don't bother, Posner seems to tell them at this point, the inquiry is bottomless and you can only come up empty-handed.

The legislature, of course, is one arena for the delineation of entitlements that the judiciary can follow.¹⁰⁷ Indeed, Posner indicates that the fundamental role of articulating entitlements should be displaced from the judiciary to the legislature.¹⁰⁸ This displacement, however, is problematic in several respects. First, an active legislative role seems to contradict Posner's belief in the wisdom of nineteenth-century common law. If the classic common law was getting it right in delineating entitlements, better to diminish the legislative

102. *See id.* at 324 (arguing that sphere of distributive justice determines what entitlements person has); *see also* R. POSNER, *JUSTICE*, *supra* note 13, at 65 (discussing relationship between property rights and distributive justice).

103. R. POSNER, *JUSTICE*, *supra* note 13, at 81.

104. *See* R. POSNER, *JURISPRUDENCE*, *supra* note 1, at 313-52 (discussing difference between corrective and distributive justice and rejecting idea that judges should look for political norm to determine legal obligations).

105. *See id.* at 388 (articulating judicial and legislative division of labor in which judiciary maximizes input of entitlements created by legislature).

106. *Id.*; *see id.* at 316-17 (describing notion of "corrective justice").

107. *See id.* at 360 (pointing out that legislatures have ability through taxing and spending powers to redistribute wealth).

108. *See id.* (insisting that legislature should determine wealth distribution and judiciary should apply efficient rules).

role rather than exalt it. Second, the legislature turns out not to be a forum where distributive justice concerns can actually get heard.

Posner portrays, with no evident disapproval or regret, a process in which strong and well-organized interests secure legislation transferring wealth in their favor from the weak and ill-organized.¹⁰⁹ Though this might seem to undermine the moral authority of legislatively defined entitlements as bequeathed to the judiciary, Posner nevertheless insists that the judiciary should defer to legislatively defined entitlements and stay out of the business of inquiring on its own as to proper entitlements.¹¹⁰ The judiciary's limited proper role is thus two-fold: first, the application and enforcement of legislative enactments; and second, the promotion of wealth maximization. Still more confusion arises here, however, because Posner has advised us that the legislative distributive process of wealth-raiding is unlikely to coincide with, and may easily contradict, considerations of wealth maximization.¹¹¹ If so, the judiciary's mandate to promote wealth maximization clashes with the imperative that it defer to legislatures. Posner betrays no inkling of this problem, nor does he tell us why entitlements articulated by the legislative process, as he portrays them, should carry any moral weight in the first place.

Though Posner confusingly alludes to both distributive justice and legislative enactment as foundations of entitlement definition, part of him seeks to rely on wealth maximization alone as the device for delineating entitlements. Posner retreats toward distributive justice when the complexities of wealth maximization inquiry seem intractable or its implications unsavory. Unwilling to tarry long with distributive justice, however, Posner excuses himself awkwardly and shuffles off toward the legislature. After finishing up there (and perhaps stopping off for a stiff drink or two), he seems to have forgotten what was troubling him and, in a much cheerier mood, returns with gusto to wealth maximization.

While it is tempting to dwell further on the obtuse assumptions and repugnant implications of wealth maximization, it is worthwhile to inquire instead into the internal intellectual coherence of Posner's model. Because space permits only a few illustrative criticisms, I focus on several specific problems out of a much wider host

109. See *id.* at 354-55 (describing how organized interest groups pressure legislatures to pass statutes which transfer wealth to them from unorganized taxpayers).

110. See R. POSNER, JURISPRUDENCE, *supra* note 1, at 355 (advocating that judges should be agents of legislatures).

111. See *id.* at 354 (noting that legislators are generally motivated to maximize self interest, not necessarily wealth).

of weak positions and arguments. Moreover, I try to articulate arguments not extensively rehearsed in the critical literature on law and economics, though some well-established arguments are too crucial to omit.

Several problems flow from Posner's benchmark position that judges should rule always to maximize wealth, but never to redistribute wealth. This view is based on Posner's notion that judicial rulings cannot effectively redistribute wealth, because attempts to do so generate incentives which induce market actors to alter practices in ways that undo or cancel out the intended redistributive effects.¹¹² Posner's favorite and oft-repeated example of this is that pro-tenant legal changes in residential rental properties inevitably lead to rent hikes and/or diminished market availability.¹¹³ This scenario is vastly oversimplistic and hence exaggerated in its certainty as to such dire outcomes, as has been argued elsewhere.¹¹⁴ Moreover, there is disharmony between the notion that the judiciary cannot efficaciously redistribute and certain other Posnerian propositions.

First, an anomaly exists in Posner's myth of the common law's evolution toward efficiency and wealth maximization.¹¹⁵ In order for legal rules to have evolved toward efficiency, they must have been less efficient at an earlier period. A move toward greater efficiency requires changes in the legal rules which enrich some interests and impoverish others, with the gains presumably exceeding the losses. These gains and losses, of course, represent redistributions. Redistribution, however, is what Posner insists cannot be accomplished by common law rule changes, because it will always be undone by inevitable secondary effects.¹¹⁶ Were this truly the case, the common law could never have evolved toward greater efficiency.

Posner might respond that rule changes could redistribute wealth efficiently in the past, but can do so no longer. This argument, however, requires the assertion that we are now at the precise moment in history when all attempted redistributions are cancelled by a backflow of secondary effects. This seems improbable and certainly

112. *Id.* at 359.

113. *Id.* Posner believes that rules allowing tenants to break leases induce landlords to raise rents, which poor tenants cannot pay. *Id.*

114. See Ackerman, *Regulating Slum Housing on Behalf of the Poor*, 80 *YALE L.J.* 1093, 1104-10, 1115-16 (1971) (arguing that comprehensive and strictly enforced housing code programs will not have deleterious effect on housing costs and conditions).

115. See R. POSNER, *JURISPRUDENCE*, *supra* note 1, at 356 (arguing that judges created law which maximizes society's wealth).

116. See *id.* at 359 (discussing judges' inability to redistribute wealth because gains from common law rule changes are always offset by losing parties' attempts to return to status quo).

unprovable. Posner's defense of the "pre-regulatory" common law status quo seems to imply that the classical common law scheme had somehow arrived at optimal equilibrium, so that no departures could augment, and many might diminish, wealth.¹¹⁷ Because there can be no empirical proof of this notion, its plausibility must rest entirely on the idea that common law rules somehow came to embody the "natural" imperatives of the competitive market. This, however, cannot stand against the realist/crit insight that no pre-regulated market—unstructured by particular legal rules—can be imagined as an independent variable or causal agent that accounts for legal evolution.

There are other perplexities as well. Posner portrays a legislative process of wealth-raiding with redistributive consequences.¹¹⁸ He also clearly imagines that legislative actions can effectively accomplish redistribution.¹¹⁹ He never explains, however, how these legislative redistributions evade the backflow effects which supposedly confound judicial efforts at redistribution.

Deeper problems emerge upon scrutiny of the wealth-maximization methodology itself. The *reductio ad absurdum* of one-person-owns-everything, discussed above, highlights a more general incoherence in Posner's reliance on the following two axiomatic propositions: first, all voluntary exchanges enhance wealth because each item of trade winds up in the hands of a buyer willing and able to pay more to acquire it than the seller is willing to forego in order to retain it; and second, that the initial entitlement to an item should ideally lie with the person who values it most, in terms of willingness and ability to pay. Taken together, these two propositions weave a paradox, in that every wealth-enhancing exchange reveals an inefficient error in the pre-exchange assignment of entitlements. By revealing who valued each item more, the exchange indicates who should have had the entitlement to that item in the first place. This paradox emphasizes an "uncertainty principle" in the heart of Posner's economic science. This "uncertainty principle" is that law cannot promote "efficiency" through the simultaneous devices of fostering free exchange on the one hand and delineating base-line entitlements based on willingness and ability to pay on the other. At

117. See *id.* at 356 (praising common law as "remarkable" example of wealth maximization).

118. See R. POSNER, JURISPRUDENCE, *supra* note 1, at 354-55 (discussing how wealth of unorganized citizens is redistributed to organized interest groups).

119. See *id.* at 360 (comparing judges' lack of capacity to redistribute wealth effectively with legislatures' ability to accomplish it).

any given moment the law can follow one or the other of these objectives, but it cannot follow both at once.

This paradox illuminates an absurdity in the neoclassical tautology embodied in Posner's first proposition on wealth-maximizing voluntary exchanges. This neoclassical market model stresses that wealth is created in the sphere of circulation, not production.¹²⁰ According to this conception of wealth and efficiency, "wealth" expands each time a good is bought and sold in trade. By this reasoning, the more transactions required for each good to reach its ultimate destination in the hands of the person who "values" it most, the greater the "wealth" and "efficiency" of an economic system. Such a system then should be "wealthier" than one which by some "planning" device assigns goods directly to those who will value them most. The absurdity of the exchange vision of "efficiency" is underscored by recognizing that in the real world, each reiterated transaction entails actual economic costs, which can be counted as pure waste. In an ironic sense, Posner's method of assigning entitlements, to the highest "valuer," is the socialist planner's fantasy since each good is assigned precisely and directly to whomever will "value" it most. What separates Posner from socialism, however, are divergent conceptions of "value." Socialism equates "value" roughly with "need," while Posner equates it with the capacity to pay, yielding the one-guy-gets-all scenario as one possible ramification.¹²¹

Posner's maximization-through-exchange conception engenders an argument in favor of stringent enforcement of contracts against reluctant parties. Contracts represent voluntary exchanges, it is argued, and since voluntary exchanges represent enhancements in wealth, contracts should be enforced in the name of wealth maximization. The problem, of course, is that in contract-enforcement disputes, one party has concluded that performance will actually contradict her well-being. Contract enforcement therefore becomes a matter of involuntary exchange rather than voluntary. While it may be tautologically true that voluntary exchanges improve the well-being of both parties, the same cannot be said of involuntary exchanges. Hence, an "efficiency" argument for stringent contract enforcement becomes dubious. There is, moreover, a fairness question: why should the interests of the party who gains from enforcement be advanced at the expense of the reluctant party? There may

120. *Id.* at 356-57 (analyzing relationship between exchanges and wealth maximization).

121. *See id.* at 357 (stating desire without ability to pay is irrelevant).

be many answers to this question, but the focus here will be on Posner's response and its inadequacy.

Posner offers an argument explaining how contract enforcement is both efficient and fair, based on the intriguing concept of "*ex ante* compensation."¹²² Contracts, Posner argues, are always made in the context of uncertainty about the future state of the world. A contract is a presumably rational bet that when time comes for performance the obliged party's gains and losses under the contract will add up more advantageously than they would have without the contract. A party will desire release from a contract only when this anticipated state is not realized and fulfillment of the contract proves too burdensome relative to the benefits it provides.¹²³ Enforced performance is unfair, that party implicitly argues, because it entails uncompensated sacrifice.

Not so, Posner argues. The "compensation" that a contract entails is not the actual achievement of some good, but rather the value of that good discounted by its advance likelihood of realization. Hence, a contractually-obligated party has always received exactly what her obligation of performance secured—a discounted *chance* that her well-being might be advanced by some amount at some designated future moment. Under Posner's view, no obligated party can rightfully plead for release from a contract on grounds that events have unfolded such that the sacrifice embodied in performance will go uncompensated. Compensation has, in fact, already been had, embodied in the probabilistic chance of desirable outcomes.¹²⁴ Contractual expectations are lottery tickets, purchased at the price of contractual performance.¹²⁵

Posner views each party to a contract as implicitly receiving wealth in the form of a discounted expectation of wealth. Furthermore, discount-expectational wealth must outweigh in value the obligation conferred in order to secure it, or the bargain would never have been struck. Thus, when the contract is fulfilled, each party will gain

122. *Id.* at 388-89. The *ex ante* concept means that a contract, viewed at the time it was made, is almost always sensible because neither party would have signed if he thought it would turn out badly. *Id.* According to Posner, simple contracts viewed *ex ante* are Pareto superior transactions—i.e. they make at least one person better off and no one worse off. *Id.* Since events may turn out differently than the parties expected and they may be worse off due to the contract, however, the transaction after the fact may not be Pareto superior. *Id.*

123. See R. POSNER, JURISPRUDENCE, *supra* note 1, at 388-89. (arguing that uncertain choices are regarded as mistakes *ex post*, but as sensible *ex ante*).

124. See *id.* at 389-90 (illustrating *ex ante* compensation through example of choice between jobs, one paying \$50,000 with 100% certainty, the other paying \$500,000, but with only 90% certainty).

125. See *id.* at 388-90 (concluding that no choice, however wise it appears, is certain to work out well).

in discount-expectational wealth more than is given up in actual wealth. Each party, therefore, gains and overall wealth is maximized when the contract is stringently enforced.¹²⁶

The bizarre character of Posner's reasoning, if not already clear, stands out sharply when pushed beyond Posner's explicit commentary. Posner assumes each party to be better off when the contract is enforced, even if the state of the world at that moment is such that one has wound up with less actual wealth than she had beforehand.¹²⁷ But if we recall at this point Posner's notion that entitlements should be assigned by courts or by other public authorities to maximize wealth, it seems that such a body should proceed to rearrange entitlements to mimic the contractual scenario just discussed. Thus, this authority would take wealth from one party and confer it on another, granting in return a discounted possibility of wealth which may not actually materialize. The party deprived of actual wealth by this efficiency-seeking public authority, however, has no grounds for complaint. What she got in return *might* have been worth a lot, according to the probabilities calculated by the public authority in the same way that they would be calculated by private contracting parties. Following the implicit logic of Posner's "efficiency" argument for stringent contract enforcement, therefore, a state could compel citizens to extend risky loans at interest to other citizens, while insisting that the reluctant lenders had not been expropriated of wealth, but had in fact been enhanced in their wealth, even if the loans should ultimately default.

Posner heroically tries to persuade us that economic analysis can by itself delineate the proper contour of legal entitlements.¹²⁸ At several points in *The Problems of Jurisprudence*, as in his other work, Posner provides examples of how he thinks this may be done. These examples are unconvincing, however, and in their failure both undermine the simplistic ideologies of market-economy efficiency and emphasize the dependence of entitlement notions on non-economic moral commitments. One typical example of his entitlement analysis illustrates Posner's weakness. In this example, Posner compares two situations: damaging someone's business enterprise by launching competition against it, and stealing a neighbor's car.¹²⁹ Because the competition victim has no "entitlement"

126. *Id.*

127. *See id.* at 388 (arguing that wealth maximization can be grounded in Pareto transactions although one or both sides may actually lose).

128. *See* R. POSNER, *JUSTICE*, *supra* note 13, at 81 (stating that wealth maximization resolves distributive considerations automatically).

129. R. POSNER, *JURISPRUDENCE*, *supra* note 1, at 440-41.

against the loss suffered while the theft victim does, the former has no legal remedy but the latter does.

But why should this be the case? Posner believes that efficiency analysis explains the recognition of one entitlement and the non-recognition of the other. Business competition, Posner remarks, yields a "net increase" in social wealth, while theft yields a "net decrease."¹³⁰ Hence, while an entitlement against business competition contradicts wealth maximization, an entitlement against car expropriation promotes it. Posner assumes that the transfer from victim to beneficiary in each case results in a net wealth change of zero, the victim's loss balancing out the beneficiary's gain. With this assumption established, however, Posner offers no satisfactory argument why competition yields net benefit, although he does explain the net loss from the theft as the cost of "resources consumed in committing and preventing thefts."¹³¹ Hence, Posner's efficiency analysis explains why there are entitlements against car expropriation, but not against competition.

This point seems sound until one thinks about it. Thought indicates, however, that in business competition resources are heavily consumed in "committing and preventing" competition itself. These expenditures embody social costs exactly like those concerning the prevention of ordinary thefts. Posner's argument about resource waste not only fails to explain which entitlements warrant recognition, but also highlights a crucial and too seldom mentioned inefficiency of competitive markets: the enormous dissipation of resources in the competitive struggle itself. This resource waste includes brand advertising, market research, packaging, and trade secret protection, along with many other resource-guzzling competitive expenditures. Thus, although market competition may yield real advantages such as technological innovation and energetic effort, it also entails gargantuan economic costs which are generally ignored in rosy paeans to the efficiency of market arrangements. Innovation and energy may be what Posner has in mind when he indicates that competition augments social wealth, but his position ignores the possibility that many forms of business competition are economically wasteful. Efficiency, therefore, cannot justify the prevailing absence of anti-competitive entitlements and may even suggest that we should have more of them.

Posner candidly acknowledges that economic legal analysis encounters "problems" when it inquires as to proper delineations of

130. *Id.* at 441.

131. R. POSNER, JURISPRUDENCE, *supra* note 1, at 441.

entitlements,¹³² which, of course, is equivalent to saying that it encounters problems when it tries to resolve actual disputes. This calls into question the value of law and economics in general, since Posner sees the primary value of economic analysis as assistance in dispute resolution. Posner vastly underestimates the problems confronting economic analysis over entitlement assignments. His work is peppered with examples, like the competition/theft example discussed above, which purport to show how economic analysis rationalizes entitlements and resolves cases. Every one of his examples, however, is vulnerable to attack. The competition/theft example epitomizes the entire difficulty: efficiency analysis, standing alone, simply cannot tell us which goods people should have a right to and which should be up for grabs.

Posner's difficulty is even deeper than the incapacity to show which entitlement configurations will be more efficient than others. He does not even establish the more basic notion that one entitlement configuration ever *could* be more efficient than others. Posner's entire economic jurisprudence is astonishingly obtuse to the argument established by Coase in a seminal law and economics article.¹³³ With frictionless transacting, Coase suggests, no configuration of entitlements could possibly hamper efficiency because all valued items would be sold and purchased until the ideal efficient configuration had been reached.¹³⁴ Though Posner is aware of Coase's point, he persistently ignores it.¹³⁵ Coase's argument implies that entitlement configurations, though bearing decisively on distributional outcomes, entail no efficiency consequences whatsoever. This may suggest that entitlement problems are best approached with distributional concerns uppermost. Posner, by contrast, focuses on efficiency concerns to the exclusion of distributional ones.¹³⁶

Coase's simple axiom is notoriously confounded, of course, by the real world need to consider information and transaction costs. Posner could maintain fealty to Coase by centering his efficiency-seeking entitlements argument around information/transaction cost

132. *Id.* at 440.

133. See generally Coase, *The Problem of Social Cost*, 3 J.L. ECON. 1 (1960) (explaining that if transactions are costless, initial assignment of property rights will not prevent ultimate efficient use of property).

134. See *id.* at 17-28 (arguing that efficiency with which resources will be employed is unaffected by initial assignments of rights if transaction costs are zero).

135. See R. POSNER, *JUSTICE*, *supra* note 13, at 71 (arguing that property rights serve efficiency only in settings with low transaction costs).

136. See *supra* notes 107-08 and accompanying text (discussing Posner's view of why distributive concerns should be left to legislatures).

analysis. His efforts to do so are rudimentary, however, perhaps because of the daunting complications introduced by information/transaction cost analyses.

Where information/transaction costs are positive, efficiency may turn on correct entitlement assignments because blockages on bargains hamper Coasean wealth-maximizing rearrangements. Hence, Posner's project might seem theoretically vindicated for the real world of non-frictionless markets. There is another difficulty, however, this one from the opposite direction. The presence of information/transaction costs may hamper efficiency, precisely because efficiency-maximizing bargain rearrangements are blocked. Thus, the law and economics "uncertainty principle" mentioned above plays itself out here.

Law and economics seeks to promote wealth maximization simultaneously by exalting free exchange and by assigning entitlements efficiently.¹³⁷ In Coasean friction-free situations, the efficient assignment of entitlements is superfluous, since all problems resolve themselves through free exchange. In friction-laden situations, by contrast, assigning entitlements efficiently becomes critical due to market inefficiencies. In such a world, the existing entitlement configurations may be efficiency sub-optimal, because either (a) initial entitlement assignments were incorrect; or (b) the world has changed since the initial assignment, making once-efficient configurations inefficient. At a theoretical level, these two possibilities are really one since the occurrence of the latter reveals the previous existence of the former. In any case, situations arise in which it is inefficient to protect a previously recognized entitlement. If information/transaction costs are positive—this problem could never arise unless they are—contract and market exchange cannot be relied upon to deliver efficiency. At such points, "public law" (such as tort) rearrangements of extant entitlement configurations become necessary to serve efficiency. Posner recognizes this point, noting that when transaction costs are too high, it may be inefficient for law to recognize and protect "absolute" entitlements.¹³⁸

Here the "uncertainty principle" yields a practical paradox. Efficiency does not indicate when to give strong protection to entitlements, making them subject to rearrangement only through voluntary exchanges, and when to tinker with wealth allocations through public law for fear that voluntary exchanges cannot reliably

137. See R. POSNER, JURISPRUDENCE, *supra* note 1, at 356-57 (discussing wealth creation through exchange).

138. R. POSNER, JUSTICE, *supra* note 13, at 71.

deliver efficiency. In Coasean low-friction situations, we may boldly assign absolute entitlements to everything, confident that the market will ensure efficiency. In high-friction situations, by contrast, we must assign entitlements tentatively, acutely conscious that we may err damagingly or else need to reconsider perpetually.

Given this predicament, is it worthwhile to organize a jurisprudence around the search for efficient entitlements? In low-friction situations the search may be superfluous to the goal of efficiency, and in high-friction situations it may be detrimental to the goal. Though not articulate as to this dilemma, Posner seems dimly aware of it. He occasionally suggests we should assume that most situations fall in a middle zone where information/transaction costs are positive but low.¹³⁹ In this zone, presumably, friction is high enough to make the Coasean insight nugatory, yet low enough to avoid the problem of efficiency-blocking entitlements. The Posnerian methodology makes sense for such a middle zone. The problem, however, is that we have no way of knowing whether such a middle zone actually exists, either in general or in any particular situation. In any disputed situation, there is simply no way to tell whether the operative market friction is too low, too high, or just right for the assignment of entitlements by Posner's efficiency criteria.

Posner insightfully notes that contract problems can all be recharacterized as tort problems, and vice versa.¹⁴⁰ Tort remedies can be described as vindications of hypothetical bargains the parties would have struck, but for blockages posed by bargain obstructions, in seeking their maximum respective advantages. Contract remedies, meanwhile, can be properly measured by the scope of entitlements an efficiency-maximizing tort law would assign for purposes of subsequent exchange. This truth, however, utterly confounds Posner's entire jurisprudential myth by making the problem of entitlement assignment and its resolution entirely circular. Tort outcomes actively assign and reset efficient entitlements for future exchange, yet also passively reflect and vindicate the contractual rearrangement of previously-set entitlements. Conversely, contract outcomes passively vindicate and reflect the voluntary exchange of preset entitlements, while, through damage measures and other doctrines, actively setting and determining the configuration of those entitlements based on efficiency.

139. See *id.* (recognizing that zero transaction costs are not realistic).

140. See R. POSNER, JURISPRUDENCE, *supra* note 1, at 361 (stating that tort cases have pre-accident contract element and contract cases *ex ante* remedy element).

Posner's methodology presents us with a quandary over how to decide when efficiency requires us to protect existing entitlements and when it requires us to tinker with them. Posner's only suggestion for this dilemma would be to do what is efficient.¹⁴¹ The pathos of Posner is that he is adept enough to discern, albeit dimly, the host of difficulties confronting his jurisprudential project. He steps along more and more frantically in his quixotic quest for a goal which inevitably vanishes before he finds it, impelled onward all the while by the conviction that it surely must exist.

At the heart of Posner's incoherence is the circularity of his core notion that entitlements should be assigned to maximize wealth, defined as willingness/ability to pay. This criterion favors, without adequate justification, the interests of the wealthy. The problem is deeper than this bizarre bias, however. Wealth has no legal meaning other than the enjoyment of certain entitlement preferences. To have wealth simply *is* to have certain entitlements delineated in one's favor: these things are mine, not yours nor anyone else's. The wealth maximization approach is to allocate entitlements to whomever is willing or able to pay the most for them. Thus, an entitlement should go to the party most willing or able to sacrifice entitlements already possessed in order to secure the one in question, with the surreal twist that the party in that position gets the entitlement without actually having to pay for it.

Hence, the decision as to who should get any particular entitlement turns on how previously-settled entitlements were delineated and then brought to bear in bidding for the disputed entitlement. But how do we know whether those previously-settled entitlements have been assigned correctly? Posner's approach tells us whether those entitlements are correctly delineated by reference to still other entitlements various claimants have been willing to bid for the ones now in question. The same is true for these entitlements, and

141. This reminds me of Spike Lee's film, *Do the Right Thing*. At one point in the film, a somewhat tiresome busybody elder man, who functions as a sort of neighborhood philosopher, intrusively collars the busy, hassled, and preoccupied young-man-on-the-make Mookie, played by Spike Lee. The philosophe detains Mookie to impart a crucial piece of life advice, and the exasperated Mookie is virtually compelled to linger long enough to listen. "Always do the right thing," the philosophe admonishes Mookie. The anticlimax of this understated message throws Mookie for a complete loop: "That's it?" he cries complainingly. "Do the right thing? Ok. I got it. I'm gone. . . ." The philosophe's advice is as powerful and as frustratingly enigmatic as the Kantian ethic itself. Always do the right thing. But what is the right thing to do? At the film's climax, Mookie encounters a situation where he feels especially strongly that he must do the right thing, and he does something which both he and the viewer may or may not feel was right. Posner's jurisprudence, distilled to a maxim, can be stated as, "Do the efficient thing." Posner's admonition, however, turns out to be not just enigmatic but conceptually empty. This is all the more disappointing since Posner's maxim lacks in the first place the Kantian power and pathos of Spike Lee's concern.

so on. Sooner or later the efficient delineation of entitlements becomes circular, with each particular delineation referring to all the others, including the one originally in question.

This circularity can be escaped only if there is some ultimate baseline, a "correct" initial configuration of entitlements, to serve as the benchmark for the entire process. This benchmark configuration constrains and shapes all the subsequently-unfolding legal determinations, according to Posner's theory, yet cannot itself be established by his efficiency method. Posner thus leaves us to ponder how this original configuration should be settled. Distributive justice, anyone?

IV. TORT

Posner's jurisprudence should be explored not only in its general assumptions and method, but also in its arguments as to particular areas of law. The previous sections examined the pro-wealth conclusions of Posner's basic models. This section and the next explore the implications of Posner's pro-wealth conclusions in two areas of law, tort and labor, where his proclivities prompt him highly to favor privately-owned capital. As discussed above, Posner attempts to interpret common law doctrinal structures as embodying evolutionary natural efficiency. For example, he asserts the "correctness" of two cornerstones of the common law structure in tort, the fellow servant rule for workplace injuries and the negligence standard for liability in general. Posner asserts the "correctness" of these cornerstones from the viewpoint of efficiency analysis.¹⁴² It is illuminating to inspect the economic reasoning Posner embraces in purporting to vindicate the common law's purported efficiency on these matters.

Farwell v. Boston and Worcester R.R.,¹⁴³ which launched the fellow servant rule in American law, was for much of the nineteenth century one of the most widely-praised opinions in the entire jurisprudential lexicon. The issue in *Farwell* was whether a worker injured on the job through the negligence of a co-worker can recover damages from the employer under vicarious liability. *Farwell* answers "no" by analyzing an implicit prior bargain between the victim and his employer.¹⁴⁴ This resolution of a tort rule issue by referring to an implicit contract quintessentially foreshadows law and econom-

142. See Posner, *A Theory of Negligence*, *supra* note 13, at 44-48 (discussing negligence standard in general and fellow-servant rule in particular as doctrines promoting economic efficiency).

143. 45 Mass. (4 Met.) 49 (1842).

144. *Farwell v. Boston & Worcester R.R.*, 45 Mass. (4 Met.) 49, 55 (1842).

ics. *Farwell* suggests that justice does not require that the victim be compensated, because he or she has already been compensated in premium pay for the risk of suffering injury.¹⁴⁵ To order tort damages, therefore, would be to depart from the terms of an implicit contract whereby the worker agreed to accept a determinate quantum of premium pay in return for working under risky conditions. In other words, a damage payment would represent double compensation for the worker.

Legal commentators exalted *Farwell* as exemplifying the highest arts of common law reasoning.¹⁴⁶ The opinion and the rule it configured have since fallen into disfavor, reviled as hideous relics of a harsh age when business interests enjoyed excessive sway over law and when mean-spirited casuistry of argument prevailed over the real lives and interests of people.¹⁴⁷ While these criticisms are well-taken, I disagree with their implicit suggestion that modern law and society have escaped those vices.

Farwell's low modern reputation makes all the more remarkable its once premier position. Contemporary criticism focuses on the fact that it neither addressed problems of unbalanced bargaining power and information failure in employer-employee relations nor weighed the morality of legitimating voluntary exposure to personal danger.¹⁴⁸ This critical consensus on *Farwell* holds sway across a broad spectrum of political opinion, from left to right. Posner, however, does not join this broad consensus. Posner supports revival of the fellow servant rule, at least for injuries not covered by worker compensation schemes. He has written in praise of *Farwell*¹⁴⁹ and in at least one case comes close to applying it on the bench, although ultimately rests his anti-recovery ruling on another ground.¹⁵⁰ Pos-

145. *Id.* at 57.

146. See R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 87 (1938) (calling rule in *Farwell* only decision common law judges of era could have made). Common law judges in the United States and England also lauded the *Farwell* decision. See L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 171 n.18 (1957) (noting Cranworth, Lord Chancellor adopted Shaw's reasoning in *Bartenshill Coal Co. v. Reid*, 3 Macq. 266 (1858) and reprinted *Farwell* therein); *Chicago, Milwaukee & St. Paul Ry. v. Ross*, 112 U.S. 377, 385-86 (1884) (Field, J.) (stating *Farwell* "exerted great influence" as rule of decision in American and English courts).

147. See Adlow, *Chief Justice Lemuel Shaw and the Law of Negligence*, in *TORT LAW IN AMERICAN HISTORY* 67 (K. Hall ed. 1987) (calling *Farwell* "harsh" and "cruel" in retrospect).

148. See *Pomer v. Schoolman*, 875 F.2d 1262, 1266 (7th Cir. 1989) (Posner, J.) (acknowledging criticisms of *Farwell*).

149. See W. LANDES & R. POSNER, *ECONOMIC STRUCTURE*, *supra* note 13, at 309-11 (noting workers' compensation dilutes workers' incentives to take care, unlike fellow servant rule); see also Posner, *A Theory of Negligence*, *supra* note 13, at 44-45, 67-71 (analyzing fellow servant rule in industrial accident law).

150. *Pomer v. Schoolman*, 875 F.2d 1262, 1266, 1268-69 (7th Cir. 1989) (Posner, J.) (call-

ner offers two main arguments as to why he finds *Farwell* so impressive.

Posner first argues that the fellow servant rule is efficient in promoting workplace safety. A worker subject to uncompensated injury by the negligence of co-workers, he suggests, will feel an incentive to monitor and curb their unsafe work habits.¹⁵¹ Posner seems to imagine that workplace peers routinely admonish each other as to dangerous practices or inform on each other to superiors. His argument justifies the fellow servant rule only if the specific fear of going uncompensated for injury creates a major independent incentive. Posner does not explain, however, how the fear of non-compensation imparts any new safety incentive beyond the baseline fear of injury itself, regardless of whether it will be compensated. Posner also fails to reckon with people's powerful hesitations to be a busybody or tattle-tale among co-workers. One advantage of workplace *respondeat superior* is that it gives the boss, who may be adequately insulated from peer group dynamics, primary safety responsibility. Posner's enhanced-safety rationale, moreover, rings true only for employees who work with each other closely enough to monitor one another's safety practices. Yet the fellow servant rule defended in *Farwell* applies to all co-workers in a firm, not just to those in mutual monitoring situations.¹⁵²

Posner's second argument is that the *Farwell* fellow servant rule reflects the contract-efficiency wisdom of the common law, something he regards as a virtue.¹⁵³ Indeed, since *Farwell* is an excellent specimen of economic legal analysis, and a foreshadowing of today's law and economics, a look at the flaws in that case elucidates the problems in Posner's jurisprudence.

The standard rejoinders to *Farwell's* implicit bargain/assumption of risk argument focus on unequal bargaining power, deficiencies in foreknowledge and risk assessment, and the pathos of ratifying sales of personal safety for money. Such rejoinders, though powerful, do not cut to the decision's internal incoherence—the inability to determine whether the implicit bargain hypothesized in *Farwell* was actually struck. In fact, the *Farwell* bargain never *could* be struck except

ing *Farwell* "tour-de-force" of economic reasoning but basing holding on fact that liability is barred when danger is obvious to reasonable person).

151. Posner, *A Theory of Negligence*, *supra* note 13, at 44-45.

152. See W. LANDES & R. POSNER, *ECONOMIC STRUCTURE*, *supra* note 13, at 309 (identifying and endorsing tendency of courts to reject proximity limitation to fellow servant rule).

153. See R. POSNER, *JURISPRUDENCE*, *supra* note 1, at 252-53 (analyzing contract theory inherent in *Farwell*).

under conditions that would contradict both its outcome and justifying rationale.

Farwell's contract argument begins by noting that the victim was paid more in his post as engineer, in which he was injured, than in his previous post as machinist, the clear implication being that the victim therefore received a risk premium for working as an engineer.¹⁵⁴ If so, justice does not demand, and may even forbid, the granting of *post hoc* compensation since the victim received compensation beforehand in the form of premium pay. *Farwell* does not and cannot explain, however, how one can be sure that the pay increase in moving from machinist to engineer actually represented a risk premium, rather than a premium for increased skills, broader responsibility, or the like. *Farwell's* justifying rationale in denying tort compensation therefore crucially depends on an undemonstrable proposition.

Moreover, even if *Farwell* is correct in assuming that the pay increase represents an implicit bargain to run the risk of injury, this assumption can justify the rule of non-compensation only upon the further assumption that the pay hike embodies a premium for the risk of *uncompensated* injury. It is plausible, of course, that a worker exposed to injury risks would seek premium pay even if he expected injuries to be compensated. Hence, even if the *Farwell* pay hike is indeed a bargained risk premium, there is no ground to conclude that the parties assumed in their minds that injuries would go uncompensated. *Farwell* assumes the parties entertained that supposition. A contrary scenario, however, is perfectly plausible. The parties may have assumed that actual injuries would receive compensation, but deemed the *risk* of injury worthy of premium pay nevertheless. Under this scenario, post-injury compensation would hardly violate the parties' contractual understanding. It would, instead, ratify it.

At *Farwell's* core, furthermore, is a contradiction which foreshadows Posner-style law and economics. In order for *Farwell's* imagined bargain of premium pay for uncompensated injury to have actually occurred, the parties must have assumed beforehand a legal rule—that injuries should receive compensation—which is opposite to the rule announced by the case.¹⁵⁵ Had the parties assumed in advance that injuries would go uncompensated, the bargain

154. *Id.* at 59.

155. Prior to *Farwell*, the rule of decision in industrial negligence cases was *respondeat superior*. See Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 52-53 (1967), reprinted in TORT LAW IN AMERICAN HISTORY, *supra* note 147, at 172-73 (tracing *respondeat superior* doctrine to Blackstone). With the advent of the industrial revolu-

imagined in *Farwell* would never have taken place. The employer would have had no reason to offer premium pay to secure a right already enjoyed not to pay damages. The worker, meanwhile, would not have possessed the "bargaining chip" of a right to compensation, to be dealt away in return for premium pay. *Farwell's* justifying rationale is that its rule merely implements a bargain between the parties. This bargain, however, could never occur except under a legal rule precisely opposite to the one *Farwell* proclaims.

Farwell's rhetorical persuasiveness has much in common with law and economics. The arguments are driven along from their simple and apparently plausible premises to their strikingly concrete conclusions by crucial but unarticulated assumptions. These assumptions go unnoticed and therefore uncriticized, which lends the whole argument a deceptive appearance of solidity. *Farwell* exemplifies one genre of the law and economics lexicon, the resolution of tort issues by reference to implicit contracts. With *Farwell*, as with Posner, the class character of the jurisprudence emerges in the covert assumptions which tilt the outcomes in favor of private capital.

The *Farwell* paradox can be seen from another viewpoint, if one imagines how difficult it might have been to explain the "justice" of the fellow servant rule to the first post-*Farwell* injury victim. This next victim cannot be comforted by being told how her non-recovery effectuates a bargain she struck earlier, to trade away a right to recover in return for premium pay. This victim could never have received that premium, precisely because the *Farwell* ruling has already deprived her of what she might have used to bargain for it.

Farwell epitomizes the tendency of law and economics analysis to resolve entitlement disputes by positing the outcomes of imaginary contracts. Those imaginary contracts necessarily assume pre-contract entitlement configurations, themselves supposedly determined by prior contracts, and so on all the way down. This entire scheme can avoid bottomlessness or circularity only if it posits a scheme of original entitlements which perpetually reset themselves after each contractual rearrangement. Thus, the law and economics method must posit a scheme of entitlements which is forever alterable, yet perpetually fixed. Here again one observes the law and economics "uncertainty principle" mentioned above. The implications of this are devastating because any entitlement whatsoever can be a candidate for inclusion in the original scheme. In *Farwell*, the moment of perpetual re-set emerges immediately. For parties to strike the bar-

tion, the fellow servant rule took hold. *Id.* at 53, reprinted in TORT LAW IN AMERICAN HISTORY, *supra* note 147, at 173.

gain of premium pay for uncompensated injuries that justifies the fellow servant rule, the rule must perpetually be undone to allow those bargains to be struck. Posner is right to portray *Farwell* as an exemplar of how common law reasoning anticipates law and economics.

In addition to defending the fellow servant and assumption of risk doctrines, Posner has argued zealously in the past on efficiency grounds that negligence, as opposed to strict liability, is the proper general standard of tort liability.¹⁵⁶ Economic analysis of the negligence/strict liability argument has grown quite intricate and Posner has in fact gradually retreated from this pro-negligence position. In *The Problems of Jurisprudence*, he does little more than suggest certain insurance advantages of a negligence standard over strict liability, assuming negligence is the more efficient standard from the standpoint of wealth maximization.¹⁵⁷ Though this assumption may reveal that Posner still views negligence as the more efficient standard, he avoids any attempt to prove that it is. In *Economic Analysis of Law*, moreover, Posner takes the fairly moderate position that efficiency advantages lie with strict liability in some situations and with negligence in others.¹⁵⁸

Although Posner has attempted to defend the efficient character of the negligence standard,¹⁵⁹ his arguments closely read have concentrated on the modest claim that negligence is *no less efficient* than strict liability. Using Judge Learned Hand's $B > P \times L$ formula, where B represents the economic cost or burden of preventing an accident, L represents its economic magnitude, and P represents its probability of occurrence, Posner defines negligence as the failure to take precautions to prevent an accident in situations where $B < P \times L$.¹⁶⁰ Under a negligence standard so defined, Posner explains, defendant liability would *not* lie where $B > P \times L$, when what the defendant might have spent to avoid the mishap exceeded the accident's cost, discounted according to its likelihood of occurrence. Posner embraces an explicitly wealth-biased view of how the BPL approach should be applied, in that it identifies negligence more

156. See W. LANDES & R. POSNER, *ECONOMIC STRUCTURE*, *supra* note 13, at 64-66 (illustrating difference between negligence and strict liability rules in efficiency terms).

157. R. POSNER, *JURISPRUDENCE*, *supra* note 1, at 390-91.

158. R. POSNER, *ECONOMIC ANALYSIS*, *supra* note 13, at 160-65.

159. See Posner, *A Theory of Negligence*, *supra* note 13, at 30 (stating negligence standard is "broadly consistent with an optimum investment in accident prevention").

160. See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (Hand, J.) (introducing formula); R. POSNER, *JURISPRUDENCE*, *supra* note 1, at 358.

readily for rich victims than for poor victims.¹⁶¹ This is because the L factor, the accident cost as conventionally measured by our tort system, is higher for rich than for poor victims when lost income is factored in. Thus, an injurer having spent a given sum B in precautions may be found negligent because $B < PxL$ if a rich person has been injured, but non-negligent because $B > PxL$ where a poor person has been hurt. Under this conception a firm may have an incentive to spend less on safety if the factory is in a black neighborhood and employs mostly women workers than if it sits in a white neighborhood and employs primarily males.

Posner neither acknowledges nor responds to this wealth-bias problem. On the contrary, his concern is that application of the BPL formula may not be wealth-biased enough. He insists that if the BPL approach is properly applied, the L factor for injured rich people must be inflated relative to that for poor people, not only for the higher actual income foregone, but also to count in the higher opportunity costs of income possibilities foreclosed when rich people suffer injury. Under this view it might have constituted actionable negligence during the eighties to interrupt Donald Trump with a wrong number.¹⁶²

Continuing to apply Hand's definition, Posner asserts strict liability must mean the imposition of liability even in situations where $B > PxL$, not just where $B < PxL$ as the negligence standard would indicate.¹⁶³ In lay terms, Posner suggests that strict liability requires the imposition of liability even in situations where accident-avoidance spending would be inefficient because its magnitude exceeds the probable economic losses avoided. Posner uses this framework to argue that strict liability provides no efficiency advantages over negligence.¹⁶⁴ Negligence, in other words, is at least as efficient as strict liability. Although he does not explicitly claim that negligence exceeds strict liability in efficiency, Posner's focus on negligence and his fascination with its supposedly efficient character may lead one to believe that his argument, if sound, establishes the superiority of the negligence standard.

Posner's effort to demonstrate efficiency parity, if not superiority, for the negligence standard has serious weaknesses. In his discus-

161. See Vandall, *supra* note 97, at 390-92, 408-16 (criticizing Posner's wealth-maximizing jurisprudence and Hand formula).

162. See W. LANDES & R. POSNER, *ECONOMIC STRUCTURE*, *supra* note 13, at 67-68 (stating when reduction in income is greater than sum of expected damages to another and costs of care, risky activity should not be reduced).

163. See *id.* at 72-73 (asking and answering question of why negligence cases exist).

164. See *id.* at 71 (stating it is impossible to pronounce strict liability economically superior to negligence "across the board").

sion of product liability, Posner argues, Coase-style, that market forces will produce efficiently safe products whether the tort standard is strict liability, negligence, or no liability at all. In Posner's view any product, to a consumer, has two elements of total cost—the actual purchase price and the probabilized cost of any injuries the product may inflict. By reducing a product's danger level, a producer reduces the total cost faced by its consumers. Consumers will then favor that product over its competitors, providing profit advantages for the producer of the safety-improved product. Hence, Posner argues, producers feel incentives to implement all cost-justified safety precautions which reduce probabilized injury costs by more than the precaution costs themselves.¹⁶⁵ Regardless of tort rules, therefore, market forces yield efficiently safe products.

Posner's argument, however, manifests a fundamental oversight. He is correct that if certain assumptions as to the competitive nature of the seller market hold true, cost-justified precautions will secure revenue advantages for firms adopting them. He is wrong, however, to assume that profit-maximizing firms would adopt all such revenue-enhancing precautions. Increased revenues do not mean increased profits unless those increased revenues exceed any increased costs incurred to secure them. Posner's notion of "cost-justified" compares the costs of precautions to their safety benefits.¹⁶⁶ Precautions that are "cost-justified" in this sense may indeed yield revenue enhancements. Firms will incur the costs of these "cost-justified" precautions, however, only if they are cost-justified in a different sense, yielding revenue enhancements sufficient to offset the costs actually imposed by the precautionary steps. Situations of this sort are only a fractional subset of those that are "cost-justified" from an overall social perspective. Hence, Posner's view notwithstanding, market forces will not dependably yield efficiently safe products. On the contrary, in any situation where optimal safety would entail additional expenditures from producers, market incentives are insufficient to induce optimal safety.

This slippage, the difference between socially optimal precautions and those yielding revenue benefits exceeding the precaution costs themselves, will not appear if the firm can pass precaution costs, in the form of higher prices, entirely through to consumers. In that case, firms would feel the proper market incentive to take all socially efficient safety precautions, identifiable as those for which consum-

165. See *id.* at 275-80 (analyzing market behavior under different products liability standards).

166. W. LANDES & R. POSNER, *ECONOMIC STRUCTURE*, *supra* note 13, at 293.

ers would willingly pay. This, however, is possible only under particular market conditions. Moreover, Posner's entire argument here presupposes that consumers shop efficiently for safety among competing products. It is doubtful that consumer safety markets operate well enough to validate Posner's argument. While Posner acknowledges this problem, he terms it "superficial," noting that competition among sellers generates safety information for consumers.¹⁶⁷ Although this may be true, the question is whether the information so generated is sufficient to promote efficient consumer behavior. After all, advertising deluges consumers with messages about products that appeal to urges far less rational than concern for safety. Posner concedes, moreover, that sellers may actually hesitate to publicize safety information for fear it may stimulate previously dormant concerns over product dangers, and thereby hamper sales rather than augment them. Hence, Posner acknowledges that the abandonment of caveat emptor in product liability, in favor of negligence, was correct,¹⁶⁸ but nevertheless insists that to go further in the same direction and supplant negligence with strict liability would be undesirable. Posner offers no argument, however, why the considerations justifying the move from caveat emptor to negligence would not equally favor the move from negligence to strict liability.¹⁶⁹

Posner recognizes that victim incentives must be considered as well. Where buyers can prevent accidents through altered use more cheaply than sellers can by altering products, buyers will prefer to take precautions themselves rather than pay higher costs for altered products.¹⁷⁰ If we entertain here as well the assumptions Posner must be making—for example, that the market is such that all new producer costs are passed along to buyers—his argument is indeed revealing. The buyer incentives Posner highlights would operate without slippage regardless which tort liability rule prevailed. Buyers will take all socially cost-justified precautions costing less than the precautions sellers could take, with the costs of those seller precautions passed along to buyers. Sellers, however, will not take all socially cost-justified precautions costing less than those that a buyer could take, but will instead take only those that are profit-enhancing as argued above. Hence, buyer behavior corresponds more closely to overall social efficiency than seller behavior. No

167. Posner, *Strict Liability*, *supra* note 13, at 211.

168. Posner, *Strict Liability*, *supra* note 13, at 211.

169. *Id.*

170. See W. LANDES & R. POSNER, *ECONOMIC STRUCTURE*, *supra* note 13, at 276-80 (showing how, under products liability standards, market determines who bears cost of care).

slippage occurs between “cost-justified” behavior and “profit-justified” behavior on the buyer’s side because, unlike the seller’s, the buyer’s “profit” factor is identical to the value of avoided injuries. The fact that market forces do not impel efficient levels of precautionary spending by the producer underscores the importance of tort standards. Therefore, strict liability should be applied to producers because incentive slippage occurs only on the producer side.

Common sense suggests that strict liability, by making producers liable for a wider range of mishaps, stiffens safety incentives, encouraging efficient levels of precautionary spending. Posner purportedly cuts the legs out from under this common sense argument. Under Hand’s definition of negligence, failure to take precautions at the efficient level, strict liability cannot provide more efficiency or safety than a negligence standard. There is, however, another flaw in Posner’s argument at this point, which could be called the “phantom accounting” problem. Under strict liability, a producer assessing possible safety measures will weigh their costs against the costs of injuries estimated as preventable by the various precautions. The firm will then act efficiently. Under a negligence standard, however, firms will estimate paying damages only at some fraction of the actual costs of injuries, since only part of the total accident costs will be deemed attributable to negligence.¹⁷¹ Hence, under a negligence standard, profit-making firms will adopt sub-optimal levels of safety precautions.

Posner might hold that this sub-optimality would not occur because courts would find firms liable for making sub-optimal decisions. Courts, however, could accomplish this only by hypothesizing that firms make mistakes about optimal safety spending, mistakes now defined as negligence, mistakes that occur only because negligence is the standard firms face. As the ironic result, negligence appears as the sub-optimal decisionmaking that arises from establishing a negligence standard. A perfect optimizing firm, by contrast, optimizes social efficiency, not just its own profits. Such a firm would never allow an accident to happen unless it were socially efficient to do so.

In other words, the optimizing firm must act as if it would pay the full social costs of its injuries, as it would have to under strict liability, even if the actual prevailing standard is negligence. To act in consonance with true optimality, a firm must engage in “phantom” cost accounting, behaving as if strict liability is the standard, even if it is not. A court purporting to apply a negligence standard cannot

171. *Id.* at 277-80.

treat firms as if they have correctly applied the efficiency norm. A court so acting would never find liability. The court must instead assume the possibility of efficiency mistakes by firms and impose liability accordingly. Such mistakes can be eliminated only through the consistent imposition of strict liability. Otherwise, the court must, under a negligence standard, try to assess which injuries represent efficiency "mistakes." This requires a determination of whether the firm made the same decision under negligence which it would have made under strict liability. To yield efficiency, therefore, Posner's negligence standard would require courts to inquire whether firms have correctly implemented what strict liability would require. Therefore, efficiency would be better served by straightforward strict liability.

V. LABOR

In recent years, Posner has trained his scholarly sights on labor law.¹⁷² His main themes are that unions produce economic inefficiency and that the Wagner Act structure enhances union power, thus fostering inefficiency.¹⁷³ Although Posner purports to address these themes in the neutral spirit of economic science by taking no position on whether unions and union-protective law are bad or good, the belief that union power intrinsically yields inefficiency seriously undermines the legitimacy of unions and union-protective law. Moreover, since his work as a whole stands for the proposition that inefficiency is bad and that the law should strive to curtail it, Posner's self-described neutral stance is disingenuous.

Posner's efforts come as part of a wave of attacks from the right during the seventies and eighties on the Wagner Act and other supposedly union-protective law. Posner endorses this literature as a preface to his own contributions to the critique.¹⁷⁴ In endorsing this literature uncritically, Posner undermines his own credibility from the outset. For example, Posner refers favorably to two articles by Epstein¹⁷⁵ which put forth arguments of uncommon silliness.

172. See generally Posner, *Some Economics of Labor Law*, *supra* note 13 (outlining Posner's application of economics to labor law); R. POSNER, *ECONOMIC ANALYSIS*, *supra* note 13, at 299-316.

173. See Posner, *Some Economics of Labor Law*, *supra* note 13, at 990 (arguing that American labor law as epitomized by Wagner Act is inconsistent with economists' desire for competition and efficiency).

174. See *id.* at 990 n.9, 991 (endorsing Epstein's views on labor law as similar to his own). With apologies to Marx, see Marx, *A Contribution to the Critique of Political Economy*, in *THE MARX-ENGELS READER* 3 (Tucker ed. 1978).

175. Posner, *Some Economics of Labor Law*, *supra* note 13, at 990 n.9 (citing Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Legislation*, 92 *YALE L.J.* 1357 (1983)).

A discussion of one of Epstein's arguments indicates what Posner is apparently willing to accept at face value.

In both articles, Epstein tries to refute the insight that unions, by enhancing worker bargaining power through collective strength, offset the bargaining advantage firms enjoy when dealing with workers individually.¹⁷⁶ The asymmetry in bargaining power in the absence of unions emerges from the straightforward fact that almost every worker needs a job more than any particular firm needs that particular worker to fill a job. Because the existence of unequal bargaining power legitimates union power, the anti-union right finds it ideologically unacceptable and therefore downplays or ignores it.

As Epstein argues, bargaining power in labor markets simply does not exist, and its nonexistence can be demonstrated empirically. His argument is simple. If unequal bargaining power existed, firms would wield it to force worker wages down to zero. Since worker wages in the real world are not at zero, unequal bargaining power must not exist; the hypothesis of its existence is contradicted by empirical observation!¹⁷⁷ Since Epstein offers this argument in two separate articles, we must assume it is no slip of the pen but is meant to be taken seriously. One must reluctantly conclude that Posner also takes it seriously, since he does endorse Epstein's articles without noting any reservations on this or other arguments within them. It is amusing to bear in mind that these men claim authority for their views by donning the mantle of hard-headed economic analysis, castigating their antagonists as mush-brained ideologues. The obfuscation in Epstein's argument is immense, especially in its failure to conceptualize any difference between relative and absolute power dominance.

Posner's own arguments do not rise to a level much higher than Epstein's. Posner indicts the Wagner Act for helping unions to "cartelize" labor supplies, thus hiking wage levels above those that would prevail under "unregulated competition."¹⁷⁸ His grievance, presumably, is that this non-competitive pricing distorts the market and thereby stymies efficiency. Posner relies on the fallacious no-

[hereinafter *Common Law*]); Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984) [hereinafter Epstein, *Contract at Will*].

176. Epstein, *Common Law*, *supra* note 175, at 1366 (arguing that identity of contracting parties is irrelevant and that special protection for workers is not necessary).

177. See Epstein, *Common Law*, *supra* note 175, at 1371-72 (arguing that because wages were not forced to zero prior to Wagner Act, unequal bargaining power is factually refuted); see also Epstein, *Contract at Will*, *supra* note 175, at 973-77 (discussing inequality of bargaining power in employment at will context).

178. See Posner, *Some Economics of Labor Law*, *supra* note 13, at 990 (arguing that American labor law is best understood as device for facilitating cartelization of labor supply by unions).

tion that there is such a thing as "unregulated" competition, which can serve as a benchmark for legal and economic analysis. Unions do not, however, release wages from determination by "unregulated" competitive forces. They merely alter the regulatory framework within which competition operates, yielding a different pattern of distributional outcomes. Union-protective labor law redefines the entitlements at work in the employment relationship. Firms, for example, are stripped of some of their power to discharge, while workers are granted the right not to be fired for their union support.¹⁷⁹ This new state of affairs is no more "regulated" than the old one which defended business power to make discharges and gave no protection to workers who supported unions. Since all entitlement schemes are legally protected and enforced, none can be called "unregulated." Thus, there is no basis for opposing a legal change as inefficient simply because it departs from an "unregulated" state of affairs which does not exist.

Posner assumes that under anti-union common law, labor was priced at the proper "competitive" level. Unlike Epstein, Posner does not explicitly reject the notion that firms dealing with isolated workers might enjoy bargaining advantages which allow them to distort wages *below* the hypothetical competitive level.¹⁸⁰ Nevertheless, by positing that "competitive" wage levels existed under the common law, Posner implicitly accepts Epstein's position that no unequal bargaining power, no employer monopoly power through control of scarce jobs, was operative. Because Posner assumes that common law wage bargains were "competitive," he can easily portray departures from common law rules as departures from "competitive" wage levels.¹⁸¹

Like Epstein, Posner defends common law enforcement of "yellow dog" contracts, under which workers agreed to shun union membership as a condition for their employment. Posner argues that enforcement of these contracts was sound because workers obtained wage premiums in return for forsaking their legal rights to join unions.¹⁸² Any such wage premiums, however, could not have amounted to much in most cases, precisely because unions were so weak, partly due to "yellow dog" contracts themselves. If a worker knows that everyone else in the firm has signed a no-union pledge,

179. See National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1982) (prohibiting termination of employee because of union affiliation).

180. See Posner, *Some Economics of Labor Law*, *supra* note 13, at 991 (arguing that unions were designed to raise wages above existing competitive level).

181. See *id.* (outlining view that common law promotes efficiency).

182. *Id.*

she knows that her abstract legal right to join a union can do her little good and probably will not demand much as a price for giving it up. Other legal restrictions with union-weakening effects, such as restrictions on picketing or secondary boycotts, will similarly shrink the price of forgoing the right to join a union.

Posner does not mourn the fact that wage premiums for yellow dog contracts were probably minimal. More generous premiums, he argues, would represent a form of monopoly rent for workers.¹⁸³ By this, Posner means that the increase in worker income that stems from unionization represents a return on union "monopoly" in the labor market, which departs from "competitive" wage levels. If so, wage premiums secured by pledging not to unionize also implicitly represent the fruits of "monopoly." It is ideologically revealing that Posner introduces the term "monopoly" first in reference to union power, not employer power. Employer power does not bother him as a departure from balanced competition. Posner later concedes that when employers deal with unions, the situation can be described as one of "bilateral monopoly."¹⁸⁴ This seems to suggest that removal of unions, through a union-hostile common law, would result in a unilateral monopoly favoring employers and allowing them to press wages below the proper "competitive" level. Posner has great difficulty acknowledging this point, however.

Posner's position seems to partake of a more general fallacy, in mainstream market analysis, which frequently denies or downplays the overtones of monopoly when large employers confront a dispersed multitude of potential workers. The ubiquity of this situation may indicate a systematic downward departure in wages from their proper "competitive" levels. This implies massive and thoroughgoing economic inefficiency, if efficiency turns on "competitive" pricing. It further implies systemic unfairness to workers, if fairness is equated to "competitive" pricing.

These disturbing implications are partially hidden by a picture of one-on-one dealings—single firms dealing with single workers. When firms and workers act as individual units, according to this picture, neither side exerts any market distorting "monopoly" power over the other. Monopoly emerges only when the firm "units" or worker "units" act in concert or merge into larger entities such as business cartels or unions. This conclusion seems reassuring as long as one avoids asking what constitutes a non-

183. *Id.*

184. *See id.* at 997 (outlining bilateral monopoly in which refusal to deal by one side imposes costs on other side and makes other side more likely to come to terms).

monopolistic isolated unit. The picture changes radically, however, if one characterizes a business firm not as a unit but as an aggregate of units of capital, all acting in concert to secure maximum income. If the supposedly "competitive" market consists of disaggregated units of labor striking deals with disaggregated units of capital such as shares of stock or dollars, any wage negotiation involving a large enterprise can be described as a confrontation with a cartel of capital units. There is no reason why firms rather than shares, dollars, or something else should be deemed the paradigmatic unit for determining whether the situation involves "monopoly." The same is true for labor. There is no reason other than sheer convenience that the individual worker, rather than a union or perhaps one nanosecond of work, should be denominated as the unit of analysis in assessing whether conditions are "competitive" or "monopolistic." With this relativity in what may be designated a unit of capital or labor, the very concept of a "competitive" wage level collapses into meaninglessness.

Posner manifests this general fallacy when he mentions the limited and special conditions under which he might deem employer monopsony power to be cause for concern. Employers might join "conspiracies" to depress wages, for example.¹⁸⁵ Posner's "conspiracy" image reveals his implicit treatment of the firm as the natural unit of market analysis, with "monopoly" manifesting itself only when separate firms conspire. He also assumes this when he acknowledges a possible monopoly problem when antitrust laws against "employer cartels" are weakly enforced.¹⁸⁶ Posner does concede that certain circumstances, such as low worker education levels, overabundance of immigrant labor, "limited" numbers of employers in "some markets," and obstacles to labor mobility such as over-specialization or abnormal ties to particular localities, suggest monopolistic perversion of competitive wage levels.¹⁸⁷ Posner's itemized list, however, suggests that disproportionate employer bargaining power occurs only as a departure from normal conditions.

Posner appears fair-minded when he admits that these departures from normality "may" once have been prevalent, but only in the

185. See Posner, *Some Economics of Labor Law*, *supra* note 13, at 991-92 (stating that employer monopsony power might exist where workers are ignorant of alternative employment opportunities, where workers would incur heavy costs in changing jobs, and where employers conspired to depress wages).

186. *Id.* at 992.

187. *Id.* at 991-92.

past.¹⁸⁸ Even if one narrowly defines the problem by Posner's list, however, nothing about the late twentieth century, except perhaps the weak union-protective legislation Posner decries, suggests that the problem has been banished. Posner suggests that we can be at ease even about the bad old days, in America at least. He points out that labor was scarcer in America prior to World War I than elsewhere and that wages were higher here.¹⁸⁹ Though Posner suggests that these factors disprove any contention of employer monopoly power on these shores, his point is a *non sequitur*. The fact that American labor held greater bargaining power than did Eurasian labor does not mean it did not face unequal bargaining power with respect to American capital.

Posner revealingly and accurately characterizes employer firings of union members or activists as "rational predatory action."¹⁹⁰ The Wagner Act framework, of course, purports to strengthen unions by placing constraints on such action.¹⁹¹ It attempts to alter market structure by ensuring that firms that do not fire union members will not be outcompeted by firms that do. Posner's discussion rests on his uncritical assumption that the Wagner Act framework succeeds in accomplishing this purpose.¹⁹² Posner betrays no inkling of the substantial literature suggesting that the Wagner Act framework, as interpreted and applied, has proved largely impotent in augmenting union power.¹⁹³ This omission alone disqualifies him as a serious commentator on the subject.

Despite Posner's blithe assumption that the bad old days are gone, worker weakness in bargaining position has not disappeared. It may in fact have worsened in the past two decades as a result of chronic economic stagnation, accelerating capital mobility, mounting anti-union aggressiveness and expertise among employers, the diminishing effectiveness of labor law in protecting union activity, and the continuing decline in private-sector union membership. Posner nevertheless clings to the notion that the Wagner Act framework tilts power excessively in favor of workers and against employers.¹⁹⁴ It seems not entirely accidental that Posner fails to discuss

188. *See id.* at 992 (indicating that such market distortions were present in 1935 when Wagner Act was passed).

189. *Id.*

190. *See id.* at 994 (defining term as firing of pro-union employees to deter unionization).

191. *Id.*; *see* Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 157-158 (1982)) (protecting employees engaging in organizing activities and prohibiting employers from interfering in such activities).

192. Posner, *Some Economics of Labor Law*, *supra* note 13, at 994-95.

193. *See supra* note 27 (providing sampling of articles in field of labor law).

194. *See Bierman, Judge Posner and the NLRB: Implications for Labor Law Reform*, 69 U. MINN.

whole topic areas, such as multi-employer bargaining, secondary boycotts, and successorship—where the law's basic assumptions are pro-employer.¹⁹⁵ Instead, Posner misleadingly ferrets out aspects of the framework he can portray as tendentiously anti-employer.

In his discussion of unionization election campaigns, for example, Posner highlights the prohibitions on anti-union discharges and interference, on threats of retaliation for union victory, and on promises of benefit in the event of union defeat.¹⁹⁶ His subtext seems to be that such prohibitions are over-restrictive since employers "are more limited in what they are allowed to say than are candidates and supporters in political elections."¹⁹⁷ In political campaigns, "promises of benefits" are a "staple."¹⁹⁸ Posner has nothing to say about the fact that employer speech restrictions may be appropriate for unionization elections because they factor out the coercive power implicit in employer statements. He also ignores the question of why employers should be allowed to speak or otherwise intervene at all in a process purporting to promote the best interests of workers. By the logic of countenancing employer speech in unionization campaigns, foreign governments should be allowed to contribute to United States presidential campaigns and schoolteachers should be allowed to endorse candidates in student council elections. Moreover, the employer speech prerogative seems especially anomalous in view of the fact that workers typically enjoy no entree whatsoever to company board or stockholder meetings.

Posner's blinkered focus emerges again in his discussion of employer power to break and deter strikes by hiring permanent replacements for strikers. Posner makes the odd observation that hiring permanent replacements would "never be necessary" if employers could legally hire temporary employees at a premium wage higher than that paid to the striking workers.¹⁹⁹ He then complains that prohibition on such action tilts power in favor of workers in the eventual resolution of the dispute.²⁰⁰

Posner's emphasis here is obfuscating. Any pro-worker effect of the premium wage prohibition only partially offsets the pro-em-

L. REV. 881, 904-07 (1985) (citing evidence of National Labor Relations Board's bias toward political party in control means Board is not continuously pro-union).

195. See Posner, *Some Economics of Labor Law*, *supra* note 13, at 999 (explaining away omission of these topics because of time and space constraints).

196. *Id.* at 995-96.

197. *Id.*

198. *Id.* at 996.

199. Posner, *Some Economics of Labor Law*, *supra* note 13, at 997.

200. *Id.* at 997-98.

ployer tilt inherent in the employer's right to hire permanent replacements in the first place. The wage ceiling may limit the employer's advantage in being free to hire permanent replacements, but it does not eliminate it. Posner implies that firms resort to permanent replacements only because laws prohibiting premium wages for temporary replacements make it "necessary" to woo replacements with offers of permanent status. This picture does not comprehend the realities of economic struggle. It ignores reasons why employers would hire permanent replacements, other than difficulty in wooing temporary ones.

In the real world, the option to hire permanent replacements equips employers with several concrete advantages. Strikes are deterred or broken by worker fears of job loss, while the long-term proportion of union support in bargaining units is weakened by the diluting effect of permanent replacements whose attitudes and interests may be union-hostile. Posner errs grievously in suggesting that these employer advantages stem from the fact that the replacement premium wages are *forbidden*, rather than from the more fundamental fact that hiring permanent replacements is *allowed*.²⁰¹

Posner's position on the negative efficiency impact of unionization, which rests on the dubious "competitive wage" notions explored above, is vulnerable from another direction if unionization fosters higher productivity. If this is the case, the supposedly anti-efficiency effect of union wage pricing must be weighed against the pro-efficiency effect of enhanced productivity. Posner is troubled, therefore, by studies showing that unionization *does* on average promote productivity by reducing worker turnover, enhancing workplace morale, harnessing worker "voice" to augment rational management, and impelling raised wages, thus furnishing employers with incentives to invest more capital per worker.²⁰² Rather than accepting this conclusion or disputing the evidence on its own terms, Posner insists that it *cannot* be true. If unionization promotes productivity, he argues, employers would encourage it, not resist it, because enhanced productivity enhances profit.²⁰³ The fact that employers fight unions fiercely proves that unions hamper productivity, thinks Posner.

201. See Posner, *Some Economics of Labor Law*, *supra* note 13, at 997-98 (outlining Posner's view of balance of power).

202. See R. FREEMAN AND J. MEDOFF, *WHAT DO UNIONS DO?* 162-80 (1984) (outlining modern quantitative analysis which indicates unions raise productivity in most circumstances).

203. See Posner, *Some Economics of Labor Law*, *supra* note 13, at 1000-01 (stating theory that unionization promotes productivity is hard to accept because it is inconsistent with economic assumption that employers are profit or utility maximizers and would thus accept unions if they were more productive).

Posner's argument is wrong because his premise is false. Enhanced productivity does not necessarily mean enhanced profits. Important studies indicate that unionization can reduce profits through its wage hike effect while simultaneously augmenting productivity through other effects.²⁰⁴ Firms fight unions because they abridge profits, not because they hamper productivity. Moreover, if it is true that unions actually enhance productivity, employer resistance contradicts, rather than augments, economic efficiency. Posner fails to address this because he apparently does not discern the possibility that unionization, through increased bargaining power, might secure wage hikes over and above whatever productivity enhancement it contributes.²⁰⁵ His argument manages to overlook both the obviousness of this possibility and the fact that it is confirmed by leading studies in the field.

In addition to attacking unions, Posner has also attacked labor-protective minimum wage and safety legislation, as well as judicial departures from the common law rule of employment at will, as inconsonant with efficiency.²⁰⁶ Although there are significant problems in Posner's analysis of each of these, I focus on his discussion of the "employment at will" issue, which exemplifies the fallacies in his economic analysis of entitlements, including inattention to the offer price/asking price issue.

The employment at will rule, which could also be called the "discharge at will" rule, denies most American workers any legally-protected job security. Epstein offers the astonishing argument that this rule prevails because employment at will is beneficial both to firms and to workers.²⁰⁷ Epstein's suggestion that the rule benefits workers by leaving them free to leave their jobs at will²⁰⁸ is an utter *non sequitur*. Worker freedom to depart a job at will has no bearing on the employment at will rule, which concerns employer freedom to fire a worker at will. Epstein's point only makes sense if he assumes that workers could not be given the right of departure at will without a concomitant employer right to discharge at will. There is, however, no reason whatsoever why the worker's departure right

204. See R. FREEMAN AND J. MEDOFF, *supra* note 202, at 162-80 (reporting evidence that union workers are generally more productive than their non-union counterparts).

205. Posner, *Some Economics of Labor Law*, *supra* note 13, at 1001. Posner writes that employers would not resist productivity-enhancing unionization because, "[e]ven if the whole productivity gain is paid to the employee in the form of a higher wage, the employer will be better off," due to competitive advantages the hike in productivity confers. *Id.* He does not ask what happens if the wage goes up by *more* than the productivity gain. *Id.*

206. R. POSNER, *ECONOMIC ANALYSIS*, *supra* note 13, at 306-12.

207. Epstein, *Contract at Will*, *supra* note 175, at 966-67.

208. *Id.*

must be symmetrical to the employer's discharge right, aside perhaps from a misplaced concern that asymmetry would be "unfair" to employers.

Epstein also insists that the employment at will rule must be "beneficial" to both parties, and presumably "efficient" in Posner's eyes, since such arrangements are more common than any other type of employment contract.²⁰⁹ Epstein ignores the possibility that the prevalence of discharge at will contracts stems from the law's enforced presumption that employment contracts entail discharge at will. Workers desiring escape from the employment at will rule must secure, at the expense of reduced compensation, explicit contractual terms providing job security. Epstein's suggestion that both parties must be "better off" under the discharge at will rule or else the employment contract would not be struck misses the point completely. A worker may, of course, be "better off" with employment at will than with no job at all. This does not mean, however, that she would not be better off still with job security. Epstein's presentation obfuscatingly suggests that since employment at will is so common, workers would be worse off under conditions of greater job security.

At this point Posner enters the discussion, citing Epstein exclusively.²¹⁰ Posner offers three different arguments on efficiency grounds in defense of discharge at will. Each argument, although not as preposterous as Epstein's, is faulty for a different reason. Posner first suggests that discharge at will must be efficient because if a contrary requirement of job security were efficient, the parties "voluntarily" would negotiate for such a requirement.²¹¹ Posner fails to discern this discussion as a classic context for Coasean analysis of entitlement assignments.

If discharge at will is "optimal," to use Posner's term, the parties may arrive at it through voluntary negotiation, just as Posner suggests, whatever the legal rule may be. Imagine two different entitlement configurations, one under which an employer may discharge at will, the other under which the worker has some entitlement to job security. If the latter entitlement configuration were chosen as the initial posture, the parties would remain free to negotiate a departure, replacing the original configuration with one under which the worker could be discharged at will. Presumably the worker would secure some compensation premium in return for sacrificing job security. There is thus no reason from an efficiency standpoint not to

209. *Id.* at 965.

210. See R. POSNER, *ECONOMIC ANALYSIS*, *supra* note 13, at 315.

211. *Id.* at 307.

confer an entitlement of job security, even if it might be a sub-optimal initial assignment.

This analysis falters, of course, if information/transaction costs block the move from "sub-optimal" job security to "optimal" discharge at will. Posner does not, however, rest his case on the problem of transaction costs. He instead insists that deal-blocking costs are low in this context,²¹² a position he *must* take lest someone point out that the discharge at will rule might actually be sub-optimal, but prevalent because of blockages on optimizing moves to job security contracts. If that were the case, of course, efficiency would demand the replacement of the discharge at will rule with one protecting job security to ensure optimality.

Posner follows his voluntary negotiation argument by another argument which seems to anticipate the rejoinder just raised. Assuming discharge at will as the normative original configuration, Posner argues that the fact that job security contracts are not arrived at must be because employer losses in sacrificing the discharge at will entitlement outweigh worker gains of obtaining job security.²¹³ Hence, workers will not pay employers enough to "buy" the entitlement. To Posner, this means that the entitlement in question has more "value" to the employer than to the worker and the discharge at will entitlement therefore comports with efficiency. This argument is distinct from both the transaction-blockage argument and Epstein's position that the discharge at will rule is efficient because both parties gain. Posner recognizes the obvious fact that one party gains and the other loses under the discharge at will rule, but nevertheless proclaims its efficiency because the gain outweighs the loss.²¹⁴

To claim even-handedness, Posner must assume that the average contractual outcome, discharge at will, is not determined by the selection of discharge at will as the initial entitlement configuration. This assumption, however, cannot stand. In a regime recognizing a job security entitlement, worker bargaining power and wealth would be enhanced since workers could either enjoy the entitlement or trade it away to secure other wealth. Firms, by the same token, would possess less wealth. Therefore, each party would be affected in its willingness/ability to pay for any particular negotiated entitlement. Willingness/ability to pay is a function of how much wealth one has. Under such a regime workers would be willing/able to pay

212. *Id.*

213. *Id.*

214. R. POSNER, *ECONOMIC ANALYSIS*, *supra* note 13, at 307.

more for the entitlement in question, while firms would be willing/able to pay less. Hence, in a regime offering an initial entitlement of job security, employment contracts providing job security would be more common than they are where discharge at will is the entitlement.

Posner's argument that discharge at will embodies efficiency falls to pieces if discharge at will prevails as a bargaining outcome only because it first prevails as the initial entitlement. Empirical evidence supports this notion. European workers enjoying legal protection for job security do not generally work under discharge at will contracts.²¹⁵ Thus, bargaining outcomes seem strongly dependent on the initial assignment of entitlement. If so, Posner's efficiency analysis sinks into indeterminacy and uselessness. His method serves only to defend the haves in what they have and to justify giving them more.

The third argument in Posner's repertoire states that employers extending job security to workers will tend to pay lower wages than comparable employers who retain power to discharge at will.²¹⁶ This point may be true, but it is also irrelevant. Posner presumably means to suggest that workers are better off under the discharge at will rule than under a job security rule because job security comes at the cost of lost wages. While it is true that workers under job security *contracts* may earn less than those under discharge at will *contracts*, job security workers and discharge at will workers are both better off under a job security *entitlement* than their respective counterparts under the discharge at will *entitlement*. Under either initial configuration, workers who wind up in discharge at will contracts may earn higher wages than those who wind up in job security contracts. The difference lies in the way they arrive there. Under the discharge at will rule, workers who want job security must buy it, leaving them worse off than they would be if job security were theirs to start with. Workers under a job security entitlement, however, who are willing to risk discharge at will, can trade their security away for a wage premium, making them better off than workers under a discharge at will rule who have no entitlement to trade away. Posner misconstrues a truism about contracts for a truth about efficiency. The fact that job security workers may earn less than those with discharge at

215. See Raday, *Individual and Collective Dismissal—A Job Security Dichotomy*, 10 COMP. LAB. L. 121, 121 (1989) (recognizing distinction between European job security model and American employment at will labor tradition); Comment, *Employment-At-Will: The French Experience As a Basis for Reform*, 9 COMP. LAB. L. 294, 316-18 (1988) (discussing trend among industrialized democracies, other than United States, to enact unjust dismissal legislation).

216. R. POSNER, *ECONOMIC ANALYSIS*, *supra* note 13, at 307.

will contracts, which is true regardless of the legal rule, does not mean that they are better off without a right to job security.

CONCLUSION

Posner is widely reported to be brilliant and creative and has been described by prominent observers, even those who disagree with him, as a "genius."²¹⁷ I do not dispute these abstract characterizations. Posner's scholarship, however, does little to support his superb intellectual reputation. Although Posner has invested his scholarly career in the endeavor known as law and economics, careful appraisal reveals that his thought is held together by a remarkable array of alarming values, unexamined and implausible assumptions, circular arguments, and logical fallacies. By comparing Posner's reputation with his actual scholarly record, I do not seek to villify Posner *ad hominem*. Rather, my objective is to provoke reflection and discussion on the relationships among scholarship, reputation, and ideology. Posner himself might even welcome such a dialogue. In fact, his book on Justice Cardozo indicates a strong interest in issues of legal scholarly reputation.²¹⁸

My deep dismay over Posner's strong intellectual reputation should come as no surprise. Posner is a man for his time, not unlike Cardozo in Posner's assessment of him. During the past two decades American capitalism has grown increasingly destructive and inept, while the intellectual energy devoted to defending it has mounted exponentially. This intellectual effort has confronted special difficulties in legal scholarship, due to the debunking legacy of legal realism, the critical school that flowered earlier in our century, during a previous period of capitalist crisis. Legal realism unmasked the ideological sleights of hand which allowed an inequitable regime of property and market rules to proclaim itself as natural, inevitable, brilliantly created, and good. Legal realism's central insights are so elegant and simple that they are virtually undeniable by anyone who understands them, and a sophisticated thinker like Posner cannot escape acknowledging their power at the level of technical analysis. Early law and economics, such as the Coase Theorem²¹⁹ and some of Calabresi's early work,²²⁰ extended and

217. See Warren, *Richard Posner Shakes Up the Bench*, AMERICAN LAWYER, Sept. 1983, at 75-76 (citing unconfirmed report that former Justice William Brennan considers Posner "genius").

218. See generally R. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990).

219. See generally Coase, *supra* note 133.

220. See generally Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965).

applied the modernist attitude of legal realism in a way disquieting to some long-accepted liberal pieties.²²¹ The ironic aftermath, however, is that Coase has been more fully assimilated by left-liberal commentators than by those operating from a business and conservative standpoint. At the same time, law and economics has repeatedly ignored the main insights of legal realism, while casting itself as congruent and continuous with them. These trends are exemplified in Posner's work, which is often obtuse to the realist insight that legal rulings, social power dynamics, and patterns of economic distribution condition each other mutually, and to the Coasean insight that none of these factors bear any relationship to "efficiency," except perhaps through the murky prism of transaction costs.

Despite these fundamental shortcomings, Posner's work has acquired a monumental reputation. The long-term significance of Posner's work, however, may be quite different than Posner's current intellectual reputation. By pushing neoclassical efficiency logic into all areas of the law, Posner's work hastens recognition of the absurdities and paradoxes which have always lurked within neoclassical analysis. We now live in a moment when the prevailing private economic order is confronting both its intellectual defenselessness, long since established by legal realism and other critical schools, and a deepening crisis in performance, both of which heighten the need for work like Posner's. What could be more natural in such a period than the high reputation of a champion of the decaying order who writes within an elaborate veneer of neutrality and novelty? The spasmodic twitchings within Posner's thought echo the desperate thrashings of an economic order struggling to escape the destructive self-contradictions that define its identity and give it its very life.

221. See Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905, 906-11 (1980) (tracing early law and economics in law schools).