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The Rhetoric of Law and Economics

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ESSAYS

THE RHETORIC OF LAW AND ECONOMICS

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Economics and law have contrasting rhetorics, which is one reason perhaps why economics has become influential in law. It is a new way of arguing, and lawyers are on the watch for new ways of arguing.

These "rhetorics" are not always bad. "Rhetoric" here is not merely ornament and trickery, but all persuasion, from arithmetic to moral character. We humans must decide what arguments we find persuasive. The lawyer's appeal to stare decisis or the economist's claim to scientific status are rhetorical acts, good or bad. I want to argue that economics is a sweet science, but the rhetoric of science in economics is mainly bad, not least because it makes lawyers feel like unscientific imbeciles.

Economics, like mathematics, thinks it uses no rhetoric but logic. One takes premises that someone else is willing to grant and then "proves" some theorem in the usual ways, by construction or by contradiction. The ways of proof are individual, gripping the mind of the individual reasoner. At their most social they are only dialectic (Greek: pick out; converse) — which is the classical name for logic, not "dialectic" in the open sense of Hegel. Dialectic does not view itself as social. Plato's dialectic needs only two people, a victim and a Socratic arguer. Society or culture does not matter for the argument; or so it seems. One could reason logically or dialectically on a desert island, with Friday standing there to nod his head in admiration and say from time to time "panu ge, Sokrates." Economists believe they use Robinson Crusoe reasoning.

Socrates described it with the word *elenchos* — the individual refutation, the *reductio ad impossibile. Elenchos* first meant in Greek "dishonor" or "disgrace," especially by speech. The rhetoric of the "compelling" proof is not gently "persuasive," as in Latin *persuadeo* from the same root as "sweet." On the contrary, it is authoritarian, browbeating, shaming, anything but sweet. As James Boyd White

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says of the *elenchos,* "What matters between us is not the other witnesses who can be brought forward to support your view or mine but whether you can make me your witness or I can make you mine."[1] In legal terms the *elenchos* is cross-examination, to be contrasted with evidence of third parties or appeals to rules of law.

An example of logical, Robinson Crusoe reasoning, classical in every sense, is the proof that the square root of two cannot be calculated as the ratio of two integers. The victim examines the proof. After some quiet thought she surrenders to its force, or surrenders at least if she accepts the law of the excluded middle. Likewise in economics the proof of the existence and stability of competitive equilibrium or the proof of the rationality of altruism appears to be a piece of logic. If you grant me this or that assumption I can force you to testify against your own doubts that economies work as the economists say. The *elenchos* is formal logic.

The law, by contrast, if not always the scholarship of lawyers (although the two seem to be models for one another), uses what I shall call for a moment "*social* reasoning." That is, it uses reasoning that makes essential use of our position as members of a community. It is not Robinson Crusoe logic but so to speak Boulean logic, to be used in the Boule, or Council, at Athens. The most obvious example of Boulean logic in the law is the use of witnesses, strictly irrelevant to the operation of the other, dialectic logic (in which it is not supposed to matter in the proof that a reliable witness *says* that the square root of two is irrational). There are other cases, as I shall note in a moment, most especially the heavy use of analogy in the law. One could call the social discourse, as Socrates and Plato did, "rhetoric." The rhetor in Greece and Rome was above all a lawyer. The descendants of the rhetors are professors of English, communications, and law.

So economics claims to be "dialectical" in the Greek sense ("logical" in the modern sense), but law is "rhetorical."[2] One could demonstrate — dialectically or rhetorically — that economists consider themselves bound only by dialectic, while legal scholars and judges consider themselves bound by rhetoric. It is noticeable that economists, even when talking about legal matters, will seize on the narrow-

1. J.B. WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 102 (1984).

2. I apologize for the laymanly mixing up of law in courts with law in books and in the minds of legal scholars. The word "law," unlike the pair "economics" and "the economy," has that maddening but suggestive ambiguity of the word "history," used to name the study of the thing as well as the thing itself. In "history" it is raised to a further level of confusion because the writings that are histories of events have themselves a history, as law has laws, though with the distinct name of jurisprudence.

est reasoning they can find, sidestepping many of the issues (by plea of nolo contendere) and stating their arguments as compelling "theorems." Lawyers, even when talking about economics, will argue any point, with any reasoning that seems persuasive, in a lawyerly way.[3]

The one sort of reasoning, then, I have called dialectical or logical, the other rhetorical or social.[4] Four points about these reasonings: First, as was just argued, the law is social. Second, the logical, Robinson Crusoe reasoning in our culture sneers at social reasoning. Therefore, third, economic reasoning sneers at legal reasoning. But, fourth, economic argument after all is social, too. I am arguing that we are all social reasoners together, we economists and lawyers. If economics is to influence legal scholarship it had better do so because the arguments are humanly persuasive (as, I must say, they commonly are), not merely because they satisfy some timeless criterion of scientific, logical reasoning.

In academic talk and in textbooks on logic the social reasoning that characterizes law is gathered under "Fallacies":

• The circumstantial *ad hominem* argument, for example, is the figure "practice what you preach." The personal circumstances of the mathematician, we would usually say in logic, are irrelevant to the persuasive power of his proof. But when an excellent economist at Yale who had testified in an antitrust suit was discovered by the opposition lawyers to have written to the contrary in a scholarly journal his troubles were more than intellectual. And it is of course common practice in the street as much as in the courts of law to try to undermine an argument by showing that the advocate or witness does not herself practice it. A doctor testifying in court against a cigarette company would not be a useful witness if she had to step down from time to time for a smoke.

• The *argumentum ad baculum,* the appeal to the cudgel, is the appeal to the force of jail or other punishment. No one will put you in jail if you speak against the irrationality of the square root of two, or even if you act on your speech by approximating the square root of two by a decimal. (One is reminded of the bill said to have been put before an American state legislature that would have rounded *pi* to 3.0 to make calculations easier.) But someone most assuredly will jail you

3. I am thinking of Richard Posner, Robert Bork, Guido Calabresi, Walter Blum, and Harry Kalven, Jr.

4. Modern philosophy makes a narrower distinction between formal and informal logic, for which see D. WALTON, ARGUER'S POSITION: A PRAGMATIC STUDY OF *AD HOMINEM* ATTACK, CRITICISM, REFUTATION, AND FALLACY (1985); and R. JOHNSON & J.A. BLAIR, LOGICAL SELF DEFENSE (1983).

if you speak up in court against the authority of a judge, or if you speak up in public against some economist in a libelous way. Again the argument is used differentially in the law as practiced and the law as studied. There are no jail sentences for errors in law reviews, although readers doubtless would favor three to five years of hard time for certain authors. But we have other sanctions, other cudgels against colleagues who violate the laws of scholarship — noting that the sanctions do not appear to work so well when challenged boldly, as recently by the Critical Legal Studies professors at fair Harvard. We certainly have sanctions against the students. So again law in the courts and classrooms uses "fallacious" reasoning.

• The *argumentum ad verecundiam,* "the appeal to reverence," is the argument from authority, the worst form of "mere rhetoric," at least by the canons of a rhetoric that makes first-order predicate logic the only reasoning. Robinson Crusoe logic says that it scorns authority, which recommends it to the fierce individualists of the West. No appeal seems to be permitted to authorities outside the affirmer and the contradictor. Yet the "fallacious" appeal to authority is obviously and properly effective in court, and only less so in law reviews. (The bizarre system of citation practiced in legal scholarship appears to be an appeal to authority, in a mass.) As *Coke on Littleton* says, *"Argumentum ab authoritate est fortissimum in lege,"* most strong indeed.[5]

• A related fallacy popular among lawyers is that witnesses and juries count, and even mere majorities of these. The *argumentum ad populum,* by a majority of good men and true, has no force in narrow logic, but great force in social reasoning. Socrates chides Polus for his lawyerly ways: My gifted friend, I reject your reasoning

> because you attempt to refute me in rhetorical fashion, *as they understand refuting in the law courts.* For there, one party is supposed to refute the other when they bring forward a number of reputable witnesses .... But this sort of refutation is *quite worthless* for getting at the truth; *since occasionally* a man may actually be crushed by the number and reputation of the false witnesses brought against him.[6]

To be sure, he may be crushed, as was Socrates. But considering that the aristocratic quest for certainty initiated by Socrates has not attained its object, some 2400 years into the program, it seems reasonable in the meantime to decide with numbers and reputations as much as with syllogisms. As Coke said, *"[o]mnis conclusio boni & veri judicii sequitur ex bonis & veris praemissis et dictis juratorum,"*[7] every

5. 2 SIR EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON 254a (19th ed. 1832) [hereinafter COKE ON LITTLETON].

6. PLATO, GORGIAS 471 E-472A (W.R.M. Lamb trans. 1983) (emphasis added).

7. 2 COKE ON LITTLETON, *supra* note 5, at 226.

conclusion of a good and true judgment follows from good and true premises, *and the sayings of jurors.*

• Law and ordinary life — even ordinary academic life — are filled with "ethical appeals," that is, arguments from the *ethos* of the speaker, from his or her character. In formal logic it would seem ridiculous to claim that a good mathematician will do well to be a good person, or that if an economist is seen to be a bad man his economics will be rendered in some way doubtful. But ethical appeals are made daily in legal proceedings, as in life. It is often *not* irrelevant that a witness is a well-known fool or liar (even in formal logic if a Cretan says that all Cretans are liars we are in some difficulty). An expert witness is given special weight, and in legal scholarship the argument of someone without a law degree is suspect. As Coke said, *"cuilibet in sua arte perito est credendum,"* whosoever is skilled in his art is to be credited, and especially whosoever is skilled in the art of law.[8]

• The argument a fortiori involves often the fallacy of a missing premise, a premise furthermore which formal logic disavows: namely, that an order of rigor from minor to major governs the comparison of cases. In Talmudic argument it is called *kal ve-chomer,* the relation of weighty to trivial, the first two rules of interpretation in the systems of Hillel the Elder and of Rabbi Ishmael. Miriam spoke against her brother Moses, for which the Lord made her leprous. The question arose how long she was to be shut out from the camp. The Lord answered, "If her father had but spit in her face would she not be ashamed seven days? [A fortiori, then] let her be shut from the camp seven days, and after that let her be received in again."[9] As Moses Mielziner notes, "Here an inference is made from minor to major, namely, from a human father's to the Lord's disfavor."[10] He quotes *Coke on Littleton:*[11] *Quod in minori valet, valebit in majori; et quod in majori non valet nec valebit in minori":* What has force in a minor matter will have force in a major; and what does not have it in a major matter will not have it in a minor.

• Above all there is analogy, precedent. Analogy has no status in the simpler forms of logic that are usually taken as the very meaning of logicality. But analogy is obviously the very meaning of law, especially common law: Edward Levi was not saying anything startling when he remarked that jurists argue by "the controlling similarity be-

8. 1 COKE ON LITTLETON, *supra* note 5, at 125.

9. *Numbers* 12:14.

10. M. MIELZINER, INTRODUCTION TO THE TALMUD 131 (1968).

11. *Id.* (quoting 2 COKE ON LITTLETON, *supra* note 5, at 260).

tween the present and prior case . . . ."[12] Yet there is no syllogistic form, except perhaps in fuzzy sets, that goes "All beings *similar to* men are mortal; Socrates is *analogous to* a man; therefore Socrates is *probably* mortal." To such logic-mongering Coke replied, *"argumentum a simili valet in lege,"*[13] an argument from similarity is valid in law, however invalid it is said to be in logic.

One could go on. Take down a modern elementary textbook on logic — Copi's standard book, for example — and slowly read the section on "fallacies."[14] Try to ignore the authoritarian and dismissive rhetoric with which the philosophers treat the "fallacies," and ask yourself — Are these not in fact the usual forms of legal reasoning? Are they really all wrong, to be discarded in serious conversation? Or should we rather make distinctions between good analogies and bad, good arguments from authority and bad, good rhetoric and bad?[15]

However one comes out of that mental experiment it is clear why the reasoning that economists claim to offer the law has such prestige. The intellectual traditions in which lawyers are educated as undergraduates tell them that the ways of legal reasoning are "fallacious," and that the only really correct way to argue is logically, mathematically, dialectically, by *elenchos* on a desert island. Education before law school says that reasoning is a matter of "logic and evidence," defined in certain ways pleasing to René Descartes, a mathematician, and to Francis Bacon, a lawyer (though no friend to Coke's common law).

Though he practiced it, Bacon claimed to dislike the richly argumentative ways of Shakespearean England. He urged what T.S. Eliot called the dissociation of sensibilities, the severing of argument from personal experience. The unified sensibility in common discourse and metaphysical poetry was to be set aside: "the mind is already, through the daily intercourse and conversation of life, occupied with unsound doctrines,"[16] the "specious meditations, speculations, and glosses in which men indulge."[17] The Baconian mind would be a mirror of nature; at present "the minds of men are strangely possessed and beset, so that there is no true and even surface left to reflect the genuine ray

12. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 7 (1948).

13. 2 COKE ON LITTLETON, *supra* note 5, at 191a.

14. *See* I. COPI, INTRODUCTION TO LOGIC 86-126 (1978).

15. *Cf.* D. WALTON, *supra* note 4; W. BOOTH & M. GREGORY, THE HARPER AND ROW RHETORIC: WRITING AS THINKING, THINKING AS WRITING ch. 13 (1987).

16. F. BACON, *The Great Instauration, and The New Organon,* in FRANCIS BACON: A SELECTION OF HIS WORKS 327 (S. Warhaft ed. 1978).

17. *Id.* at 333.

of things."[18] The unassisted "human understanding is like a false mirror, which, receiving rays irregularly distorts and discolours the nature of things by mingling its own nature with it."[19] The solution is to submit the mind to a machine, "not left to [the mind's] own course, but guided at every step, and the business done as if by machinery."[20] In this way we will achieve "not pretty and probable conjectures, but certain and demonstrable knowledge."[21] The imprisonment of the mind will set it free. "The understanding must not therefore be supplied with wings, but rather hung with weights to keep it from leaping and flying."[22]

As Amelie Oksenberg Rorty has remarked recently about Descartes, Bacon's assault on rhetoric makes an assault on itself, for he "found himself using the very modes he intended to attack."[23] Descartes, too, was reacting to rhetoric, but "[d]espite his austere recommendations about the methods of discovery and demonstration, he hardly ever followed those methods, hardly ever wrote in the same genre twice."[24] The same mischievous observation might be made of modern Cartesians and Baconians: namely, that a fuller rhetoric (which would use the "fallacies" when reasonable people were persuaded by them) is rejected in philosophy and economics by appeal to the very fallacies to be disallowed, such as an appeal to an analogy between a mathematical model and an economy or an appeal to an image of the human mind as a mirror. The antirhetoricians argue with an unexamined rhetoric against the rhetorical tradition.

After a general education dominated by the men of the early seventeenth century, the lawyer of the late twentieth century laboriously acquires nonetheless a richer way of arguing about product liability or criminal evidence, and tries not to worry too much when the way of arguing seems disjoint from her earlier studies of logic. But at length she is told by some smart aleck from the Economics Department that, after all, this legal thinking about economic or social matters is mere anecdote and tale-telling, not real science.

Economics participates in the false rhetoric against rhetoric. The prestige of the seventeenth-century program encourages the economist

18. *Id.* at 317.

19. *Id.* at 336.

20. *Id.* at 327.

21. *Id.* at 329.

22. *Id.* at 364.

23. Rorty, *Experiments in Philosophic Genre: Descartes' Meditations,* 9 CRITICAL INQUIRY 545, 548 (1983).

24. *Id.*

to sneer at legal reasoning, on the grounds that legal reasoning is social and rhetorical, not the splendid Robinson Crusoe reasoning we are all so thankful for and use so seldom. Yet the economist is vulnerable to rhetorical attack, in particular the *tu quoque* (so's your uncle) and the circumstantial *ad hominem* (put your money where your mouth is). Economic reasoning, too, is social and rhetorical. So's your economics teacher. Economics itself uses intensively the "fallacious" figures of speech. Economist, know thy own rhetoric.

Economics, which claims officially to argue by logic alone, appealing to Robinson Crusoe sitting in his cave, in fact argues also in the social way. Indeed, the only reason for making the distinction between narrowly logical, Crusoe reasoning and social, rhetorical reasoning is to throw over the distinction itself, to throw over the prejudice that reasoning must be something more transcendental than honest participation in a community of speech and other laws. To coin a phrase, the prophecies of what the court of informed opinion will do are what I mean by reasoning.

It is always so. The interpretation and use of "logic" will always depend on the culture. My ten-year-old daughter had a textbook published by Midwest Publications in Pacific Grove, California, called *Mindbenders,* little puzzles in well formed formulas. As in the game Wff'nProof, reasoning is identified with logic. The young minds are to be bent towards deduction, learning for instance a great deal more than one would care to know about the possible arrangements of first and last names. The educators at Midwest Publications, however, know they are dealing with children and know they must make explicit the rhetorical premises of the logic. The section entitled "General Comments About Clues" urges the children to

> Think of standards which are generally acceptable to U.S. society as a whole. Use common sense and context in deciding what the clues mean. . . . Assume that only males have male names. . . . [I]f John went on a date with Abbott, assume . . . Abbott is a female, since it is not generally acceptable for a male to "date" a male.

The point has been made well by Richard Harvey Brown, citing Garfinkel's detailed studies of reasoning in jury rooms. He notes that logic, procedure, rationality are not available before a trial, simply to be applied. They emerge. "Thus rationality, rather than being a guiding rule of individual or social life, turns out to be an achievement — a symbolic product that is constructed through speech and actions that in themselves are nonrational."[25] Perhaps it is not so much nonratio-

25. Brown, *Reason as Rhetorical: On Relations Among Epistemology, Discourse, and Practice,* in THE RHETORIC OF THE HUMAN SCIENCES 194 (J. Nelson, A. Megill & D. McCloskey, eds. 1987).

nal as a-rational, or entailing a rationality more complex than fits comfortably on a 3 × 5 card.

An example of the point turning back on economics itself is so-called "rational expectations." The argument is that the economy anticipates on average whatever can be profitably anticipated by economists. That is, the economy is nobody's fool. In particular, it is not the economist's fool. An economist cannot predict the interest rate, for instance, because other and better informed participants in the bond market have every incentive to predict it before the economist does. You see, if the economy is nobody's fool it is not as easy to manipulate as we once thought.

Most economists who have come recently to respect this argument (and I am one of them) think they respect it on mathematical and econometric grounds. Yet the real reason they do, when they do, is that it is an argument from circumstantial *ad hominem.* Like most economists I consider such an argument to be powerful. But in the way of *ad hominem* arguments it is less impressive to outsiders. The argument is The American Question: if you're so smart, oh economist who thinks the economy is a fool, why ain't you rich? An economist who could predict interest rates would be fabulously wealthy. Such a one would make Ferdinand Marcos look like a Bowery bum. No economist is fabulously wealthy (an exception was Otto Eckstein, but he got wealthy by *selling* the alleged predictions, not by acting on them). Therefore no economist can predict interest rates. Therefore the economy does as well as professors do in prediction. Q.E.D.[26]

So economics uses rhetoric. That is an imprecise way of putting the matter. Only partly do we "use" rhetoric. As Coleridge said, we do not speak the language; the language speaks us. There is no way to be "nonrhetorical," to stand entirely outside the traditions of argument and "use" rhetoric to "communicate" the "substance" of argument. Plato imagined a point on which to stand outside of human discourse. He assaulted the law professors of his day (by the name of sophists) because they said that man, not God, was the measure of man's sayings. His portrayal of the sophist/lawyers is still credited by the sort of reader who gets his evidence about women and the Midwest from H.L. Mencken. Rhetoric, to repeat, is not merely the ornament one adds into the speech at the end, and it is not necessarily dishonest. It is the whole of argument — its logic, its arrangement, its appeals to authority, its passion, its pointed lack of passion, its audience, its pur-

26. *Cf.* McCloskey, *If You're So Smart: Economics and the Limits of Criticism,* AM. SCHOLAR (forthcoming).

pose, its statistics, its poetry. Of course economics, and therefore law and economics, will be "rhetorical."

You can see this in any passage taken at random. I take this one, very obscure:

> Our survey of the major common law fields suggests that the common law exhibits a deep unity that is economic in character. . . . The common law method is to allocate responsibilities between people engaged in interacting activities in such a way as to maximize the joint value . . . of the activities. . . .
>
> . . . .
>
> . . . [T]he judge can hardly fail to consider whether the loss was the product of wasteful, uneconomical resource use. In a culture of scarcity, this is an urgent, an inescapable question.[27]

Look at these words as a piece of scholarly poetry. Go back to your freshman English course and read them for their effect. Recall that reading a poem for its effect is not a hostile act. Unhappily, there is a rhetoric of rhetoric in its usual sense, of hostile debunking. We point with a smirk to the President's "heated rhetoric" and are well satisfied with ourselves for having unveiled his nasty tricks. But literary criticism has a deeper and more sympathetic function. Scrutinizing a text is not necessarily hostile. Indeed, I choose Posner in order to lean against the presumption of hostility, because I am largely persuaded by his arguments, the more so because he taught himself economics and ancient Greek as an adult.

The argument in the passage is carried in part by the equivocal use of economic vocabulary: "allocate," "maximize," "value," and "scarcity" are technical words in economics, with precise definitions, but here they are used also in wider senses, to evoke a sense of scientific power, to claim precision without necessarily using it. The sweetest turn is the use of "uneconomical," which is not in fact a technical word in economics, but encapsulates the argument that judges follow economic models because to do otherwise would be "wasteful." The "economical/uneconomical" figure of speech supports the claim that economic arguments (arguments about scarcity) are pervasive in the law, hammering it home by treble repetition (technically, *commoratio*): first in this word "uneconomical"; then in the reference to a culture of scarcity (a nice echo of "a culture of poverty," that, from the other side of the tracks); and finally in the repetition of "urgent, inescapable."

People involved mutually in automobile accidents or breaches of contract are said to be "engaged in interacting activities." The inter-

27. R. POSNER, ECONOMIC ANALYSIS OF LAW 98-99 (1972).

action, however, does not extend to the political or moral systems of the society. A rancher and a railroad "interact," but a judge does not "interact" with people who think that big enterprises like railroads are blameworthy. A vocabulary of "engaging in interacting activities" makes an appeal to the character of scientist or observer (technically, as I have noted, an "ethical" argument). It sounds clinical. But it carries with it a philosophy of community. The words matter to the argument. Style is substantive.

Again, the passage uses the metaphor of "deepness" in unity, as do other arguments trying to change the way we categorize the world. A critical legal theorist will tell you that the "deep" structure of law is an apology for capitalism. The legal economist will tell you, as here, that the "deep" structure is on the contrary a celebration of capitalism.

And so forth: one could in this way examine the texts of law and economics rhetorically, asking who are its implied readers, what genres it draws on and creates, whether there is a text in this class.

Finally, then, I've done it. You've been waiting all this time for me to say something impolite about my friend Richard Posner and other devotees of law and economics. To lay out his prose this way is certainly impolite. After all, that's what "rhetoric" means, right? "Rhetoric" means sneaky words. Those economists and their fellow travelers use "rhetoric," don't they, while the good guys use simple logic and evidence? Right? O.K.?

No: Wrong. Not O.K. If you still have these rhetorical expectations I have not been making myself clear. "Rhetoric," the way I have been using it here, and the way it is increasingly used in such conversations, as it was used anciently, is not necessarily *bad* talk. The bad-talk rap, I have noted, was hung on rhetoric by Plato. Plato was such a good advocate — such a good rhetorician when making merry of rhetoricians, as Cicero put it — that rhetoric was banished from the more elevated parts of the conversation of mankind for two thousand years, and especially in the past three hundred.

Rhetoric reached its nadir of prestige in the 1930s and 1940s, when it became virtually another word for irrational anger and state propaganda. In her little introductory book of 1943 on logic, L. Susan Stebbing orated angrily against the orator, whose aim, she said, "is to induce belief at all costs" and whose "appeal is not to reason but to uncontrolled emotion, not to considerations logically relevant but to prejudice."[28] At a time when Axis armies were still occupying large parts of Russia and the Pacific, and seemed to have gotten there in

28. L.S. STEBBING, A MODERN ELEMENTARY LOGIC 160 (1943).

part by manipulating public opinion, one can excuse Stebbing's *anaphora, indignatio, antirhesis,* and other uncontrolled emotion directed against uncontrolled emotion. But it must be evident that badness in talk is a result of being a bad person, like Hitler or Tojo, not a result of using a bad method. Good or bad, we all use rhetoric. Law is rhetoric. Economics is rhetoric. Mathematics is rhetoric.

So I'm not saying that Posner is uniquely "rhetorical" in the way he writes. That is not the point of looking closely at his passage. The point is merely that we are all rhetorical, the most sober and antirhetorical among us.

Rhetoric is not a fault to be overcome. On the contrary, the rhetoric of the field called law and economics is unusually healthy, at any rate if the field is viewed from economics. There are fields of economics in which the examination of evidence counts for little (such as international trade) or in which certain styles of argument are discouraged without proper airing (such as macroeconomics). It will be shocking for the enemies of law and economics to hear this, but an economist reading in the field is delighted by the breadth of the reasoning to be found there. It reminds him of economic history. Both are hybrids in which economists try to contribute to a radically different field, and so change economics. In trying such a difficult feat they find themselves adopting some of the foreign rhetoric. You will find that economic historians are nearly the only economists serious about the birth of institutions. Likewise, economists in law and economics are nearly the only economists serious about the adult life of institutions. It is by blending rhetorics that law and economics achieves its best work. And the work is good for economics, giving it a model of cumulative work in science. Two cheers for the rhetoric of law and economics.

That is not, however, to say that I do not have something a little impolite to say about Posner and company, admirable though they are. For all their breadth acquired from law they might well rein in one of their rhetorical practices taken from economics — their use of the scientistic appeal. The particular variety of scientism that tempts law and economics is "positive economics." Most mainstream economists subscribe to it, though it is at present on the defensive, especially in econometrics.

Incidentally, I do not believe Posner is personally to blame for such philosophical misdemeanors. Through no fault of his own he fell into bad company on the south side of Chicago — a compassionate argument that I am sure he now applies from the bench when dealing with other young men gone wrong. The bad company was George

Stigler, a very fine economist who leads the philosophers of positive economics. Stigler never quite succeeded in shaking all the legal sense out of Posner.

Stigler and other methodologists who huddle around the corpse of logical positivism have succeeded better in overcoming sense elsewhere in economics. Positive economics was useful for a time, up to about 1965, in forcing economists into a narrow program worth attempting. But it was and is a sort of voluntary imbecility, as the crystallographer and philosopher Michael Polanyi described it. It was the bad rhetoric that only a narrow range of reasoning is needed because only the narrow reasoning is properly scientific. The rhetoric has had a disastrous effect on scholarly standards in Chicago school economics (which I otherwise espouse, to my cost), and would have made such a career as Ronald Coase's impossible. Under such a methodology it does not matter whether an argument is rich or relevant or persuasive. We are to be nourished on certain scraps of utilitarian ethics, certain demonstrably irrelevant statistical tests, and certain rules of evidence enshrined in the oldest law books of positivism and behaviorism.

It is about time that we economists stopped limiting conversation by arbitrary philosophical rules: do not use questionnaires; consult only quantitative evidence; pretend to derive every "observable implication" from a higher order hypothesis. A Chinese sage was walking by the fish pond with his disciple. The sage said: "See how the fish play: they are happy." "But, honored one, how do you know they are happy? You are not a fish." "How do you know I don't know? You are not me." A ruder and more modern story makes the same point. A man and woman, strictly positivist and behaviorist in their intellectual lives, make love. The man says to the woman, "You enjoyed that . . . did I?"

The rhetorical advantages of the positivistic move were two: first, it used the ethical appeal to the character of the scientist, a potent one in our culture. The rhetoric of the scientific paper since Newton has said "I am a scientist: give way." Positive economics simulates science, and shares in its prestige. The second rhetorical advantage was that, by reducing it to a set of rules remembered from a college course in the philosophy of science, the positivists made economic science dead easy. Positive economics asks only that the scientist produce observations "consistent with" his maintained hypothesis. Never mind how plausible or implausible the hypothesis may be on other grounds. The other grounds are ruled out of court. The problem with such narrowing of the rhetoric is that most observations of, say, the lay of the land are "consistent with" the hypothesis that the earth is flat.

Mere "consistency" is worth a look, to be sure, and is not to be scorned, but is seldom a powerful test.

Positive economics claims that it pursues high scholarly standards, staking out the lofty and desiccated heights of logic and measurement, pure Robinson Crusoe reasoning out of time and culture. But such techniques are easy, not hard. The standards of argument are made lower, not higher. Any fool can learn to set a first derivative equal to zero or to run the local regression package. The evidence accumulated on the point is conclusive. It is harder, as a logical and as an empirical matter, to range over both terrains, over the sweet valleys of persuasion and the peaks of proof. Positive economics urges economists to stick with the easy arguments. My regression coefficients are significant at the .01 level: don't bother me with ethics, analogy, testimony, or intellectual tradition.

Economics itself would expect easy arguments to encourage entry. That's what happened. Anyone can set up as an economic scientist: "Look, I have a coefficient here statistically significantly different from zero: promote me." Or, "Since my argument is merely that the common law behaves *as if* it were trying to achieve efficiency I do not have to inquire into the motives of judges or attorneys to prove it: promote me." Positive economics is a formula for publication. But unhappily it is not a formula for insight. As a distinguished Chicago economist, the late Harry Johnson, once put it: "[T]he methodology of positive economics was an ideal methodology for justifying work that produced apparently surprising results without feeling obliged to explain just why they occurred."[29]

You may wonder what all this has to do with the pragmatic matter of the fit of economics to law. Nothing of what I have said implies that it is a bad idea for lawyers to take seriously the conversations of economists. I offer my opinion — not worth much on this matter, and therefore not much of an argument *ad verecundiam* — that economic thinking has a great deal to give to legal thinking. Partly this is a market test. The consumers have spoken. In his Maccabean lecture on jurisprudence in 1981, Guido Calabresi reported the current opinion that law and economics was the only sure route to promotion and tenure.

More seriously, I do not see how a law school can get along without economists. (The weight of this remark would be reduced if I were to admit that I also do not see how a law school can get along

29. Johnson, *The Keynesian Revolution and the Monetarist Counter Revolution,* AM. ECON. REV., May 1971, at 1, 13.

without statisticians and historians and rhetoricians and accountants and sociologists and philosophers and English professors; so set aside that testimony.) Being self-conscious about the rhetoric of economics and being alert to its possible misuses is not a reason to abandon it. That economics can be misused, and for rhetorical purposes represented as a nonmoral science like meteorology, does not make it useless. As Aristotle said of rhetoric itself: "And if it be objected that one who uses such power of speech unjustly might do great harm, *that* is a charge which may be made in common against all good things except virtue, and above all against the things that are most useful."[30]

Law deals much with economic matters. The law of torts has been much illuminated since Calabresi, Coase, and Posner spoke out loud and bold. To take another example, apparently remote and assuredly grisly, it is hard to see how one can think clearly about the use of body parts after death without at least considering the option of leaving the matter to economic forces and the right of a person to the residuary estate, so to speak, of his corpse.

So law and economics is a good idea, and anyway a successful one. Economics certainly has a lot to say to law. The other point, however, and my main one here, is that law has a lot to say to economics. A field law-and-economics that knew its own rhetoric would be a messenger from law to economics, too. Wayne Booth, a literary critic, wrote: "[T]he processes developed in the law are codifications of reasonable processes that we follow in every part of our lives, even the scientific."[31] So it is. In other words, the first and best thing that economics can learn from law is the breadth of reasoning necessary to make a believable case. If the noble science of the economy is to have an effect on the noble science of the law it must not achieve it by a specious rhetoric of authority, arguing that economic reasoning is especially scientific or objective or some other word from the philosophical ruminations of sophomores. Economics is "scientific" in the non-English meaning of "science" — systematic, thoughtful, wise. But it is not special. Its topics of argument are mainly the general ones, the topics of reasoning everywhere. Such topics are most apparent in that body of "slow motion" reasoning, as James Boyd White puts it, in the law.

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Justice Holmes said that law becomes more civilized as it becomes more self-conscious. Economics, and law and economics, could with

30. ARISTOTLE, RHETORIC bk. 1, ch. 1, 1355b, at 23 (W. Roberts trans. 1954).

31. W. BOOTH, MODERN DOGMA AND THE RHETORIC OF ASSENT 157 (1974).

profit become more self-conscious about rhetoric, becoming thereby more civilized. Another of Holmes's remarks is applicable, too. It is more applicable perhaps to the voluntary imbeciles of science who offered him eugenic "proofs" in court than to the poor soul to whom he in fact applied it: "Three generations of imbeciles [in positive economics] is enough."