

COMMENT ON DONOHUE

RICHARD A. POSNER

Professor Donohue has written a serviceable defense of the economic approach to law, emphasizing the utility of the Coase Theorem and the political neutrality of economics. I would not use quite the terms Donohue does to describe myself, but I cannot believe that the readers of this journal would be interested in what I have to say on that subject, so I shall hold my peace.

I would not emphasize the Coase Theorem as much as Donohue does. The essential relevance of economics to law lies not in a particular theorem but in the fact that economics is the most advanced of the social sciences. Law is an important social institution. It is for the most part a nonmarket institution, but there is a thriving economics of nonmarket behavior, and it is no wonder that it should have many fruitful applications to law. The wonder is that legal scholars continue to resist as vigorously as they do the use of economic models and methods in law. The law and society movement is a conspicuous focus of resistance.

The resistance is based, in part at least, on a misunderstanding, or rather a series of misunderstandings, about economics. The one emphasized by Professor Donohue is that economics embodies a conservative ideology. It does not. The essential assumption that powers economic analysis is that people are rational, in the sense of adapting means to ends as effectively as possible given relevant constraints such as lack of information. Almost everything in economic theory follows from this assumption. The assumption can hardly be thought liberal or conservative. Whether specific results of economic analysis are liberal or conservative depends on the various auxiliary assumptions, priors, empirical findings, and what have you that particular economists bring to their work. For every Posner, there are at least two Donohues.

A second misunderstanding is that the attempts of economists to achieve greater rigor than has been customary in social science, by heavy use of mathematics and statistics, disables the economist from capturing the rich human complexity of so verbally and culturally dense an institution as law. The economist, in that dreaded term of academic opprobrium, is "reductionist." There is a confusion of terms here. All science involves abstraction. Newton's law of falling bodies abstracts from many of the particulars of bodies (for example, was the apple red?) in an effort to discover a law of nature—a law that describes the behavior of a wide variety of bod-

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ies (from apples to tides to stars) that differ in many of their particulars. We do not describe this as reductionism. We reserve that word for what we sense are unsuccessful efforts to explain one thing in terms of another—for example, ideas in terms of molecular changes in the brain. The economic analysis of law attempts to formulate general laws about behavior in and of legal systems. The Coase Theorem can be viewed in this light. Donohue gives another example, the Priest-Klein hypothesis that plaintiffs win fifty percent of litigated cases. The hypothesis has a solid basis in economic theory, and some empirical support. It may someday be falsified (Newton's law of falling bodies was falsified), it will no doubt be refined, but it is not reductionist.

Economics is a cornucopia of interesting hypotheses on law. Here are some others: abrogating the laws against selling babies for adoption would reduce, not increase, the price that adoptive parents must pay to acquire a child; making the losing party pay the winning party's attorney's fees would reduce, not increase, the settlement rate; the Supreme Court's "anti-religion" cases of recent years have helped the fundamentalist movement at the expense of the main-line religious faiths; the switch from contributory to comparative negligence has raised insurance rates without affecting the accident rate (except insofar as the rate changes may have done so indirectly); no-fault accident insurance plans increase the number of highway fatalities compared to a pure fault system; reducing court delay increases caseloads. I should think that anyone seriously interested in the sociology of law—which I take to be the focal interest of the law and society movement—would, regardless of his or her ideological commitments or political persuasion, be fascinated by a body of thought that has generated such intriguing hypotheses.

Professor Donohue expresses concern that economics, as it becomes more mathematical, may lose touch with law. There is no danger of that. First, the whole society is, at long last, becoming more mathematical, more "numerate." And high time. The quality and quantity of mathematical education in this country are both disgraceful. Second, and more important, there is no reason economic analysts of law should feel duty-bound to use the most advanced mathematical techniques. They should use the techniques appropriate to their subject matter and to their audience. Economic analysis of law is an applied field of economics; it is not obliged to aspire to the headiest heights of theory.

Despite resistance from legal scholars—not only conventional legal scholars but practitioners of rival interdisciplinary schools such as the law and society endeavor—economics has made great strides in law in just the last twenty years. Today it is an established and significant part of the curriculum of most major and most minor law schools. It contributes a substantial part of the first-rate legal scholarship produced in this country and, increas-

ingly, abroad. It has its own journals. It has a growing foothold in legal practice, and in the judiciary. It fascinates even those whom it repels. The law and society movement has much to learn from its successes, and among the things it has to learn is the importance of theory and the value of political diversity.

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