

# Michigan Law Review

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Volume 80 | Issue 4

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1982

## The Economics of Justice

Michigan Law Review

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### Recommended Citation

Michigan Law Review, *The Economics of Justice*, 80 MICH. L. REV. 942 (1982).

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THE ECONOMICS OF JUSTICE. By *Richard A. Posner*. Cambridge: Harvard University Press. 1981. Pp. xiii, 415. \$25.

In *The Economics of Justice*, Richard Posner defends the concept of wealth maximization as an adequate ethical basis for evaluating legal and quasilegal institutions. Followers of Posner's frequent articles will find little that they have not seen before — virtually every chapter is based on articles that have previously appeared in legal or economic journals — but the book may be greater than the sum of its parts because of Posner's sweeping attempt to use economics normatively rather than descriptively. Readers should have at least a general familiarity with economic theory. Posner occasionally lapses into economic shorthand when asserting arguments tangential to his major points,<sup>1</sup> and some of these arguments may prove difficult for those unacquainted with economic theories of tort liability and optimal criminal punishment.

In Part I, Posner compares wealth maximization with other concepts, primarily utilitarianism and "Kantian" ethics,<sup>2</sup> in an attempt to demonstrate that wealth maximization offers a surer normative footing for the concept of "justice." In Posner's scheme, wealth is maximized when material goods and other sources of satisfaction are distributed so that their aggregate value to possessors, as measured by individuals' willingness to pay, is maximized. He contrasts this approach with Bentham's belief that the law should seek to maximize total *societal* utility. Posner criticizes Bentham's views on several counts. He argues first that Bentham relied on intuitive rather than empirical notions of what would increase happiness. And, he continues, Bentham's focus on total happiness at a societal level required, at best, a paternalistic state willing to "educate" the people or, at worst, a state willing to use totalitarian methods (p. 40).

Posner then compares Blackstone with Bentham and argues that Blackstone, who personified the common law, was more concerned with protecting the fundamental rights of individuals than with upholding laws aimed at increasing total utility. These fundamental rights are precisely those that Posner believes are necessary to facilitate wealth maximization:<sup>3</sup> personal security, personal liberty, and private property. The common law, he claims, arrived at efficient —

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1. The neophyte seeking his first exposure to this area should read R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977).

2. In this category, Posner includes the work of Charles Fried and Richard Epstein. The term "Kantian" is used to refer to ethical theories that subordinate social welfare to human autonomy and self-respect. P. 55 n.21.

3. The prerequisites for wealth maximization are security in accumulated wealth and freedom to enter into voluntary exchanges.

in the sense of wealth maximizing — results rather than utility maximizing results.<sup>4</sup> He points to the common law's failure to recognize a good samaritan duty or to effect income redistribution as evidence of its rejection of utilitarian aims (p. 106).

*The Economics of Justice* makes an appealing case for wealth maximization as an ethical basis for justice. Posner's emphasis on voluntary transactions promotes individual liberties while avoiding the difficult problems of comparing interpersonal utilities that plague utilitarians.<sup>5</sup> But wealth maximization is not without its problems, particularly when markets cannot deliver goods to those willing to pay. Posner argues:

[B]ecause there is no common currency in which to compare happiness, sharing and protection of rights, it is unclear how to make the necessary trade-offs among these things in the design of a social system. Wealth maximization makes the trade-offs automatically. [P. 112.]

The market is, for Posner, a *deus ex machina* that answers difficult questions "automatically." Posner's critics would point out that an automatic answer is not necessarily a "correct" answer and that the more difficult questions are where and how markets have failed and how those failures might be corrected.

After establishing the respectability of wealth maximization as an ethical precept, Posner attempts to demonstrate in Part II that wealth maximization can explain many institutions of primitive societies. He characterizes primitive society as lacking effective government, deficient in trade and innovation, beset by high information costs, and providing little privacy (pp. 146-52). Under these conditions, Posner asserts that practices such as gift giving, kinship groups, polygamy, exogamy, brideprices, strict liability, and retributive notions of justice can best be explained in economic terms. Unfortunately, he does not document his implicit assertion that these societal conditions and institutions coincide as dominant aspects of a significant number of primitive societies, and his generalizations can be faulted on this ground. The facility with which he jumps from economics to

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4. Posner argues that wealth maximization accommodates individual rights because it provides a rationale for distributing rights to their "natural" owners. It makes economic sense to assign to me, rather than to a third party *X*, the right to my labor, since it will be less costly for those desiring my services to bargain for my labor rather than to seek out *X*. This argument makes some sense if my labor is in some way unique, and sought after by people who have had contact with me (but not necessarily with *X*). Even accepting this argument, the wealth ethic is fundamentally majoritarian. The price that the market places on the exercise of various "rights" will, to a considerable extent, determine the "freedom" of people to exercise them.

5. For example, the cost to trespassers of avoiding injuries along railroad right of ways may be less than the cost to the railroad of avoiding them (by reduced speeds, fences, etc.). The railroad (if liable for injuries) would bargain for the exercise of care by all potential trespassers to reduce its costs, but the transaction is infeasible. The common law responds by giving the railroad impunity, thereby placing the burden on those who can at lowest cost avoid the injuries.

Social Darwinism and sociobiology to explain various customs makes for interesting reading, but one is left with nagging doubts about the support that his views would find among anthropologists. In fact, the breadth of Posner's treatment may undercut the persuasiveness of his basic thesis: Although the number of different arguments that he presents is impressive, few are pursued in depth. It is thus difficult to tell whether Posner's theory has predictive validity or is merely flexible enough to accommodate historical fact.

In Part III, Posner leaps from ancient customs to the relatively modern development of the law of privacy and related interests. He finds the historical development of the common law of privacy, defamation, and disparagement consistent with economic theory. He views privacy as an intermediate interest, valued chiefly for its contribution to other ultimate goals. This view is intuitively plausible in the context of business-related secrets, but Posner's analysis of personal privacy as an intermediate interest is questionable. Do individuals really object to eavesdropping and other intrusions upon privacy because they do not wish to waste time and energy using more formal and circumspect means of communication? Posner's view that the protection of privacy promotes efficient manners of speech and action seems strained. Posner himself concedes that if privacy is viewed as valuable for its own sake, rather than as a means to an end, economic analysis grinds to a halt.<sup>6</sup> Nevertheless, he opposes statutory attempts to protect privacy on the ground that private information will not be sought out unless it has a rational use. Thus, he would not object to an employer's practice of refusing to hire any ex-convicts because the costs of sorting out the reformed from the unreformed was too high (p. 300).

In the book's final section, Posner turns to the economic implications and antecedents of racism and affirmative action. He begins with the assumption that race is a discreditable fact that cannot be concealed. Posner then argues that an efficient form of racial discrimination exists in cases where: (1) blacks are, on average, less qualified than whites for a specific type of work; and (2) the cost of determining the ability of *individual* black applicants is greater than the loss suffered by an employer in a competitive market under a decision rule that precludes hiring blacks (p. 377). The solution that economic theory offers gives credence to the accusation that economics is a dismal science: Individual blacks must reduce their wage rates to induce employers to give them individual consideration. Posner believes that "most discrimination in contemporary society is the result of costs of information rather than irrationality, exploitation or the suppression of competition" (p. 376), and concludes that antidiscrimination laws cannot be justified on efficiency grounds

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6. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 394 (1978).

alone (p. 386).<sup>7</sup> He does, however, allow that these laws might be justified on distributive grounds because "discrimination imposes proportionally greater costs on the minority than on the discriminating majority" (p. 386).

Posner would not, however, sanction affirmative action or reverse discrimination. He views affirmative action as an attempt by a "minority group to impose costs on the majority if they do not redistribute wealth to it, over and above the redistribution brought about by outlawing discrimination . . ." (p. 386). If, however, affirmative action would eliminate the statistical tendency of blacks to be less qualified than whites for certain work, then efficient discrimination of the sort that Posner would uphold (p. 407) would disappear. More productive blacks would swell the work force and total wealth would increase. The present value of this long-run increase *could* be bargained for in today's market but for one crucial fact: Affirmative action cannot be successful without concerted action by all employers.<sup>8</sup> The government, therefore, eliminates this problem by using its organizational power to bring about the wealth maximizing result.<sup>9</sup> The point is not that affirmative action is desirable or justifiable on the basis of the above reasoning. Rather, it is that the free market is not necessarily maximizing wealth, except in the very short run, by encouraging efficient discrimination.

*The Economics of Justice* falls somewhat short in its ambitious attempt to establish wealth maximization as an adequate ethical basis for legal institutions. Posner provides an interesting approach to problems, but the mere application of economic theory to a question does not resolve it. Instead, the law must confront a series of questions concerning the efficiency of markets, what transactions would take place in the absence of market inefficiencies, and whether governmental intervention could, or should, eliminate such inefficien-

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7. Posner's belief that irrational discrimination has been, or soon will be, eliminated by market forces seems overly optimistic. True market forces will act in that direction, but how long the process will take is anybody's guess. As Posner points out, this rationale is weaker when applied to government entities or protected monopolies, such as trade unions. Pp. 353-54. The fact that entities that are protected from competition cannot be relied upon to discriminate only as much as is efficient provides a justification for the "state action" requirement of the fourteenth amendment and is a basis for defining state action. P. 357.

Posner does not consider whether equal representation or the level of representation resulting from "efficient" discrimination more nearly reflects the true preferences and abilities of blacks. If the former, then the question comes down to whether blacks should bear the cost of "efficient" discrimination or others should bear the cost of affirmative action. The wealth maximizing answer is whichever cost is lower, irrespective of what group is required to pay. This raises the questions of which cost is lower (a difficult empirical question) and whether some sacrifice in wealth might not be justified to achieve a more uniform distribution of wealth (an imponderable in economic terms).

8. If affirmative action imposes costs on employers without commensurate productivity gains, employers engaged in affirmative action would be unable to compete with those practicing "efficient" discrimination.

9. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

cies. Whether restating complex issues in this way facilitates their solution remains to be seen. The real strength of the economic approach to law may lie not in its power to provide easy answers, but rather in its ability to structure empirical study of complex problems.