

REVIEW SYMPOSIUM on Law and Economics

## Law and Economics in the Personal Sphere

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RICHARD POSNER, *Sex and Reason*. Cambridge: Harvard University Press, 1992. Pp. 485. \$33.00

ERIC POSNER, *Law and Social Norms*. Cambridge: Harvard University Press, 2000. Pp. 336. \$25.00.

ROBERT FRANK, *Luxury Fever*. New York: Free Press, 1999. Pp. 272. \$45.00.

MARGARET BRINIG, *From Contract to Covenant*. Cambridge: Harvard University Press, 2000. Pp. 352. \$52.50.

Law and economics has encountered considerable hostility, but none more vehement than when it ventures into the personal sphere. Some of the criticism has been on moral or instrumental grounds. People oughtn't to speak of the personal sphere as being a market. Or if people do speak of the personal sphere in market terms, before we know it, the personal sphere will turn into a market (or more of a market than it already is?). Included in this category is what I would characterize as "shoot the messenger" type criticism: The argument being made is somehow too monstrous to contemplate. An example of work that has elicited such criticism is the article by John Donohue and Steve Levitt (2001) on the relationship between abortion rates and crime rates; Donohue and Levitt argued that the drop in crime rates might reflect that many would-be criminals had been

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aborted.<sup>1</sup> The baby- and organ-selling debates also prominently have this shoot (or at least maim) the messenger feature.

But potentially the most scathing criticism is that law and economics has nothing to say about the personal sphere—that the personal sphere is beyond the type of analysis law and economics can do. It is with this last criticism that I am most concerned; if law and economics has nothing to say about the personal sphere, then the other criticisms are moot. But if law and economics has something to say, then a strong case will need to be made as to why its insights oughtn't to be developed and discussed. Perhaps such a case can be made; it's naïve to think that scholarship or discourse is ever purely descriptive. Scholarship necessarily aims to make a different reality, if only by persuading one reader. But the instrumental argument, that using law and economics to discuss matters in the personal sphere is somehow wrong as a matter of morality rather than wrong as a matter of fact, is surely a complex one, requiring intricate balancing.

Economics itself, and law and economics, has a long history of venturing into the personal sphere. The inquiries began in economics several decades ago with the work of Gary Becker. Becker won the 1992 Nobel Prize in economics “for having extended the domain of micro-economic analysis to a wide range of human behaviour and interaction, including nonmarket behavior” (Bank of Sweden and Royal Swedish Academy).

While the criticisms of law and economics when it ventures beyond the commercial sphere largely come from people outside the field, one prominent law and economics scholar, Robert Bork (1985), has also taken this position, on grounds that law and economics' expertise is in the commercial sphere, and that the personal sphere is qualitatively different in ways that make the modes of analysis far less useful: Economics “has produced its most valuable results and insights when dealing with the behavior of persons and firms in real markets, where dollars may be used as measuring units.”

Law and economics hasn't been very good at converting nonbelievers. Often, it seems that its proponents are not really trying. Those not

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1. One article criticizing Donohue and Levitt mischaracterized them as advocating abortion—as, in effect, arguing that “because the poor and disadvantaged lives that routinely get snuffed out by abortion stand a far greater than average statistical chance—had they been allowed to live—of becoming murderers and crooks...the best solution is to exterminate the little blighters before they can break into our cars, hold up our variety stores, shoot one another in some desperate ghetto brawl, or come cruising into our neighborhoods to shoot us” (Goodden 2001). The article further notes that among those born into desperately poor households were Abraham Lincoln, Johannes Brahms, Vincent Van Gogh, Pope John Paul II, and one-half of the Beatles. I include this quote to give a flavor of the visceral criticisms that Donohue and Levitt's work has elicited.

accepting law and economics' core principles are, it seems, lost—without reason: irrational.<sup>2</sup> They want to avoid accepting “harsh” realities.

This essay aims to make the case for law and economics in the personal sphere to people who may or may not accept it in the commercial sphere but who object to it, typically with some vehemence, in the personal sphere. I will call such people skeptics. This essay also aims to improve the case to be made: It shows how the visceral reactions that law and economics in the personal sphere elicits are often facilitated, if not caused, by pathologies that aren't necessary features of law and economics; further, it shows how greater attention to the personal sphere might improve law and economics' description of the commercial sphere.

One starting point will set the stage. Law and economics seems determined (indeed, even eager) to make people see themselves warts and all.<sup>3</sup> A person might want to think of himself as caring deeply about the environment, persons with disabilities, world poverty, and other social ills. Law and economics often tells people they don't care as much about such things as they like to think, insofar as they want good results without being willing to pay for them. In this regard, consider the often-made point that people will advocate spending more money than they have, more money than is sensible, more money than exists to save one life or a few lives. Similarly, a person might want to think of himself as a romantic, being carried away by sentiment in his choice of romantic mate. Law and economics would likely point out the extent to which mate choice is marketlike.

A rapprochement is possible on both sides. Law and economics can spend more time explaining why *market* shouldn't be an expletive. It can stress the pervasiveness of metaphor, and metaphor's instrumental character. Metaphors are everywhere; thought and reasoning can't proceed without metaphor.<sup>4</sup> Using a concept in a new context—carrying the suitcase—doesn't commit us to wearing all the clothes in the suitcase. We can get the benefits of the explanatory power while limiting or even eliminating the use of the clothes we would like to have left behind.

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2. Law and economics, and economics itself, have in common with analytic philosophy. The characterization of irrationality as among the most serious epithets. Indeed, the philosopher Robert Nozick (1981, 4, 13) has several eloquent passages discussing the ultimate philosophical epithets (such as irrationality and inconsistency), and the manner in which philosophers hurl them about.

3. Indeed, it's arguable that many law and economics scholars have reveled in shocked reactions they elicit with their more dramatic proposals. Interesting sociological and psychological observations could be made about the differences in temperament between such scholars, who seem very much at home as self-styled outliers, and scholars who make their best case to “the opposition.”

4. “Understanding a thing is to arrive at a metaphor for that thing by substituting something more familiar to us. And the feeling of familiarity is the feeling of understanding” (Jaynes 1990, 52).

Consider, for instance, the use of the war metaphor in biological research; many people who might think society overemphasizes and overvalues war don't find the metaphor objectionable, because its instrumental value seems well established.<sup>5</sup> We can use the methodology of law and economics without accepting all its traditional ontology. Indeed, law and economics ought to encourage such an analytic move, because to do so best honors one of its (in my view disingenuous) precepts—to judge scholarship by its usefulness rather than its truth.

But critics of law and economics can, and I think should, take more seriously the possibility that they are engaging in cheap sentiment. Who wouldn't want to feel virtuous at no cost?<sup>6</sup> In a fascinating review in the *New York Times* of the successful movie *Dancing with Wolves*, Caryn James (1991) attributes part of the movie's success to its ability to elicit cheap sentiment. One feels, according to James, as though one would have sided with the Indians, yet one doesn't in any way feel called on to do anything difficult or uncomfortable now, 140 years later.

Romance may provide the best example. The popular mythology of cupid's arrow belies how marketlike romance is.<sup>7</sup> There was once a satire of *Cosmopolitan* in which women facing a man shortage were advised to find dates among homeless men in the park. The article recommended packing designer water with a gourmet picnic lunch, going to the park, finding some available-seeming man and having a delightful and romantic lunch al fresco. If one really took seriously the struck-by-lightning metaphor, one wouldn't even rule out the possibility of romantic lightning striking for people as different, and as differently endowed with societally valued attributes, as Cosmo girls and homeless men in city parks. The satire is funny because the baseline societal expectation, bolstered by anecdotal and statistical evidence and everybody's experience, is that romantic partners very often have approximately equal amounts of societally valued

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5. Alternatively, maybe the metaphor has become so entrenched that it's hard to imagine trying to cure a disease as not being in salient respects like a war. This observation might seem to hurt my point by acknowledging the validity of the instrumental critique of market metaphors in the personal sphere: we'd best curtail the use of such metaphors lest they become completely entrenched. But I'd argue that the market metaphor is already quite entrenched in many personal spheres (consider courtship, rife with its metaphors of competition); perhaps a better strategy for those who object to the metaphor's entrenchment is to promote more neutral concept of market rather than rejecting the metaphor altogether.

6. The 1 June 1997 *Sixty Minutes* episode featured a segment on organ sale and donation (Howard 1997). The segment featured many people, including some in need of organs, discussing their objections to giving financial incentives to potential organ donors—the organs should, they said, come from people who weren't motivated by money. One wonders whether, if actually offered a purchased organ (or the opportunity to purchase an organ) they would decline on principle.

7. A recent article quoted the general manager of Yahoo Personals, a large internet dating service: A "consumer insight is that women like to feel [that meeting the right person is]... part science, part magic, that there's an element of fate" (Lauro 2003).

attributes.<sup>8</sup> Nobody is surprised when a titan of industry marries a beautiful famous actress; everybody would be quite surprised if the actress married a paunchy copy machine repairman.

None of this is to say that the application of a market model to romance, or to anything else in the personal sphere (or, for that matter, the commercial sphere), is simple or mechanical. But denying that romance does have its marketlike features, that people might make assessments influenced by marketlike considerations when it comes to health, the environment, and friendship, in the face of what seems like very strong evidence to the contrary, seems, in my view, hard to explain except by reference to some form of cheap sentiment. Perhaps critics of law and economics in the personal sphere can be persuaded to view their objections with this possibility in mind.

## I. MY THESIS

Consider these possible objections to law and economics in the personal sphere. The first is that the personal sphere is simply outside the ambit of what law and economics can describe. Law and economics describes behavior in a market, the commercial sphere; the personal sphere is not a market; ergo, law and economics can't describe the personal sphere. The second is a more limited version of the first. Law and economics may be useful to describe some matters within the personal sphere, but it's not true. The methodology may contribute something, but the underlying ontology does not. Indeed, the underlying ontology should be affirmatively rejected as to the personal sphere.

The third is instrumental. Whether or not law and economics actually describes or illuminates matters in the personal sphere, using it in that sphere is a bad idea. Description is not a neutral act. Rather, saying it's so can make it so. Speaking as though people were commodities makes them more like commodities (Radin 2001).<sup>9</sup>

This essay speaks to the first two objections; the third is outside its scope. I argue that law and economics is both useful and true in the personal sphere. Indeed, I argue that law and economics is useful precisely

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8. Not equal, though. I believe that the market for romantic partners can be modeled as a complex market that takes into account both societally valued attributes and attributes valued more idiosyncratically, and also includes various strategies to aid in "satisficing."

9. Suggestive evidence comes from studies demonstrating that economics students are far more likely to behave self-interestedly than are other students (Frank, Gilovich, and Regan 1993). Of course, the causation may go the other way—the more self-interested students may have been those specially attracted to economics. But Frank and his coauthors found some evidence that studying economics did indeed make students more self-interested.

because it is true.<sup>10</sup> But—to anticipate an objection that can properly be made to my argument—what’s “true” is a rather diluted version of law and economics, one in which the traditional ontology has been heavily diluted. I can therefore properly be accused of defining away what’s objectionable about law and economics.<sup>11</sup> But, nowadays, so can the field of law and economics itself. The umbrella is expanding, and the traditional ontology—the person maximizing her own utility (narrowly construed), correctly using lots of (in some accounts perfect) information and long-form calculative prowess (whether consciously or unconsciously)—is, in many circles, becoming a caricature.<sup>12</sup> Deficiencies in information have been increasingly emphasized; indeed, the 2001 Nobel Prize in economics was given for work in this area.<sup>13</sup> Deficiencies, or at least deviations, from long-form calculative prowess have been increasingly emphasized: Indeed, the 2002 Nobel Prize in Economics was given partly for work in this area (Bank of Sweden and Royal Swedish Academy of Sciences). And people are seen as sometimes lacking self-discipline, and hence seeking to bind their present selves so they can best maximize utility to their long-term selves; their efforts to do so may or may not be successful.<sup>14</sup>

Moreover, what constitutes utility, and more broadly, what a person might seek to maximize, have been increasingly scrutinized. The traditional view implicitly or explicitly hypothesized a very limited set of candidates, principally money and power. Expanding the set adds more realism but, as many scholars have pointed out, only at the expense of tractability. Add enough candidates (utility from setting yourself on fire? utility from giving everything you own to the homeless guy who lives in the subway tunnel?)

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10. Indeed, I think claims that what counts is usefulness, or predictive power (Friedman 1953) rather than explanatory value are problematic, for many of the same reasons as does Luban (1996): it scarcely seems satisfactory to predict something—say, a relationship between sports outcomes and the direction of prices on the stock market—without hypothesizing a reason why the prediction should hold true.

11. In this regard, consider the argument made by the political scientists Green and Shapiro that rational choice theory (which for present purposes can be considered the ontology of law and economics) hasn’t contributed much of value to political science (Green and Shapiro 1995). They strongly imply that nobody in political science would object to the watered-down version of rational choice theory that *has* yielded something of value: “[V]irtually all students of politics, past and present, harbor causal intuitions consistent with rational choice theory” (1995, 237). But the same isn’t the case for law and economics in the personal sphere. People can, and do, object to the notion that in the personal sphere, people are making calculations at all, much less rational calculations.

12. For particularly insightful treatments of this subject, see Rabin 2002 and Cowen 2001.

13. That being said, the Nobel Prize was given for work on information that’s incomplete because it’s asymmetric, not because it’s incomplete for some other reason. As I argue in section III.B of this essay, asymmetric information is emphasized at the expense of incomplete but not asymmetric information in part because of an underlying pathology in law and economics, that of thinking there’s much more consensus than there is as to what exists and how it’s to be categorized and understood.

14. Consider, in this regard, people who buy health club memberships rather than paying for each visit, hoping to motivate or shame themselves into going to the health club more frequently.

and the proposition becomes virtually tautologous, some have argued: One purposively seeks what one seeks. (Korobkin and Ulen 2000). A principle based on evolution—that our preferences might reflect successful survival strategies adopted by our ancestors—has been discussed by various scholars including Robert Frank (Frank forthcoming). And other resolutions of the tautology “problem” are possible as well. But for present purposes, it is enough to say that there is some debate, and that many people in the academy who are considered to be doing law and economics don’t fully subscribe to the traditional view. (They may actively contest it; alternatively, they may simply be doing work that doesn’t commit them to the traditional view in toto. Examples include such scholars as Richard McAdams (1992, 2000, 2001), Peter Huang (2000), and O’Hara and Yarn (2002). Whatever people seek to maximize, others’ well-being is surely part of it. Indeed, increasingly, concepts like trust, cooperation, reciprocity, and altruism are gaining currency in law and economics.<sup>15</sup> What looks like altruism sometimes is plausibly explained as self-interest. Other times, however, such an explanation is nearly impossible; what looks like altruism is difficult to explain as anything other than altruism.

Preferences are increasingly being explored. Economists used to leave preferences in a black box. People want what they want. The only assumptions made were that people knew what they wanted and that their preferences were stable, consistent, and well ordered. A great deal of literature seemed to speak as though it implicitly accepted a caricatured view of preferences in which preferences extended to particular things: person X would know that she valued a box of Wheaties cereal as much as one-half of a Madonna CD. The debate as to whether advertising can manipulate people summons up the caricature: the extreme position, that people want what they want, would suggest that manipulation is impossible, whereas common sense dictates that wants are indeed stoked by advertising campaigns (Kysar 2003). Again, middle grounds are possible, wherein advertising not only provides information but provides a means to give the information credibility (a dynamic countenanced under the traditional view) and also makes it more available (a dynamic countenanced under the new behavioral law and economics view) and hence more likely to be acted on. This debate also goes beyond the scope of my essay. But for present purposes, what is important is that law and economics can accommodate and even embrace a worldview in which many preferences, especially for day-to-day objects and services, aren’t fixed or stable; they aren’t just truths that people either know or somehow discover about themselves. The preferences that *are* stable may very well relate to, in Gary Becker’s phrase,

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15. As is the role of emotions (Huang 2000). As law and economics increasingly takes account of emotions, it will be assisted by work in psychology that seems ready-made for economics methodology and analyses (Ketelaar and Clore 1997).

“underlying objects of choice.”<sup>16</sup> One such object of choice is probably a relative preference for status and esteem. A person might want to have an income in the top X% of all households in the United States, or to be thought well of by his neighbors.<sup>17</sup>

What is left of the traditional paradigm? That people are purposively seeking to maximize something—often (but not always) their own utility, as they appraise it—and that their purposive efforts are in general well suited to their ends.<sup>18</sup>

Maximization of this type characterizes not just behavior in the commercial sphere, but also behavior in the personal sphere. The personal sphere is properly analogized to a market (and/or some other creature of the commercial sphere, such as a firm)—and that the analogy applies not just in broad brush, but also to many specific dynamics found by law and economics scholars to be useful in understanding the commercial sphere. If my essay persuades the reader of the foregoing, I will have accomplished my objective: demonstrating that law and economics has much to contribute to analyses of the personal sphere. That something may only be methodological if one remains persuaded that law and economics means or requires its traditional ontology. But it may be more than methodological if one accepts the refinements and critiques of the traditional ontology currently being debated as giving rise to a broader vision of law and economics. Indeed, in this regard, it is noteworthy that the field of behavioral law and economics, with its emphasis on cognitive mistakes and increasingly, departures from self-interest, is no longer regularly characterized as posing an objection to law and economics.

One important reason why law and economics in the personal sphere haven't done as well with skeptics as it might is because certain pathologies of the field have afforded skeptics far too many cheap shots—ways to dismiss the

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16. Certainly, Becker never hypothesized that people had fixed preferences for day-to-day items. According to Becker: “The preferences that are assumed to be stable do not refer to market goods and services, like oranges, automobiles, or medical care, but to underlying objects of choice that are produced by each household using market goods and services, their own time and other inputs. These underlying preferences are defined over fundamental aspects of life, such as health, prestige, sensual pleasure, benevolence, or envy, that do not always bear a stable relation to market goods and services” [Becker 1976, 3].

17. In *Luxury Fever*, Robert Frank gives an evolutionary explanation as to why this should be so. The intuition behind Frank's exploration is well captured in the following well-known joke: Two hikers were walking up a trail high in the Rocky Mountains one day, and as they came around a bend, they found themselves face to face with a huge bear. One of the hikers immediately sat down on the ground, pulled a pair of running shoes out of his backpack and began putting them on in place of his heavy climbing boots. The other hiker stared at him in amazement and asked, “What are you doing? Do you think you can outrun a bear?” The first hiker answered, “I don't need to outrun the bear; I only need to outrun you!”

18. Some law and economics scholars may be arriving at a definition of rationality closer to the psychologists' definition than that of traditional economists. Herbert Simon, a seminal figure in psychology, characterized the psychologists' concept of rationality as procedural and the economists' concept of rationality as substantive (Simon 1987).



messenger without listening to the whole message. The principal pathologies at issue all relate to the affectation the fields of economics and law and economics sometimes have that they are doing science. (And not just any science, but rather, the hardest of hard sciences. Daniel Farber notes that economics has a famous case of physics envy [Farber 2001, 295]). Law and economics scholars not infrequently deny the extent to which their starting and ending points are influenced by their starting intuitions, their own perspectives, and their imaginations. They thus claim more—more support—for their conclusions than is warranted. Because they think of themselves as doing science, and think that doing science sanitizes their intuitive starting points, they don't acknowledge their dependence on intuition. Intuition may be the source of hypotheses, but the hypotheses are, after all, tested against data; the result is something that transcends its origins.

But everybody is far more influenced by intuition than this caricatured view of science would suggest, at both the beginning and end of an inquiry. And everybody is far less persuaded by scientific-caliber proof than this caricatured view of science would suggest. An example from Deirdre McCloskey's *The Rhetoric of Economics* makes the point. McCloskey considers the various reasons why economists believe a seminal tenet of economics, the law of demand. Only a few are "scientific," and many others rely on intuition. "Some economists have tried to subject the law [of demand] to a few experimental tests. After a good deal of throat-clearing they have found it to be true for clearheaded rats and false for confused humans . . . , an interesting result which no one worries about too much . . . . The Scientific arguments yield mixed results. Does this leave economists uncertain about the Law of Demand? Certainly not" (McCloskey 1998, 24–25).

Thus, as McCloskey convincingly argues, even in economics, intuition thus isn't sanitized—it may or may not be borne out, and it is distinctly a product of something not scientific—nor can the results of what economists (and law and economics scholars) do be viewed as the unassailable products of an unassailable method.

Not acknowledging the role intuitions play in one's work is problematic on many counts. But it may be particularly problematic when law and economics scholars venture into the personal sphere. They may, by training and perhaps by aptitude, simply have far worse intuitions about personal matters than they do about commercial matters.<sup>19</sup> There's no reason to suppose their intuitions are better than anybody else's; certainly, this is not

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19. Thanks to Lloyd Cohen for this point. Lloyd points out that to do good economics about coal mining, you don't need to know much about human nature. Economists equipped with the tools to do terrific economics about coal mining may, when using the same tools to address matters in the personal sphere, fall short because they don't know much about human nature. I think Lloyd may overstate the case: The coal mining economists could probably do a better job if they knew more about human nature too. But their failures won't be as visible or fury-inducing as those of the economists venturing into the personal sphere.

the area in which they were trained. The problem presents itself particularly in the many visceral types of matters in the personal sphere, not just because economists may have particularly bad intuitions, but also because many other people are likely to have strong and competing intuitions. (Their intuitions about commercial matters may have some systematic limitations as well; whatever else economists have been trained to do, they haven't been trained to correct for others' not being like them. In experiments among college students [Frank, Gilovich, and Regan 1993] the ones consistently acting most in accordance with economists' predictions were economics students.) Having modeled the role of intuition as minor, and having modeled the role of their reasoning and the evidence they marshal as sufficient, they can mistakenly believe they have transcended the limitations of the processes that form their intuitions.

The solution is easy enough, at least in theory: for law and economics scholars to become more agnostic about the extent to which their prior beliefs affect what they think and how they interpret evidence confirming or disconfirming their prior beliefs—more broadly, to become more agnostic about one's ability to avoid being influenced by their own perspective, experiences, and imagination. But it's important for law and economics not to become too agnostic. Too much of a good thing proves disastrous, as a perhaps only slightly caricatured view of some critical legal scholarship indicates. It's well and apt to note that one can't help but be constrained by one's own perspectives and prior beliefs. But the right answer is not to wallow in one's own limitations; doing so is a recipe for becoming stuck. It seems possible, and in many cases desirable, to make a diligent effort to correct for one's limitations and prejudices while moving on. Indeed, one can observe several approaches to this issue in modern scholarship. Some might say that analytic philosophy has the worst of all worlds: an obsession with getting its starting points correct, but a denial that its starting points should consist of something other than intuitions of its practitioners. (And, many would say, given that its starting points are never completely correct, an inability to make much progress at all.) Some critical theory arguably falls into the opposite trap: getting locked into discussions bemoaning the fact that getting beyond one's own perspective is impossible. Law and economics simply needs to meet these two extremes in the middle: to be aware that its starting points reflect its practitioners' prior beliefs, that the priors are not sanitized, and that imagination is lacking, but to do the best it can nevertheless.

Before proceeding, I must address another preliminary matter: What is the personal sphere? A precise definition is impossible. Work is commercial, and romance is personal? It's easy to think of counterexamples: imagine a literature professor who marries for money. Activities engaged in for consumption are personal, whereas those engaged in for investment are not? Again, it's easy to think of counterexamples. Imagine the restaurant

critic who also makes money indulging her secret passion for stock analysis. Activities done for their own sake are personal, and those done as means to an end are commercial? Imagine, again, the person who becomes better read, or goes to a therapist, purely in order to be more appealing to potential romantic partners.

The distinction may be impossible to draw rigorously; still, it clearly exists. There are paradigmatic commercial activities, such as managing a corporation or buying and selling businesses. And there are paradigmatic personal activities, such as choosing a romantic partner or one's friends, becoming a parent, and choosing one's recreational activities. One reason the distinction is impossible to draw rigorously is because it is artificial in many important respects. All activities are human activities, engaged in for many complex reasons, some of which may involve the pursuit of money, some of which may involve the pursuit of happiness, some of which may involve the pursuit of comfort, some of which may involve the pursuit of status, and so on.

It would be surprising indeed if the rich metaphors from the commercial sphere didn't have a great deal to say about how people conduct their personal lives. Consider in this regard the concept of a cartel, the paradigmatic example being OPEC. The dynamic concept to very well describe some aspects of feminism in the 1960s: Women sought to get other women to agree not to coddle men. Traditional theory correctly tells us that such a cartel would present cartel members with an enormous temptation and opportunity to cheat—that is, to coddle men notwithstanding having agreed not to and reap “extra” benefits, coddling would be rarer and presumably more highly valued. Some of the advertising messages of the time can be understood as encouraging women to give in to temptation and cheat, by telling them that they could indeed coddle men but not actually be. For instance, women were told to dress provocatively, but to do so “for themselves.” Traditional theory also tells us that enforcement by cartel members is very difficult. It is my view that any semblance of a “no-coddling cartel” has indeed broken down, perhaps in part due to difficulties in enforcement. Another example is provided by Barry Nalebuff. Professor Nalebuff has suggested that suburban and rural teenagers who drive up the main drag and into all the local parking lots each school night and, the next day, taunt the students who weren't seen on the drag or in the parking lots, can be seen as attempting to enforce a no-studying cartel.<sup>20</sup>

It would also be surprising if metaphors useful in describing one's conduct in the personal sphere didn't carry over to the commercial sphere. Consider the very important concept of hostages in law and economics. The concept comes, of course, from the personal sphere, but applies perfectly to the commercial sphere. A classic example: I borrow money from you. You

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20. Professor Nalebuff made this suggestion in an informal lecture.

would like to get extra assurance beyond my promise to repay. One means of assurance is collateral—something you can take that has value to you if I don't repay. But another means is a hostage—something that has great value to me, but perhaps none at all to you. If you want collateral, you may ask for the right to take my house if I default; if you want a hostage, you may ask for the right to take my mixed-breed, paunchy 10-year-old cat. And of course, law and economics has always made ample use of the concept of reputation, which would seem more personal in origin. Reputational and relational models of the commercial sphere have been enormously successful. Indeed, the pure market transaction—perhaps, a spot market transaction, between people who don't know each other and will never interact again—may be further from the standard commercial interaction than are many personal relationships. The commercial sphere and the personal sphere may be far more similar than either skeptics or law and economics scholars have been willing to acknowledge.

## II. THE BOOKS

I will discuss four books in which law and economics has been applied to the personal sphere. The books are *Sex and Reason*, by Richard Posner; *Law and Social Norms*, by Eric Posner; *From Contract to Covenant*, by Margaret Brinig; and *Luxury Fever*, by Robert Frank. It would have been impossible *not* to include a book by Richard Posner: As Ian Ayres and John Donohue have said, Richard Posner may have done more than any other single individual to both advance and set back the field of law and economics (Ayres and Donohue 1987, 811). My analysis will focus on how well these books make the case for using law and economics in the personal sphere to skeptics; beyond that focus, I will not appraise the arguments' merits or shortcomings. Thus, I will give only a general overview of each book's aims and coverage, and then discuss particular portions that make or detract from its appeal to skeptics.

Both *Sex and Reason* and *From Contract to Covenant* are trying to make the case for the applicability of law and economics to the personal sphere. But where Brinig is addressing her argument to skeptics, Posner is either neutral to that portion of his potential audience or, perhaps, downright antagonistic. Certainly, Brinig takes pains to acknowledge that law and economics doesn't completely explain the phenomena at issue; by contrast, Posner seems anxious not just to avoid addressing potential criticisms, but if anything, to stoke them. Eric Posner and Robert Frank seem to lack a meta-motivation, hoping only to convince people that what they say is interesting, sound, and important. Still, I appraise their books as I do the ones by Richard Posner and Margaret Brinig, to determine how well they make the case for the applicability of law and economics to the personal sphere, rather than focusing on the merits and specifics of the authors' arguments.

## A. Sex and Reason

Sex proved an irresistible topic to Richard Posner, probably in part because it seemed like the ultimate example of a personal matter. If economics has something to say about sex, it has something to say about everything. Posner says that “it is a commonplace that sexual passion belongs to the domain of the irrational; but it is a false commonplace. One does not will sexual appetite—but one does not will hunger either. The former fact no more excludes the possibility of an economics of sexuality than the latter excludes the possibility of an economics of agriculture” (pp. 4–5).

In *Sex and Reason*, Posner considers a wide range of topics; his end is to articulate an “economic theory of sex.” “My larger ambition is to present a theory of sexuality that both explains the principal regularities in the practice of sex and in its social, including legal, regulation and points the way toward reforms in that regulation” (pp. 2–3). The theory he advances “asserts the paramountcy of rational choice in volitional human behavior, which sexual behavior is...[but]...does not deny that sexual desire, including gender preference, is rooted in our biological nature, and so it does not deny the intense emotionality of the sexual act” (p. 3). He concludes that a “handful of variables,” “the occupational profile of women...women’s economic independence, plus urbanization, income, the sex ratio, and scientific and technological advances relating to the control of fertility and to the care of mothers and infants” explain and predict the variance among eras, cultures, classes, races, and sexes as to behavior, attitudes, customs, and laws relating to “premarital sex, homosexuality, polygamy, prostitution, rape, contraception, abortion, infanticide, pornography, public nudity, and child sexual abuse” (p. 5). He aims to use social scientific knowledge of sexuality “as a foundation for proposing reforms in law and public policy” (p. 7).

## B. Law and Social Norms

In *Law and Social Norms*, Eric Posner considers why people conform to social norms (which he defines as observable behavioral regularities). Social norms are one nonlegal mechanism of cooperation. Eric Posner’s book “follows a tradition of work that criticizes legal scholarship for focusing too much on the state, for simplifying the relationship between citizens and the government, and for analyzing simple problems to the exclusion of important and interesting ones” (pp. 4–5). He proposes a “methodology that enables a systematic analysis of the relationship between the law and nonlegal mechanisms of cooperation” (p. 5).

The methodology is a model of nonlegal cooperation in which people abide by social norms in order to show that they are good cooperative

partners who won't cheat in a sustained cooperative relationship.<sup>21</sup> "People who care about future payoffs . . . signal their ability to resist the temptation to cheat by conforming to styles of dress, speech, conduct and discrimination" (p. 5). Eric Posner then considers the relationship between legal rules and social norms. He argues that while some social norms are good, some are not, and that legal regulation might help "eliminate the pathologies produced by social norms" (pp. 7–8). His book aims, as well, to "show the value of concepts from game theory for understanding legal issues" (p. 7).<sup>22</sup>

### C. From Contract to Covenant

Margaret Brinig's book, *From Contract to Covenant*, is subtitled *Beyond the Law and Economics of the Family*. She seeks to analyze family relationships using models from economics, but also taking into account "the limitations of economics for describing intimate relationships" (p. 2).<sup>23</sup> Among the ways she thinks law and economics falls short is in describing parental obligations to support their children. She notes that these "non-contractual" obligations what parties might have contracted for. Parents might wish to walk away from their children altogether, but parental obligations are among the aspects of family life that, according to Brinig, "make the family what it is." "They are beyond economics, and therefore beyond contract" (p. 131). Her book "offers some suggestions for creating a better fit among theoretical models, legal rules and the State of Western society" (p. 2) in the area of family law.<sup>24</sup>

Brinig argues that in some respects entry into family relationships, particularly courtship and adoption, is usefully, albeit imperfectly, described as market-like (p. 3). During the course of the family relationship, the family is usefully, albeit imperfectly, analogized to a firm. (Brinig calls the

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21. The relationship is, in game theory parlance, a game. A good cooperative partner is one who cooperates; a bad cooperative partner is one who defects. For each party, defection may be a better strategy than cooperation if he can't be assured that the other will cooperate; for both parties to achieve the best payoffs, each needs some assurance that the other will cooperate. Posner uses game theory terminology and a game theory framework. Because my objections to Posner are based on deviations between the real world and the world assumed by the Spence signaling framework, my account instead uses the Spence signaling framework that underlies the game theory framework.

22. Paul Mahoney (2002) and Richard McAdams (2001) have written particularly interesting and persuasive critiques of *Law and Social Norms*. The book was also the subject of a special symposium in volume 30 of the *University of Richmond Law Review* (2002).

23. Brinig thinks some aspects of family relationships are beyond the purview of economics; however, she also thinks that some aspects of family relationships are well captured by the new institutional economics but not by law and economics. For purposes of this essay, I will treat law and economics as subsuming and including the new institutional economics, since my purpose is to contrast an economics view of family relationships with one that is outside economics altogether.

24. Brinig is quick to acknowledge the extent to which some of the application of economics to the family is not original to her, but in fact comes from the work of Gary Becker.

family analogue to a firm a *covenant*.) Should the family dissolve or rupture, the resultant state of affairs can be modeled as a franchise under the umbrella of covenant. The family presents classic problems well described by economics: informational imperfections and the presence of externalities, both positive and negative, particularly because of the existence of children. Brinig argues that “thinking of the family in terms of covenant relationships will suggest ways for laws to strengthen ties among existing family members” (p. 8). Among the “partial” solutions she discusses are “allowing couples to choose their divorce regime through a covenant marriage option, retaining or retuning to fault in the granting of alimony or in the division of property, or explicitly recognizing investment in earning capacity” (p. 216). She also discusses joint-custody laws, characterizing them as a desirable innovation from the child’s perspective (p. 216).

#### D. Luxury Fever

Robert Frank’s book, *Luxury Fever*, is subtitled *Why Money Fails to Satisfy in an Era of Excess*. Frank argues that we are caught up in a pernicious consumption arms race, in which much consumption is merely intended to make somebody do as well or better than her neighbors. We have caught luxury fever; we want an extremely expensive watch or grill because all the neighbors have one. And, because we want such things, we work harder and have less time for our families, while becoming no better off, since all we’ve done is maintain the status quo in relation to the neighbors. Frank argues that we may be able to reduce “the speed of the consumption treadmill” and thereby free up resources that “would make more of a difference in our lives” (p. 11). He makes a “pragmatic” case, “based on self-interest alone,” for a progressive consumption tax. Such a tax would provide a “simple change in the incentives we face”; with such a change, all of us can “expect to live longer, healthier, and more satisfying lives” (p. 12).

### III. APPRAISING HOW, AND HOW WELL, THE BOOKS MAKE THE CASE TO SKEPTICS

Richard Posner and Margaret Brinig’s books make the case for law and economics in the personal sphere by using an economics framework to make plausible observations about, respectively, sex and family relationships. At least some of the phenomena at issue seem usefully described and explained using vocabulary and concepts from law and economics. Brinig is quick—I’d say too quick—to acknowledge law and economics’ limitations in the sphere of family relationships. Richard Posner, most would say, isn’t quick enough to acknowledge such limitations. In my view, Posner’s problem is more qualitative than quantitative: It’s not so much that he uses law and

economics too much but rather that he claims more for his observations than his data (and, probably more important, other peoples' intuitions) can support. Eric Posner and Robert Frank's books make the case for law and economics in the personal sphere by articulating and developing one very elegant idea. In Eric Posner's case, the idea is a game theoretic explanation of social norms. In Frank's case, the idea is a model of the forces that impel us toward destructive conspicuous consumption, and how a shift in incentives can derail the competition and redirect our consumption in ways that will increase our utility. Eric Posner's book would make the case better were its assumptions about people more realistic. Frank's book makes the case almost too well. Skeptics embracing the book's proposals might be rather disappointed if the proposals were actually adopted; the book probably overstates the proposals' benefits, and understates their cost.

### A. Sex and Reason

*Sex and Reason* makes the case for law and economics in the personal sphere exceedingly well: It applies economic reasoning in interesting and creative ways to a broad array of current and historical sexual practices and regulations. Unfortunately, it also makes the case for law and economics in the personal sphere exceedingly badly, and this latter effect has almost certainly swamped the former.<sup>25</sup> Many skeptics would have been inclined to simply dismiss or too readily disparage *Sex and Reason*; Posner has, unfortunately, given them some substance-based and methodological reasons to do so.

The problem is familiar: Posner speaks as though his intuitions are far better than they are, and that he is using them a great deal less than he actually is. At the beginning of *Sex and Reason*, Posner seems about to acknowledge the limitations of his intuitions when he says "[a]nyone in our society who wants to write about sex without being accused of prurient interest had better explain what the source of his interest in the subject is. In my case, it is the belated discovery that judges know next to nothing about the subject beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much (not entirely of course) screened out of the judiciary" (p. 1). This acknowledgment is apparently quickly forgotten, though, as it becomes clear how much Posner is drawing on his own sense of what's plausible—his own prior beliefs, which presumably come from his personal experience or at least aren't contradicted by his personal experience.

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25. For instance, consider the largely critical reviews of Posner's book in a special issue of the *Connecticut Law Review*, including Fineman 1993. This is not to say there have not been more measured reviews, such as Nussbaum 1992 and Eskridge 1992 and favorable reviews.



Posner should have been cautious in his discussion, not only because he had reason to be wary of his intuitions, but also because empirical evidence—never as good as one would like—should be particularly difficult to find and rely on when it comes to sex. Studies may not have been done; even if they have been done, people may not have been honest. For instance, it's commonly believed that the rape of men is more underreported than the rape of women, in part because men are more embarrassed to admit they've been raped than women are.

The result is, in my view, a somewhat squandered opportunity. Posner doesn't think that he needs to pull any punches; he simply says what he thinks. And of course he's entitled to this perspective and *modus operandi*. But had his aim been to best position his arguments against readily anticipatable and, in some cases, justified, objections, he might have proceeded a bit differently, as I discuss below.

Posner not infrequently makes a broad factual assertion and gives "evidence" that seems more like going through the motions than something that really helped convince Posner or could potentially convince readers. For instance, Posner says that "the different forms of deviant sexuality are . . . much more common among men than among women" (pp. 98–99). His sole citation is to one article entitled "Cerebral Aspects of Sexual Deviation." As it happens, most skeptics probably have no difficulty with this assertion; it certainly comports with my intuition.

But consider the more controversial assertion that women have weaker sex drives than men. Posner asserts that since a "powerful sex drive would probably stimulate a taste for sexual variety, or at least make it more difficult to adhere to a strategy of being choosy about one's sexual partners [a strategy that Posner has asserted that women have], it is plausible to expect natural selection against a powerful sex drive in women" (p. 91). Posner asserts as well, presumably as evidence of women's weaker sex drive, that "lesbian couples have intercourse less frequently, on average, than heterosexual couples do, while male homosexual couples have intercourse more frequently than heterosexual couples do" and that "even in societies in which women are prosperous and independent and could afford to patronize prostitutes, there is no demand for prostitutes of either sex to service women." He does not footnote these latter two assertions. He does footnote the first, general assertion, that women have weaker sex drives than men.

Posner is quick to explain away some evidence suggesting that women's sex drives may not be weaker. The men in a particular tribe described in research Posner discusses "do seem to have an unusually weak sex drive, for men. But all that this may prove is that the sex drive of either sex can be blunted by social circumstance. And apparently that of women is more easily blunted, for there is no counterpart in [the tribe's culture] to the sexual anesthesia that Victorian culture imposes on many women" (p. 92). He is also quick to dismiss some other potential evidence to the contrary,

with reasoning that initially seemed to me completely opaque: “Sherfey [a scholar writing in the area] . . . argues that if not repressed by men, women would have the stronger sex drive. Her principal evidence is that women, unlike men, can have repeated orgasms without a pause between each. But capacity for orgasms and desire for them are two different things” (p. 92). Posner then gives citations to some criticisms of Sherfey.

Posner probably means that what matters is what impels people to act; if women act as though they have weaker sex drives, it may make sense to regard them as having weaker sex drives. Now, this is a perfectly sensible point, except that by itself, it doesn’t refute Sherfey’s point. We know (or at least, just about everyone apparently believes) that women don’t act the way “typical men” do, the way Posner seems to think someone with a strong sex drive will act: persuing sex with multiple partners and having some interest in patronizing prostitutes. Physiological differences between men and women—including that women can become pregnant—suggest that they might differ on precisely these sorts of dimensions. Indeed, we don’t really know much about what women might be doing about sex, Posner’s observation about the infrequency of sex among lesbian couples notwithstanding. Presumably, we have no difficulty classifying somebody who has frequent sex with a regular partner or even frequent solo sex but doesn’t have (or, perhaps, has but doesn’t act on) a desire for multiple partners or hired sex partners as having a strong sex drive. The harder case involves somebody who in fact doesn’t have sex (however we define having sex) much, or perhaps even at all. Could we imagine such a person to ‘have a strong sex drive’? Perhaps not. But what Posner has good evidence for is that women’s sex drives don’t impel them to act the way men’s sex drives impel them to act, a far more limited claim than the one he makes.

Posner may or may not be right about the relative sex drive of men and women. Research, reported subsequent to Posner’s book, by Professor Edward Laumann at the University of Chicago and coauthors, certainly suggests that many women have difficulties enjoying sex and think less often about sex than men do, although Laumann and his coauthors think this difference is probably social rather than genetic. They say while “fully recognizing the significance of biological factors . . . we suggest that sexual behavior is fundamentally structured by social factors” (Laumann et al. 1994, 78). Helen Fisher, a prominent anthropologist, notes that most Americans believe men’s sex drive is stronger than women’s sex drive. But she believes that “women’s sex drive is simply different from men’s, more subtle, more complex, and much more misunderstood.” (Fisher 1999, 202). The literature in economics’ analytic soul mate, sociobiology,<sup>26</sup> supports the

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26. The term *sociobiology* got sufficiently bad press that it is used nowadays more in the popular press than in the academic world. I use the term loosely to refer to scholarship in fields such as evolutionary biology, behavioral biology, and evolutionary psychology, which is concerned with the types of issues I discuss in the text. I certainly do not want to suggest that

proposition that women are choosier about their sex partners than men (although, interestingly, Fisher concludes that envisioned wisdom overstates the difference in choosiness between women and men) there is no such consensus about the strength of women's sex drives.<sup>27</sup> In sum, Posner writes as though he's just drawing conclusions based on evidence, where a closer reading suggests that he's not completely evenhanded in what he's willing to accept as evidence.

And it's not just that Posner's ending points are colored by the way he takes in evidence. It's also that his starting points—his intuitions or prior beliefs—are problematic as well; they are shaped by his particular lens. Unlike other critics, I'm not as concerned with *which* distorting lens Posner sees through than that it be a distorting lens. But of course, oftentimes, the distorting lens is one a male is far likelier to have than a female. To give just one small example: Posner apparently thinks a prostitute regards the sex she has with her clients as a sexual outlet (p. 180). It would strain common sense not to consider what a prostitute does with her clients "sex" for many purposes—for instance, in computing rates of pregnancy and sexually transmitted disease. But "sexual outlet" is another matter.<sup>28</sup> Would Posner think a gynecological exam involves a sexual outlet? For who? The patient? The doctor? both? Would Posner think a movie actress would regard her on-screen kisses as part of her romantic life? Or, for that matter, a movie actor?

Posner depicts himself as willing to consider, and defend if he thinks appropriate, the most abhorrent social practices (including baby selling,

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these fields are uncontroversial. Indeed, Hadfield (1992) criticizes Richard Posner for not resisting "the pull of biology." She says that "*Sex and Reason* embraces a biological-differences story much like the traditional male-centered story that anthropologists, primatologists, and evolutionary biologists have increasingly come to reject" (Hadfield 1992, 481–82).

27. The standard sociobiological account today includes the following propositions: The sensible male sexual strategy is to impregnate as many women as possible; the sensible female sexual strategy is to be choosy in picking mates; men therefore tend to be promiscuous and women therefore tend to be coy. Men seek looks, youth, and health in a mate; women seek wealth and other evidence that the man can support her and the child. (There is also increasing evidence that evolution encouraged women to mate with men with desirable physical characteristics such as strength and attractiveness while selecting as providers older, more settled men, convincing them that the child is theirs.) It is agnostic about a woman's sex drive, hypothesizing only that women would be more apt to have a higher sex drive during ovulation. Consider the logic. Both men and women want to maximize the number of genes they spread to the next generation. Men's best strategy to accomplish this end is to deposit their semen in as many wombs as possible; hence, a taste for variety is adaptive. But of course a taste for variety is not adaptive for women, since they are exceedingly limited in the number of children they can have (relative to men). But there's no sociobiological reason why women ought to want less sex; they just ought not to have a taste for variety; with men as eager as they are, women can perfectly well be choosy consistent with wanting sex a great deal. It's well established, as Posner says, that men are aroused by visual stimuli that they encounter regularly, all the better not to miss a chance to impregnate a female. Women's arousal is apparently more cyclical, and peaks around the time she's most likely to become pregnant.

28. This being said, Fisher discusses evidence that the more highly compensated "call girls" may sometimes enjoy sex with their johns. But certainly the "sexual outlet" characterization strains credulity for the vast bulk of women selling sex for money.

which he calls parental rights selling, making the reasonable argument that it's the right to raise the baby that's being sold, not the baby itself). Indeed, *Sex and Reason* includes a dispassionate discussion of the benefits of clitoridectomy to a society (pp. 143–44, 214). Yet somehow, even though the benefits of clitoridectomy are considered, the benefits of a male analogue are not. Posner doesn't ask why the society doesn't seek (by surgery?) to curtail men's sex drive to ensure that they'd be less apt to stray and would hence provide better for their children. Why not? After all, men are apparently influenced by sociobiological forces to seek lots of sexual variety. The quest takes up valuable time, and it may lead the man to leave the mother of (some of) his children and do less good a job at providing for those children. Just as, on the sociobiological party line, the man cares that the women not be having sex with other people, lest he invest his valuable time rearing somebody else's baby, the woman cares that the "provider" she has so carefully chosen actually stays around to provide for her child. One response might be that Posner is considering only existing practices, trying on efficiency explanations for fit. But if that's the case, why doesn't he spend more time figuring out why female orgasms or the continuous sexual availability of women might be adaptive, after causally mentioning some scholarship that asks those questions? (p. 113).

Furthermore, Posner's analysis of the benefits of clitoridectomy can be critiqued even on its own terms. Posner advances as an important benefit of clitoridectomy that it assuages men's paternity anxiety by making their women less apt to seek gratification from, and hence become pregnant by, other men. He hypothesizes that the benefits might very well exceed the costs. But the costs may be nontrivial, even if one doesn't take into account the costs of eliminating women's ability to have orgasms. And the benefits may be small, since women can get pregnant in ways other than searching for sexual gratification. They might have consensual sex for some other reason, or they might be raped. Posner mentions that in Victorian times, clitoridectomy also was practiced, but as a cure to female masturbation (p. 112). The weakness of the paternity-anxiety assuagement story, coupled with the existence of another rationale, might have led Posner to consider the possibility that clitoridectomy has something to do with society's—that is, men's—discomfort with female sexuality, but it did not.

Indeed, at a few points, Posner considers, and rejects, the idea that certain practices might be explicable by reference to men's desire to subordinate or somehow take advantage of women. The rejection takes a great deal of fancy analytic footwork; skeptics will, for the most part, not be convinced, nor in my view should they be, as my arguments above about Posner's discussion of clitoridectomy suggest. The costs and benefits of practices such as clitoridectomy (or female infanticide, which Posner discusses as well) indeed ought to be considered. But Posner needs to be more evenhanded, not just in also considering the male analogues, but in his

consideration of costs. By discussing matters with problematic consequences for women, and giving short shrift both to those consequences and to matters with problematic consequences for men, Posner makes it all too easy for skeptics to simply dismiss him as anti-female and not take his arguments more seriously.

Posner himself notes that he has an analytic handle with which to consider the possibility that “a good deal of [sex] law must be a successful effort by men to redistribute wealth (in the broadest sense) from women to themselves. This would make sex law much like other forms of special interest legislation” (p. 216). Posner could have made serious inroads with skeptics had he taken these types of considerations more seriously, and he could have done so perfectly well within an economic framework. In this regard, one wonders what Posner would make of two present-day practices in Africa: described in recent news accounts. First, virgins are required to have sex with men with AIDS because of a tribal belief that sleeping with a virgin cures AIDS (SBS Television 2003).<sup>29</sup> Second, when a woman’s husband dies, in order for her to attend his funeral, remarry, and resume her life, and in order for the evil spirits she carries to disperse, she must have sex with somebody in the community who may—indeed often does—have AIDS and is anointed as a sanitizer of women for this purpose, typically an exceedingly unattractive man (Wax 2003). Providing efficiency justifications for these practices would require an extraordinary imaginative leap; special interests seem to provide a far more compelling explanation.

My point, again, is not (just) that Posner is seeing matters through a lens far more likely to belong to a man; rather, it is that Posner is not being the fearless scientist he claims to be. He seems far readier to consider the virtues of abhorrent practices when they involve the other gender’s genitals. And he doesn’t make inquiries that might lead him to question views he’s come to hold, such as that women have weaker sex drives, or that the strength of a sex drive is evidenced, if not measured, by interest in multiple or hired partners.

The foregoing discusses points as to which Posner has been criticized, and in my view, rightly so. Posner has been criticized in many other areas where the picture is much more complicated. Consider his stance on rape. Posner says that “men who would commit rape and seduce children if there were no laws against these acts are...for the most part quite normal” (p. 183). In our society, though, he says, with its high expected punishment costs, rapists and child seducers are “unattractive”; they might rape in part because getting consensual, free sex is difficult for them. He says in a footnote that by *unattractive* he doesn’t mean homely, because “that would not be a strong demerit in the eyes of most women.” Rather, he means “deficient in elementary social skills, diseased, or otherwise of low value,

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29. Some have suggested that very few people actually believe this myth, but that it is sometimes used by men to “rationalize” rapes they commit (Susman 2003).

actual or apparent, as potential mates” (p. 107). He is quick to acknowledge there isn’t just “a simple substituting away from consensual sex.” Indeed, the rapists and child seducers in our society, where expected costs of punishment are high, may very well have “deep-seated, indeed obsessive, preferences for deviant sexuality” (p. 107). But, Posner thinks, raping *in a society where expected punishment costs are high* is what evidences the fact that these men are abnormal, abnormal in a manner that precludes them from readily getting consensual, free sex.

This is precisely the kind of thinking that would make many skeptics apoplectic, for several reasons. Rape seems to be depicted principally as a sexual outlet; men who rape are depicted as normal. But on closer examination, a more complex reaction seems warranted. My anecdotal sense before starting this paper—a belief that I think is shared by skeptics—was that many rapists have consensual and perhaps also free sexual outlets (and that hence, getting another sexual outlet couldn’t be that big a part of the story of why they raped); some evidence seeming to favor this belief is that many men incarcerated for rape are or have been married. Indeed, more uncarcerated rapists are or have been married than have men serving time for violent crimes generally. While the proportion of ever-married incarcerated rapists and sexual assaulters is less than the proportion of ever-married men in the population generally, it’s not much smaller. Approximately 6 in 10 rapists and sexual assaulters are or have been married; somewhat more than one half of all violent offenders have been married (Greenfield 1997, 21). By comparison, in the population at large, the number is closer to 7 in 10 (United States Census 2000)—a higher number than for the rapists, but not much higher.

But some research (Jones 1999 and 2001) does show that men may in fact be more apt to rape if they can’t find other free or consensual sexual outlets. Jones cites one finding that in the territory of Queensland, Australia, convictions for rape and attempted rape tripled during a seven-year period after the closure of brothels (Jones 1999, 928). Jones also notes that the men convicted for rape and attempted rape over this period had many of the same socioeconomic and demographic characteristics as those who had frequented brothels during the earlier period. There is also some suggestive evidence that men who think they can get away with it are more likely to rape. Rape during war may fall into this category, as could rape by high-status men. Some skeptics would be pleased, perhaps, at this latter finding, as an account of how societal coddling of certain types of men is problematic and costly. Anecdotal accounts of rapes committed or allegedly committed by high-status men are readily summoned up: Kobe Bryant, Andrew Luster (heir to the Max Factor fortune), Mike Tyson, and William Kennedy Smith come immediately to mind. And the phenomenon of wartime rapes is well-known. While, of course, many examples don’t fit cleanly into this paradigm, the overall pattern may be amenable to the type

of explanation Posner is giving; certainly, mainstream sociobiologists are articulating positions not so dissimilar to Posner's. And while the mainstream sociobiologists are not necessarily right—they too have been accused of wearing distorting male lenses—the sociobiological work maybe somewhat less vulnerable to the types of methodological criticisms that have been my focus in criticizing Posner.

Another point concerns normalcy. When Posner says that men who rape when they don't fear being punished are "normal," he could be using the term in several senses. He could be using the term in a descriptive sense, to mean that rape is sufficiently common that it is normal to do it. He could be using it in another descriptive sense: men who rape are normal in other respects. Or he could mean it in a normative sense: it is normal, as in perfectly sensible, to rape if there is no punishment. I very much hope he doesn't mean normal in the normative sense, although a part of me suspects that he does. But what if he means it in a descriptive sense? Baker cites studies finding that men who rape are normal "to the extent that psychologists fail to find evidence of abnormality" (Baker 1997, 577). And certainly many skeptics who are feminists think many men are rapists. Now, these are men who Posner thinks are *not* normal; they rape in our society, with its high expected punishment costs. But it's possible—I can't appraise how likely—that Posner's very objectionable-sounding statement is actually not nearly as objectionable as it sounds.

So, Posner may not be as off the mark as his critics have suggested. But a more important point should be made here. Notwithstanding some charges by skeptics to the contrary, nobody, including Posner, who writes in this area thinks biology is destiny and that rapists ought to be treated more leniently because they're just doing what comes naturally. Posner takes pains to stress that "[s]ociobiology identifies influences on behavior, not determinants of it" (p. 109). He thinks, though—and he is far from alone in this—that those influences can be strong indeed. "The tail of the distribution of aggressiveness may contain men so aggressive sexually that they cannot easily be deterred from forcing themselves on women" (pp. 107–8). What Posner is trying to do is articulate an account of rape on which law and policy can be based—an account that suggests areas in which law may need to work particularly hard.

In my view, anything that can help us better understand the phenomenon of rape might help in devising laws and policies that might make rape less prevalent; cheap sentiment in this area can be costly indeed. Not that taking sociobiology into account is so simple and unproblematic. Some may try to use a "my genes made me do it" defense; perhaps, such defenses might become more common or more successful if sociobiological findings about rape become popularized. But the fact that the research can be misused doesn't mean we shouldn't do it or talk about it.

In sum, *Sex and Reason* was necessarily going to attract criticism for cheap-sentiment and shoot-the-messenger type reasons. As I noted at the

beginning of this essay, some people don't like the idea that people might be purposive and calculative in their search for romantic (or even sexual) partners. They may think that to apply economic concepts to romance and sex may rob romance and sex of their wondrous, mystical nature. Imagine Romeo and Juliet asking him-/herself if the other is really worth it. Unfortunately, Posner gives his critics righteous fuel when he consults his intuitions, takes a less-than-thorough look at the data, and pronounces his intuitions confirmed without, it would seem, having seriously tried to disconfirm them. And when he makes a cost-benefit analysis that speaks as though it is mechanical, glossing over the complexities of determining what's cognizable as a cost or benefit. Presumably, the benefits to Jeffrey Dahmer (perhaps the ultimate utility monster) of getting to eat human body parts don't count, nor do, in this day and age, the costs that people who object to interracial marriage incur by living in a society that permits such marriage. But, according to Posner, the costs to morale and related sentiment of permitting homosexuals in the military and permitting gay marriage do count. Posner needs to articulate a principled distinction between the costs that don't count and those that do.

And these shortcomings are a shame, because they obscure the real and important virtues of a project such as an economic inquiry into sex, and *Sex and Reason* itself. The standard economic concepts—cost-benefit analysis, search and other costs, substitution and complementarity, the role of incentives, and third-party externalities—prove quite useful. Indeed, particularly on subjects such as homosexuality (male homosexuality, principally; Posner has rightly been criticized for focusing far more on male homosexuality than female homosexuality), the priesthood, AIDS, and sex in the African American community, Posner's discussion is quite sensible; indeed, skeptics should find much to agree with. He makes the following points:

- The more intolerant a society is of homosexuality, the higher the proportion of male homosexuals who marry women. Because marriage can help conceal homosexual activity, it may be both a substitute and a complement (p. 118).
- Because search costs for heterosexual sex are very high in prison, some inmates may substitute homosexual sex (p. 121).
- Because being in the priesthood is voluntary, we can expect that a higher proportion of priests are gay than prisoners (p. 156).
- "A climate of sexual tolerance may actually retard rather than promote the spread of venereal diseases in general and AIDS in particular." In a climate of intolerance, there would be less knowledge about condoms and less reporting of venereal diseases by homosexuals, and there might be more prostitution as voluntary nonmarital sex was discouraged (Posner 1992, 165).



- If the heterosexual community were being ravaged by AIDS, nobody would suggest that heterosexual intercourse would be banned or people desiring children should turn to artificial insemination (Posner 1992, 165).
- “Since when has self-control been a dependable method of regulation?... might not realism in our time dictate condonation of a broader range of noncanonical sex practices?” (p. 151).

The general libertarian (and critical) tone of Posner’s discussions appraising legislation punishing homosexuality should please many skeptics,<sup>30</sup> as might Posner’s view that homosexuality and heterosexuality may be on a continuum.<sup>31</sup> Similarly, Posner’s distinction between companionate and non-companionate marriage helps provide a means for appraising costs and benefits of various activities within and without marriage. While Posner did not anticipate the scandals in the Catholic Church, he would find them quite easy to explain. Of course, pedophile priests benefit from the ease of gaining access to and trust from children. And the Church hugely reduces its potential pool of priests by demanding something so difficult, celibacy. But there is a slightly less obvious point, one made in *Sex and Reason* as to homosexuals but that applies with greater force for pedophiles. For somebody who doesn’t value heterosexual marriage, the cost of forsaking it is low. Furthermore, such people surely benefit as well from not having to explain why they aren’t married, a point effectively made by Posner’s cost-of-concealment argument. In retrospect, the Church scandals seem almost too predictable.

Some of what Posner has to say has gotten a mixed reception from skeptics for substance-based reasons. Examples include his compromise stances on gays in the military (don’t discharge gays but don’t admit any new ones) and gay marriage (he favors allowing domestic partnerships instead). Posner regards societal disgust and revulsion as both more fixed than I think it probably is, and more legitimate than I think he would have regarded it as being had the disgust and revulsion been that of some group other than the group to which he belongs; he also seems to minimize the power of the law to delegitimize and legitimize. He expresses the concern, for instance, that “permitting homosexual marriage would place government in the dishonest position of propagating a false picture of the reality of homosexuals’ lives” (p. 312). Does Posner imagine that the reality of

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30. Eskridge (1992) thinks Posner doesn’t go nearly as far as he should; he thinks Posner’s purported libertarianism and moral neutrality gives way to a pragmatism that gives too much credit to social judgments of disapproval and nonacceptance.

31. West (1993) however, takes issue with Posner as to, among many other things, his acceptance of the Kinsey scale (a scale of relative heterosexuality and homosexuality), arguing that our sexual preferences and orientations are fluid and changing. And his attempts to analogize sex to a much simpler thing, a taste for one type of ice cream or another.

homosexuals' lives isn't deeply affected by whether or not gay marriage is permitted—that a true picture of homosexuals' lives somehow exists independent of both how the law affects those lives and how the law affects views of homosexuality? To take this position to its extreme would be to deny the expressive function of law. One wonders what Posner now thinks, post-*Texas v. Lawrence*.<sup>32</sup>

Some of what Posner has to say merits a more serious discussion than it perhaps has received. One example is his implicit suggestion that this country would have a lower rate of teenage births if maternity and child-care benefits were tied to the mother's employment, as is the case in Sweden (p. 168). These types of suggestions remain quite controversial notwithstanding empirical work (including Brinig's) that shows that some of people's big life decisions, such as where to live and whether and when to have children, are influenced at the margins by incentives such as state and federal financial benefits. Another example is his discussion of how the low ratio of black men to black women may give black men considerable bargaining power over black women. Indeed, these are the types of discussions that might be reviled by skeptics for cheap-sentiment or shoot-the-messenger type reasons; had Posner more adeptly avoided giving fuel to his critics, he would be far better situated than he is to potentially change some minds at the margin.

## B. Law and Social Norms

Eric Posner starts from the reasonable presumption that it's in every person's interest to convince every other person that he or she is a good cooperative partner.<sup>33</sup> Because it's in each person's interest to do so, a simple declaration won't suffice. Why should somebody believe somebody making such a self-serving declaration? The problem is among the classic problems faced in law and economics: how can X credibly make a self-serving claim to Y when Y knows that X has superior knowledge as to the truth of the claim? One way X can proceed is by signaling that he is a cooperator. Eric Posner argues that social norms serve as such signals.

Signaling is an exceedingly intuitive yet powerful concept. One of the Nobel Prizes in economics for 2001 was given to Michael Spence, who

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32. *Texas v. Lawrence* is the case in which the U.S. Supreme Court overruled *Bowers v. Hardwick* and held that the "Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the due process clause" of the United States Constitution (*Texas v. Lawrence*, 123 S. Ct. 2472 [2003]).

33. There are sets of people for whom this isn't generally the case (rebellious youths; rebellious grown-ups—and even they probably went to convince their immediate peers of their cooperativeness), but for most people, it's reasonable as a starting presumption.

originated the modern-day concept of signaling (Spence 1974).<sup>34</sup> Spence signaling solves the credibility problem. Somebody who wishes to signal that she has some desirable attribute—say, that she is a good cooperator—makes an investment that would be lost if the signal is false. Such investments are cheaper for those who are truly good cooperators than they are for those who would simply like to depict themselves as being cooperative but in fact are not. The truly cooperative can amortize their investments over all the instances in which they get the benefits of their cooperativeness. The falsely cooperative will be found out in short order, and their investments will be for naught. The traditional articulation of the point involves quality rather than cooperativeness. Consider a law firm or bank with an office full of expensive art and furniture.<sup>35</sup> If the law firm or bank is of low quality, it can only amortize the investment over the first few screwups; after that, its potential customers will wise up. The firm or bank will only make such an investment in the (exceedingly rare) situation in which the investment can be recouped before its quality becomes known. The high-quality firm, by contrast, easily amortizes its investment in art and furniture from the payoffs from a continuing stream of satisfied customers.

Note that the investments contemplated in the Spence signaling model can take many forms, so long as they are more expensive for the bad types than the good types. The investment needn't be something inherently unrelated to the matter at hand; certainly, a costly advertising campaign serves in part as a signal that the firm intends to stick around and make good on its investment. But for Eric Posner's account, the investment can't be completely related to the matter at hand;<sup>36</sup> his contribution is precisely to identify a huge variety of heretofore mysterious or apparently unrelated practices as investments in convincing somebody that one is a cooperator.<sup>37</sup> Any practice potentially can do, so long as it is costly.<sup>38</sup> Eric

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34. Ironically, a set of concepts that are arguably in the same family as signaling—those employed in semiotics—are distinguished more, many would say, by their obscurity and limited explanatory power.

35. It is helpful for the purer expositions of the model that all relevant costs and benefits are known—the cost of the investment, and the benefit that it will yield—and that the investment is purely an investment and isn't also a consumption activity.

36. Posner does acknowledge that there will be many mixed cases, where the behavior at issue is a signal but is serving some other function as well.

37. Richard McAdams makes a similar point (2001, 634).

38. Figuring out what is costly can be problematic. If I don't enjoy exercise, I might do it to demonstrate that I'm capable of discipline. But what if I do enjoy it? There's an apocryphal tale of the cheese-eating saint who started out hating cheese and ate it constantly to show God what she was willing to do for Him, but toward the end of her life, she grew to like cheese, and stopped eating it, again to show God what she was willing to do for Him. The signaling model Posner uses doesn't explain much in the cases where people would otherwise enjoy the activity or would benefit from it for reasons other than its signaling value. But it's hard to figure out how somebody experiences what she does. Another problem with costs is the familiar baseline problem. Maybe wearing a suit is costly—but compared to what? being nude? wearing more casual clothes? Indeed, all of this points to a bigger problem articulated by

Posner uses his model to explain practices as disparate as gift giving, courtship, and voting.

Posner's approach has a great deal to recommend it. First, it has, in broad brush, considerable intuitive appeal. Certainly, one thing I look for in most people I'd meet and hope to have any sort of relationship with, personal or professional, is that the person be in it for the long haul—that is, have some stake in being a long-term cooperative partner. And one way I might make my assessment is to see evidence of the person's stake. What's also appealing about Posner's idea is the confluence of the personal and the professional; the same type of mechanism would in theory work for both spheres. Somebody choosing a business partner wants to choose a good type—but so does somebody choosing a marriage partner. Somebody who wants to be chosen as a partner has an incentive to signal that she is a good type.

But Posner's theory is problematic as an exemplar of law and economics in the personal sphere. In the classic Spence model, and in Posner's account, the entire problem to be solved is credibility. Everybody agrees on the definition of good type both as to others and as to themselves.<sup>39</sup> The only problem is in the classic lemons/asymmetric information problem first described by George Akerlof: you have better information about your type than I do, and you have an incentive to say you're a good type whether or not you really are. *But many important obstacles to communication have nothing whatsoever to do with credibility.* Often, the obstacle is that one will know it when one sees it (if then) but can't set forth necessary and sufficient conditions before the fact. Many inquiries have this feature,<sup>40</sup> particularly those in the personal sphere: Which people will be a good match or good friends? Even if being credible is necessary to be a good X (which it may not be), it is surely not sufficient.

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Richard McAdams—that we must be careful to compute the costliness of costly behavior independent of its signaling benefits. Posner's theory would otherwise threaten “to make every behavior consistent with economic theory...[W]ith discount-rate signaling, any costly behavior is potentially an investment” (McAdams 2001, 641).

39. The worldview in which categorization is simple—there's a consensus about what the sensible categories are and what the criteria are for inclusion in a particular category—is one that economics takes, illicitly, from the hard sciences. All scientists agree that *elements* is a sensible category, and on what the elements are. Some categories outside the hard science have this feature, but many do not. And even in the hard sciences, many categories do not have this feature.

40. What's being signaled in some of these cases is something we know but can't articulate, or perhaps isn't articulable even in principle—something we only come to know in the process of trying to find out. Company X, doing its due diligence to determine whether it wishes to merge with company Y, discovers that it feels uncomfortable with the fact that company Y's employees wear Birkenstocks to work. It had never before considered dividing the universe of companies into those with Birkenstock-wearing employees and those without such employees. (And what other footwear would be enough like Birkenstocks to count in the same way? And what proportion of Birkenstock-wearing employees is necessary to create the company ethos that's presumably the real objection?)

Lack of necessary and sufficient conditions is also a problem in the commercial sphere. Which businesses will make a good match? Which employees will work well together? Which product will succeed in the marketplace? Again, credibility may be an issue when we make inquiries on these matters, but it is far from the only issue, and it may not even be the main issue. In Eric Posner's account, credibility issues are the only ones addressed.

The disproportionate focus on solving credibility problems is common in law and economics, and in economics as well. Consider, for instance, the field of finance: Much of the literature is about investors' fears that managers have private information, and managers' attempts to assuage those fears. The focus comes at the expense of a focus on less tractable but quite pervasive information problems, such as those concerning incomplete but not asymmetric information about the future (future trends, future climate conditions) and how such informational deficiencies affect finance. The 2001 Nobel Prizes in economics were all awarded for work on asymmetric information, which underlies credibility problems; the prizewinners' contributions were characterized by the Nobel press release as "the core of modern information economics" (Bank of Sweden and Royal Swedish Academy of Sciences).

The worldview that gives credibility problems such prominence that accords only a limited role to individuals' internal lives. People know what type they are, and their energies are devoted to attempting to convince people of the favorable truth, or attempting to conceal the unfavorable truth. Eric Posner says, for instance, "People claim to be principled because others infer that people who do not make such claims are bad types. Similarly, people claim that options are incommensurable because others infer that people who do not make incommensurability claims are bad types" (p. 192). Other objections could be made to these rather remarkable statements, but my objection is the one I think is most applicable to law and economics generally. Seeing the world through the lens where credibility problems are those most at issue, one can believe that the only information problem is that of asymmetric information, of people who can't convey, for instance, their true good type because a favorable depiction would be disbelieved as self-serving. Posner seems to be assuming that everybody knows everything about themselves, including what type they are, and everybody agrees on the definitions of the types thus, people can spend their time crafting flattering depictions or figuring out ways to get others to believe their depictions. But when do people get the opportunity to know themselves so well? Returning to Posner's statements about the motivations for someone's depiction of herself as principled: Might somebody just be making the claim to develop, for herself, a definition of what it means to be principled? Teachers often say one doesn't understand a subject until one has taught it. Mightn't an understanding about what one thinks being principled is be developed by explaining one's definition to somebody else? Might somebody just think that part of what it means to be principled

is to announce that one is principled? Might somebody be making the statement simply to give the information the statement purports to give? Or, perhaps, in a motivation more familiar to economists, one might characterize oneself as principled to constrain oneself in the future to act consistently with the principles one articulates. All these motivations seem possible, and far more plausible than the one hypothesized by Posner that contemplates a purely instrumental motive, and an obscure one at that—one that depends on hypothesizing an elaborate chain of inferences on the part of one's listener.

Returning to Posner's example of voting, might somebody vote because that's how she comes to see herself as being civic minded or having some other desirable trait? Posner has every self-depiction being external, designed to show something to others. But, again, how do people come to know themselves or view themselves in a particular light? What does it mean to have a certain trait, other than a propensity to act in a manner consistent with what the trait requires? What would it mean to think of oneself as civic minded but not do anything that one thought of as something civic-minded people do? If somebody's behavior or words were always intended to depict herself as being an X, on what basis would she conclude she was an X? And isn't it completely counterintuitive to imagine that people are so strongly focused on depicting themselves in a particular way to others? Surely, an important part of what people do is become a certain way and discover and create who they are.

Other-directedness is far more realistic as a description of how entities (and people speaking for entities) operate. The metaphor of entity-as-person includes within it the notion that such a person might have an internal life. And indeed they might, in some sense, but not so as to supplant the usefulness of thinking of their conduct (and indeed, just about everything about them) as essentially outer directed.

Where Posner's explanations are successful, the book makes a good case for the application of law and economics to the personal sphere. Even where the explanations are less successful, the approach still seems fruitful: Constructing the model, making the case for its plausibility, and showing several persuasive applications thereof is a considerable achievement, even if the model isn't applicable in nearly as many contexts as Posner apparently hoped. Indeed, whatever else he does, he makes an unassailable case that market metaphors help us understand various personal practices: That people invest in producing favorable opinions of themselves, and do so for later advantage, both personal and commercial, seems indisputable. And that the investments might take the form of learning community norms and abiding by them also has a ring of truth. And that the mechanism is often similar in the personal and commercial sphere seems right as well.

For reasons discussed in many of the reviews of *Law and Social Norms*, one can criticize the breadth of application of Posner's thesis. It's probably

only applicable to particular sorts of communities, for instance. Its strength, therefore, would seem to be as a framework for further inquiry, and a demonstration of how game theory might help explain social norms within a larger paradigm hypothesizing self-interest. Allying the personal and the professional, and showing the connection between fitting in by learning and abiding by social norms and self-interest seem particularly promising as ways to demonstrate the value of law and economics in the personal sphere.

### C. From Contract to Covenant

Margaret Brinig's book, like Richard Posner's, uses law and economics (as well as the new institutional economics, which, for my purposes, I treat as part of law and economics) to explain a wide variety of behavior and laws. Her subject is family law.

Brinig's book is careful to address the skeptics, conceding where she thinks it's appropriate that a market model or some other model from economics doesn't fully capture what's at issue, or where she does use an economics model for a sensitive subject, making sure to prepare her readers with an acknowledgment such as that the "idea that a 'market for lemons,' devised to describe the sale of consumer goods, extends to adopted children sounds at once abhorrent and seductive" (p. 68). As mentioned in the preceding section, the "market for lemons" is a model developed by George Akerlof, one winner of the 2001 Nobel Prize for economics. The word *lemon* refers to a lousy used car; the model is used widely to describe situations where somebody is about to acquire something that might be a lemon, when the acquirer and seller both know that the seller has better information as to whether the item is a lemon than does the acquirer. In Brinig's analogy, the adoption agencies are the sellers, the parents are the acquirers, and the children are the potential lemons.

Brinig takes seriously the possible anti-economic objections to her positions, and deals with them dispassionately. For instance, she discusses the effects of incentives on a woman's decision to have a child. In many circles, it is of course quite controversial to argue that if it's made more financially advantageous for a woman to have a child, she's more apt to do so. Brinig argues that economic incentives are indeed relevant, and cites empirical work, including work of her own, as evidence. But her account acknowledges that non-economic factors likely also play a role.

She uses a plethora of economics concepts. Markets. Firms. Investments in capital of various types. Holdup problems. Principal/agent problems. Opportunistic behavior. The role of incentives. Informational deficiencies. Externalities. The concepts she uses invoke not just atomistic actors out for themselves. Family relationships create, metaphorically speaking, firms and franchises—entities that have their own interests.

The following are just a few examples of Brinig's analyses. I stress contexts in which Brinig thinks economics does a plausible job. That Brinig is careful to delineate contexts where she thinks economics falls short adds to the case to be made to skeptics. However, as I discuss below, it may help too much—that is, Brinig may be too ready to deny the usefulness of economic models.

Brinig notes that a market metaphor is appropriate to describe courtship. The courtship market contains informational deficiencies and other impediments to perfect contracting, as do many types of markets. Parties don't have perfect information about one another. Indeed, one party may be perpetuating a fraud on the other. Brinig draws a variety of conclusions relating to the conditions under which annulments should be granted, how search costs are reduced, and other matters.

There is also a market for babies. Brinig discusses the explosive issue of baby "selling", considering the interests of all the actors involved. She notes that many babies are in effect rationed. Laws don't permit them to be rationed by price, so they are rationed in other ways. She notes the significant potential for opportunistic behavior by people involved in supplying babies, since the demand from people who want them is so inelastic. She argues in favor of a limited time to revoke consent to adoption, citing incentives, costs, and benefits to those doing the adopting, those relinquishing parental rights, and other pertinent parties.

Brinig's book uses not just the metaphor of a pure "spot" market, but also another metaphor from the commercial sphere, that of a firm. Doing the latter allows her to capture far better the idea that a family isn't something that most people "mark to market"—constantly. It would be unfortunate indeed if people in marriages constantly marked their relationships to market. But Brinig shows that law and economics doesn't require any such thing. There are relational contracts, and there are firms. Firms have a separate existence. If they are to cease, they must be dissolved and the dissolution takes time and trouble.

When people have formed a couple, particularly through marriage, the metaphor of a firm is more appropriate. Brinig uses the metaphor, but calls the state she is discussing covenant. Indeed, Brinig notes that the firm metaphor falls short because it doesn't capture the fact that families don't maximize financial wealth, "in at least some senses" they last forever, and they are full of unconditional love (p. 138). But people make investments in a marriage, just as they do in a firm. Brinig discusses the extent to which married people specialize in different tasks, and whether specialization is efficient. She discusses as well the extent to which the past and present contributions married people make to the marriage affects whether they'll stay together and on what terms. She discusses some public goods created by marriage, including children and the marital state itself. For instance, in Brinig's discussion of children, she notes that they often are either the



beneficiaries of positive externalities or the recipients of negative externalities. Traditional theory suggests that parties—in this case, the children’s parents—may not always take externalities into account in contracting, thus suggesting a role for law.

When a marriage is dissolving, the market metaphor, with its emphasis on contracting, again becomes relevant. Brinig spends a bit of time discussing reasons for divorce. She notes that “economics, as imperialistic as it is,” may explain a bit about divorce, and then considers explanations from economics’ close theoretical companion, sociobiology (p. 149). The argument is familiar: Everybody wants to maximize the number of offspring they produce, and for men, the best way to do that is to impregnate as many women as possible.

Brinig explains how no-fault divorce leaves a spouse (typically, a wife) vulnerable to opportunistic behavior. Fault can be characterized as a breach of the marriage “contract.” Where fault is not required for a divorce or considered in alimony decisions, there is in effect no penalty for breach—a spouse (in Brinig’s account, typically a husband) may therefore have less incentive to refrain from opportunistic (marriage contract breaching) behavior. No-fault divorce thus “comes with the dual prices of substantial negative externalities (some of which are popularly called ‘the feminization of poverty’) and problems for the marriage itself (called rent-extraction or holdup in the economic literature)” (p. 152). The highest prices may, however, only be paid by those who were married before the no-fault regimes were enacted; the situation may differ when couples marry with a no-fault regime as backdrop.

Brinig argues that most marriages can’t dissolve completely, especially if there are children. She analogizes what’s left after a marriage has dissolved to a franchise. In this analogy, the franchise “encompasses the relationships that are still present even after the strongest legal bonds are broken by divorce, emancipation [of minor children] or adoption” (p. 181). The analogy is as much aspirational as actual: Brinig wants to push law in the direction of encouraging and honoring these relationships, and discusses how seeing them as franchises would further that vision.

Brinig’s account is part of a literature that demonstrates the value of economics concepts in a theory of the family. Brinig provides a nuanced, up-to-date, and very well supported analysis of her various positions. Her account is of particular value in making the case for skeptics because she is ready to acknowledge economics’ potential shortcomings as well as applications of law and economics that are particularly sensitive.

All this being said, I think that Brinig may have been too quick at times to abandon an economics approach—too quick to label many phenomena in the personal sphere as beyond economics. Indeed, she sometimes seems to use a caricature of the law and economics actor as a foil. This caricatured actor is calculating and out for herself, infinitely (and,

typically, consciously) instrumental, and looking for advantage at every juncture; the contrast is with the actor believed in by skeptics who, in the personal sphere and perhaps not even in the commercial sphere, doesn't calculate and isn't exclusively, or even principally, out to advance her own interests.

The infinitely instrumental actor is a caricature. First, nobody can possibly be infinitely instrumental. Not (just) because people are probably not that bad, but because it would simply be too much work! We often reflexively do the helpful thing: We give correct directions when asked, even if not doing so would benefit us. (We might get better seats at the movies if we gave somebody else bad directions.) We are, at most, instrumental in a small subset of contexts—those that occur to us. A scene in the 1967 movie *Bedazzled* starring Peter Cook and Dudley Moore makes the point. Cook plays the devil, and he is infinitely instrumental. Both the character played by Moore and the audience marvel at all the opportunities the devil has for being instrumental (including tearing out the last page of mystery novels and making scratches on records). It's a full-time job, requiring considerable imagination, effort and aptitude, one that most of us couldn't manage.

The caricature assumes conscious instrumental behavior directed toward ends that are self-interested (and, especially, self-interested at others' expense). There are some extreme examples, both from fiction (the movie *How to Succeed in Business without Really Trying*) and from real life (perhaps, Jack Grubman upgrading AT&T stock allegedly in exchange for the help of Sandy Weill, CEO of Citigroup and a board member of AT&T, in getting Grubman's children into a prestigious nursery school run by the 92nd Street Y. Citigroup's Philanthropic arm contributed one million dollars to the 92nd Street Y. Weill wanted the upgrade to win the help of AT&T CEO Armstrong, who was on the Citigroup board and in a position to help Weill win a power struggle. The *Wall Street Journal* referred to the transaction as a "kid pro quo (Gasparino 2002)."

But many examples are muddier. Indeed, the same traits that may be used in a conscious instrumental manner may also be used, less consciously, to the same ends. Contrast a handsome young man who flatters older women into taking overpriced dancing classes<sup>41</sup> with one who flatters people generally, does so at a social gathering, and ends up being offered a legitimate job as a result. Or the charming spouse who arranges a nice social gathering for his spouse's business associates in order to help her advance professionally. In the latter two examples, the person may or may not be conscious of using his charms for instrumental purposes, and he doesn't have the kinds of ends that skeptics would characterize as

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41. These are the facts from a notorious contracts case, *Syester v. Banta*, 133 N.W. 2d 666 (Iowa 1965).

objectionable. Is it obvious that the person who uses his charms consciously is necessarily qualitatively different than the one who doesn't? Is it fair to say that instrumental behavior (however defined) is natural and common in the commercial sphere but has no place in the personal sphere? I would think not. Brinig subscribes unwittingly to a distinction that, in my view, is ultimately untenable.

Consider her discussion of marriage as covenant. She notes that people in a successful marriage do what they do unconditionally and not as part of an expected equal exchange. It's only when the marriage has difficulties that equality of exchange is expressly computed and contested. But mightn't it be that when the marriage has no difficulties, it is in part because the people feel they are getting an equal exchange and that they therefore don't need to be aware of, or discuss, the computation they may be implicitly making? That's certainly my intuition, and Brinig doesn't provide evidence to the contrary.

The same is, in my view, the case in the commercial sphere, in standard relational settings, including firms: Express and frequent discussions of the terms of exchange may very well signal a breakdown of the relationship, and more satisfactory relationships have much more daily unacknowledged give-and-take. Indeed, more broadly, I dispute the qualitative contrast between people in the commercial sphere, who are making bargains and deals, and negotiating with specificity to that end, and people in the personal sphere who do things for love or for friendship or some such thing. In this regard, some recent work about the commercial sphere suggests that beyond a certain point, when people try to specify more what the terms of their deals are, the deals may break down. The act of specification itself may leave hard feelings. It may also give rise to a norm that whatever isn't prohibited is permitted. Research a co-author and I have been conducting comparing U.S. and German contracting practices (Hill and King, 2004) suggests that German contracts, which specify far less, benefit from a larger reputational penumbra. With no bright line to be toed, parties may come nowhere near the place where the line might plausibly have been drawn.

A final point bears mention. That a marriage isn't formed for profit is, one hopes, in general, a true statement. However, it seems possible that maximization—at least methodologically, if not ontologically—may be a more useful framework than Brinig seems to suggest when she notes that the metaphor of firm falls short because marriages don't seek to maximize profit. As I noted in section one, scholars are increasingly considering the extent to which the ontology of law and economics can survive with a more expansive notion of utility. The self-interest constraint has clearly been solved; the unit of interest can clearly be larger than the individual and can include the firm or the family. It's possible that an analytically useful notion of nonpecuniary utility function can be developed. Dismissing the

possibility that maximization and equality of exchange are useful concepts in family relationships may concede too much.

#### D. Luxury Fever

Robert Frank's book, like Eric Posner's, makes its contribution through the development of one very elegant idea. His account is a much-needed corrective to the once-traditional notion in economics that people want what they want because they want it—that it is the inherent attributes of a good that makes it desirable to people, and that dictates the value they place on it. Indeed, it seems astonishing that the traditional view gave as short shrift to relative value as it did until quite recently. Perhaps some tastes are immediate and visceral and come to us in a form we can't doubt: Consider the experience of eating chocolate. But many items elicit far less visceral and far more complicated sensations. Why might we want a large plot of land for our house? Maintaining land is costly. What is the offsetting benefit? Why do we want the top-of-the-line car? What features does it have that we value? And how would we know how to value increments of desirability? The items at issue are all priced on a free market, of course, but all the market price reveals is what buyers are willing to pay and sellers are willing to accept. The market price can't tell us whether the valuations are absolute (how much we value an item because of the inherent pleasure it gives us) or relative (how much we value it because it gives us status and the ability to keep up with the Joneses). Nor can it tell us how much we were influenced by the market price when we came up with our valuations in the first place, a point eloquently made by Ariely, Loewenstein, and Prelec (2003).

Frank argues that much consumption doesn't make us better off but, instead, feeds a destructive arms race in which we continually try to keep up with one another. The consumption at issue is particularly visible—big houses, powerful gas grills, fancy cars, and fancy watches. He argues that other types of consumption—inconspicuous consumption, such as expenditures on cleaner air would actually make people better off, and ought to be encouraged, in part by taxing the conspicuous consumption.

Economic reasoning here is being used to show something akin to an externality, albeit an odd sort of externality—a cost that people impose on the society (externalize), but also on themselves. The reason people act in this manner is evolutionary: We are peacocks who want the biggest, most conspicuous tails, to attract mates and hence maximize the number of offspring we have.<sup>42</sup> But of course, all the energy spent trying to have the

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42. Unlike most people who espouse an evolutionary explanation, Frank doesn't distinguish between the sexes. He notes that to men, women's income is becoming increasingly important.

biggest tail is wasted. The result will be that everybody's tail gets bigger, and comparatively, none of us is better off than we were before.

Frank's claims for his proposal seem almost too good to be true. And they probably are. If there were a steeply progressive consumption tax, people might very well limit their problematic status-oriented consumption and engage, rather, in "good" inconspicuous consumption—on leisure, making air cleaner and schools as a whole better, saving more.<sup>43</sup> But people can't work as much as they used to, hence generating a huge pool for savings to be spent on "inconspicuous consumption," and, at the same time, enjoy much more leisure at home because the high tax rates on consumption have dissuaded them from working as much. Indeed, the more they're dissuaded from working, the less money there will be generated from a luxury tax to do all the commendable social things that Frank argues will make people happier in a lasting way. People might try, as some critics of Frank's argument have pointed out, even harder and work even harder, promoting the savings goal but defeating the more-leisure goal.

Furthermore, notwithstanding my overall sympathy and agreement with the view that people don't simply "want what they want" I think Frank exaggerates the extent to which people value particular items because their peers have such items. My father, for example, wanted the items he wanted because of their inherent features, caring not at all about status. He sometimes preferred obscure, inexpensive wines over the more famous and costly ones; he never doubted his ability to detect a wine's caliber. But he sometimes did think the costly items were worth the money. Increasing the consumption tax would not be painless to a person who valued costly items for their inherent attributes.

In sum, Frank's proposal has a great deal to recommend it; certainly his argument that much consumption is done to keep up with the Joneses is true and important. But those accepting his characterization of his proposal as win-win and painless may be in for a rude awakening.

## E. The Four Books

The four books I have discussed illustrate both the strengths and weaknesses of law and economics in the personal sphere. The strengths are principally in the explanatory value of metaphors and concepts from economics. Law and economics analyses of matters in the personal sphere are particularly vulnerable to some of law and economics' pathologies, most notably its science affectation. The pathology may be more pernicious in

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43. But they might not. Kubler (2001) argues that there are snob norms—directed toward owning something nobody else owns. If luxury consumption is governed or influenced by such a norm, a high consumption tax might actually encourage higher expenditures and more energy spent pursuing the now-even-more-desirable luxury items.

the personal sphere because economists' intuitions may be worse, or simply more controversial, than their intuitions about matters more normally associated with the commercial sphere. But, as I have argued, the pathology pervades law and economics. Matters should improve considerably as the field develops and adopts a more realistic view of people. With such a view, the power of law and economics can be better harnessed to explain what people want and how they go about getting it—in all aspects of their lives.

#### IV. CONCLUSION: THE COMMERCIAL SPHERE AND THE PERSONAL SPHERE

In the criticisms of law and economics in the personal sphere, especially in its more controversial and visceral applications, substance-based and instrumental/moral criticisms are coupled, almost like an argument in the alternative: What law and economics says about matters in the personal sphere is incorrect, and to the extent it's not incorrect, it's pernicious: characterizing babies as goods makes us think of them that way and treat them that way. Law and economics unwittingly plays into the continued coupling. It has been accused, in my view justly, of disingenuously claiming it is not making ontological claims. That the predictions<sup>44</sup> work, when they do, is surely not just accidental; law and economics scholars surely believe the predictions work because the models are on some level true or at least true enough. What happens is this: A plausible case is made that the law and economics scholars are being disingenuous about their ontological claims; they then become vulnerable to attacks based on strong versions of the claims they've denied making.<sup>45</sup> I have argued in this essay that one needn't be committed to a strong version of an objectionable ontology to find law and economics methodology useful and the results of that methodology, if not some version of the underlying worldview, true.

In an article I wrote about companies' financial statements, I used the metaphor of makeup designed to produce a more flattering appearance. (The metaphor is not original to me, but I took it further than others had). When I give presentations on the article in informal settings, I sometimes describe the motivating intuition behind the paper as follows. Imagine a world in which women gauge men's romantic desirability in part by the men's height. Men want to get dates. A short man—say, one who is

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44. And the notion that predictions are what are being sought seems overblown. Often, law and economics accounts are explanations *ex post*. It's not common that one can make useful, specific predictions.

45. Indeed, they are vulnerable to one of the reigning pathologies, originating in analytic philosophy, "arguments from weird cases" in Fred Schauer's felicitous phrase (1985).

5'4"—isn't going to do as well as a taller man. So the 5'4" man says he's 5'6". A second short man notices the first man is getting many dates, so he says he's 5'6" as well. Before long, adding two inches becomes a common practice. Women then know that a man who says he's 5'6" is actually 5'4". Should a 5'4" man want to tell the truth, he'll be hard pressed; a woman will believe he's 5'2". But men won't be adding 8 inches either, or women will take rulers on dates. Thus, the puffing equilibrium, adding 2 inches, and only 2 inches, is stable. And so it was with companies using accounting tricks to add 2 inches to their height—to give themselves a more pleasing financial appearance (Hill 1997). A final twist, not in the paper, but reflecting Enron and the other recent developments: Matters changed when getting the date (getting the stock price high enough to make a killing on one's options) sufficed—some 5'4" men then did claim they were 6'. At that point women took out their rulers, and the recently passed comprehensive corporate legislation, the Sarbanes–Oxley Act, requiring, among other things, corporate executives to personally certify the veracity of their companies' financial statements, was enacted.

People are people, whether they are doing deals or getting married. Whether they are acting in their personal lives or their commercial ones, their fundamental natures are unchanged. There will of course be differences, but the differences are qualitatively, and perhaps quantitatively, smaller than either law and economics scholars or skeptics may think. Only caricatured commercial actors conduct their lives wholly with conscious calculation, constantly cutting the best deal they can for themselves with their commercial partners; only caricatured personal actors conduct their lives without calculation, conscious or otherwise, always giving freely of themselves with no thought of getting something in return. Both law and economics scholars and skeptics benefit from a less caricatured version of people: one in which people are purposively, albeit not necessarily consciously and deliberately, maximizing something, albeit not necessarily money or power or some other "crass" end.

The energy skeptics spend trying to keep the market—even the market-as-metaphor—out of the personal sphere would be better spent in other ways, such as understanding how best to encourage cooperation and reciprocity in a world where people want to get ahead and are often fairly good at it, and doing so isn't necessarily at anybody's expense. But it's not just the skeptics who need to be accommodating. Just as skeptics have not thus far been willing to acknowledge the extent to which the personal sphere is like the commercial sphere, law and economics scholars have not thus far been willing to acknowledge the extent to which the commercial sphere is like the personal sphere.

The rapprochement I envision is well captured by a passage from *Sex and Reason*: "[L]ove can be given a precise economic meaning . . . it is a pre-occupation with the unique particulars of another person, particulars for

which there is, by definition, no substitute to be found in any other person" (Posner p. 118).<sup>46</sup> In a world thus described, both law and economics and that most paradigmatic of matters in the personal sphere, romance, thrive.

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46. Interestingly recent psychological work may strike some as preserving less of a role for romance. Falling in love is experiencing somebody as "the one" the psychological process is apparently that one is getting information from one's emotions that one ought to stop looking for a romantic partner and settle down with the one at hand (Ketelaar and Clore 1997). We need such a mechanism or we'd spend our lives searching.



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