

145-5

# What the Market Will Bear

*Richard Posner takes the law and economics movement a step farther.*

## FRONTIERS OF LEGAL THEORY

By Richard A. Posner.  
453 pp. Cambridge, Mass.:  
Harvard University Press. \$35.

By James Ryerson

**F**OR the past three decades, the world of legal scholarship has been under siege from the forces of the law and economics movement. Hard-line proponents of this movement seek to unify the many scattered territories of the law by reformulating legal concepts in the language and equations of the marketplace. Their conquest is far from complete, but a few areas have been occupied: most good law schools in the country now employ at least one economist, and policy reforms in fields as diverse as antitrust law, environmental regulation and criminal sentencing bear the distinctive imprint of economic analysis.

Richard A. Posner, a judge on the United States Court of Appeals for the Seventh Circuit and a senior lecturer at the University of Chicago Law School, is the most esteemed and intellectually charismatic leader of this movement. To many, he is the judge who would be king. The author or co-author of 25 books and over 1,500 judicial opinions, Posner has played a major role in widening the scope of law and economics from antitrust and tort law to topics ranging from privacy to free speech to racial discrimination. In "Frontiers of Legal Theory," Posner hopes to extend the breadth of his field in another way: by incorporating the insights of other disciplines. After all, if economics can help us understand the human behavior that gives rise to the law, then why not psychology, anthropology and sociology?

ner contends that this predicament does not pose a significant problem for the economic approach to the law: one need simply acknowledge that imagining the suffering of a murder victim "requires more 'effort' (that is, cost) than immediate perception." And the law, Posner says, has in fact counterbalanced this cost by allowing victim impact statements into evidence. Just as economics would have predicted.

"Frontiers of Legal Theory" offers many such examples where economics and other disciplines "overlap and interpenetrate." The law's obligation to heed historical precedent is considered in light of the economist's notion of "path dependence" (the idea that inefficient practices can be preferable to efficient ones if the cost of shifting from one to the other is high); the surprising reluctance of employees to accept mandated maternity benefits is discussed alongside the biological roots of "the endowment effect" (valuing something just because you have it); the federal rules of evidence are assessed by showing how accuracy in fact-finding creates disincentives for criminal activity; and rational parents are seen to have a greater incentive to instill shame than guilt in their children when it comes to breaking the law. With economics providing the big picture and empirical data from assorted disciplines filling in the details, Posner would have us "glimpse the possibility of legal theory as a unified field of social science."

It is hard to know what to make of such an ambitious project. Is the apparatus of economics really supple enough to handle so many sorts of facts about the world? If it is, is that something that should impress us or something that should make us suspicious?

In his classic work "Economic Analysis of Law," Posner himself cautioned that by making the basic scheme of economics more complex, one risks "a model so rich that no empirical observation can refute it." So the proof must be in the pudding: the vindication of the law and economics movement lies in its ability to make accurate predictions about the future, not to offer plausible explanations for past events.

This is not an innocent question. Posner is responding to a longstanding concern with the law and economics movement. The field rests on the assumption that people pursue what they want in the most efficient and rational way possible. But even supporters of law and economics have worried that this supposition, while useful in some contexts, is inadequate in many others. Quite often, critics observe, the behavior of judges, jurors, criminals, consumers and litigants is charged with emotion, distorted by cognitive glitches and failures of will, and constrained by altruism, etiquette or a sense of duty.

Posner is not discouraged. As his previous books on sex, old age and AIDS suggest, he agrees that the study of law should be made more sensitive to the empirical findings of a wide variety of fields. But though he genuinely welcomes their contributions, he argues here that other disciplines "tend to give up on rational-choice economics too soon." Indeed, much of this book is devoted to showing that economic analysis is robust enough to accommodate practically any evidence about human behavior that it encounters.

Consider Posner's example of the "availability heuristic." This is the tendency, well documented by cognitive psychologists, of people to exaggerate the importance of immediate impressions when making a complicated decision. For instance, jurors empathize more easily with people who are present in a courtroom than with those who are absent. This cognitive quirk can impair the legal process (say, if a jury is excessively moved by a murderer's plea for mercy). But Pos-

---

James Ryerson is a senior editor of *Lingua Franca*.

ON its own, "Frontiers of Legal Theory" does not provide compelling evidence that economics can do all that Posner wants it to. He rightly points out that many alternatives to law and economics seem to lack the power to generate predictions at all. And few would question the past success of law and economics in predicting the consequences of certain statutes, judicial opinions and policy proposals. But the evidence for the movement's most grand and sweeping claims has been famously ambiguous, and there seems little reason to suppose it won't be here as well.

The good news is that you don't have to share Posner's vision of legal theory as a unified science in order to embrace his call for more empirical knowledge in the law. There is an abundance of scholarship that deals with the formal merits of legal reasoning; everyone could use additional information from a variety of disciplines about how the law actually works. As Posner confesses, even much of law and economics is "empirical in spirit yet nonquantitative" in practice.

To a crusader like Posner, for whom many of the law's trickiest questions can be "decomposed into pure questions of fact," such knowledge is essential. But for more typical judges, policy makers and scholars, it is enough to realize that facts matter — even if one disputes how much they matter, and when they do. □