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Sen and the Hart of Jurisprudence: A Critique of the Economic Analysis of Judicial Behavior

Neil S. Siegel†

This Comment argues that economic analysis provides an inadequate account of judicial behavior because economic models are incompatible with a jurisprudence that recognizes basic rule-of-law values. Whereas standard economic theory is committed to thinking of a judge as exclusively self-interested, two fundamental problems with this conception exist. First, as application of Amartya Sen's critique of the behavioral foundations of economic theory to judicial behavior reveals, the decision of a judge who meets her judicial obligations may fail to maximize her self-interest. Second, even if the self-interest-maximizing decision coincides with the behavior that her judicial obligations require, economic models still fail to provide an accurate explanation of judicial decision making. This inability is attributable to economic theory's failure to recognize the distinguishing feature of judicial behavior—what H.L.A. Hart compellingly describes as relating to a rule from the internal point of view.

In Overcoming Law, Richard Posner anticipates this Comment's challenge to the economic analysis of judicial behavior, but significant problems exist with his attempt to meet it. Because Posner assumes away the problem of obligation and reduces judicial motivation to self-interest, his method neglects Hart's concern with the internal aspect of obligatory

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social rules. It is thus incompatible at the theoretical level with the liberal ideal of the rule of law.

Additionally, Posner's approach is anti-empirical by methodological necessity. Thus, his assertions notwithstanding, his theory of judicial behavior is no more empirically grounded than the liberal jurisprudence whose conception of the judge he derides. Nevertheless, this reality does not absolve adherents of liberal legal philosophy from the responsibility of empirically testing their own understandings of judicial behavior. Rather, researchers need to test empirically both Hart's and Posner's accounts of why judges follow institutional rules. In particular, in addition to observing judicial behavior, investigators need to persuade judges to introspect about and communicate their experiences of themselves and each other on the bench.

INTRODUCTION

Economists interpret legal sanctions as prices, thereby enabling themselves to employ microeconomic theory¹ to provide a scientific, behavioral theory of law. This theory empowers the economist to predict how human behavior will respond to changes in legal rules.² Because economics constitutes the first and indeed the only body of theory that allows the legal analyst to make such predictions with mathematical precision, economic analysis has had a profound impact on the law. In the words of two economists who are part of the generation that institutionalized the law and economics movement, “[e]conomics has changed the nature of legal scholarship, the common understanding of legal rules and institutions, and even the practice of law.”³

This influence notwithstanding, this Comment argues that the economic analysis of law provides an inadequate account of *judicial* behavior because economic models are incompatible with a jurisprudence that recognizes basic rule-of-law values.⁴ In other words, such models have difficulty making sense of what it means for a judge to be faithful to her office.

1. Modern microeconomic theory encompasses both game theory and price theory.

2. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 3 (3d ed. 2000).

3. *Id.* at 2.

4. This Comment does not offer a general critique of the law and economics research program. On the contrary, it is my considered judgment that economic analysis helps to clarify the nature of many legal problems. In general, economics offers valuable and valid predictions of the incentive effects of legal rules in situations that do not significantly implicate the philosophical issues and sociological phenomena with which this Comment concerns itself. Examples include broad areas of (non-judicial) human behavior within the traditional private law categories of property, contract, and tort. Of course, scholars who are hostile to the economic analysis of law would likely argue that no such unproblematic situations exist. Refutation of this claim is beyond the scope of this inquiry; I merely note my disagreement with it. The assertion that economics can explain nothing of relevance to the law is as excessive and therefore invalid as the grandiose, imperialistic claim that economics can explain everything of relevance to the law. For critical discussion of this latter assertion, see *infra* note 104 and accompanying text.

Standard economic theory conceives of actual judicial behavior as rational behavior, and it generally defines rational behavior as maximization of a judge's self-interest.⁵ This *self-interest theory* of rational choice requires that the decisions a judge renders correspond with her self-interest. This Comment argues that two fundamental problems with this approach exist.

First, the decision a judge renders in a particular case may not maximize her self-interest. This reality is evidenced by applying Amartya Sen's⁶ seminal critique of the behavioral foundations of economic theory⁷ to the problem of judicial behavior. Insofar as judicial decision making is legitimate, the connection economic theory requires between a judge's choice behavior (i.e., her decision in a case) and her self-interest⁸ may fail to exist. This may occur for either of two reasons. First, a judge's choice behavior may fail to reveal her preference.⁹ A judge who prefers decision *x* to decision *y* should and may nevertheless choose *y* in situations in which doing so is required by an obligation to follow precedent or accepted principles of statutory construction and constitutional interpretation. The judge may think decision *x* is "fairer," favors a more sympathetic party, or advances her political views, but she should and may nevertheless render decision *y* in order to meet her judicial obligations. Second, even if a judge's choice does reveal her preference, her self-interest may not be identifiable with satisfaction of that preference. For example, a judge may prefer to meet her judicial obligations, but she would enhance her self-interest by not meeting them. This identification of self-interest with preference satisfaction will fail to obtain in situations in which the judge consciously makes welfare-reducing decisions, again out of respect for the doctrine of *stare decisis* or other principles of judicial interpretation.

5. See *infra* note 34 for a more precise articulation of this statement.

6. Amartya K. Sen is the winner of the 1998 Nobel Prize in Economics for his "several key contributions to the research on fundamental problems in welfare economics. His contributions range from axiomatic theory of social choice, over definitions of welfare and poverty indexes, to empirical studies of famine. They are tied closely together by a general interest in distributional issues and a particular interest in the most impoverished members of society." *Press Release: The 1998 Bank of Sweden Prize in Economic Sciences in Memory of Alfred Nobel* (visited Feb. 12, 1999) <<http://www.nobel.se/announcement-98/economy98.html>>. In 1998, he left his professorships in economics and philosophy at Harvard University to become Master of Trinity College, Cambridge U.K. See *id.*

7. See AMARTYA SEN, ON ETHICS AND ECONOMICS (1987) [hereinafter SEN, ON ETHICS AND ECONOMICS]; Amartya Sen, *Behaviour and the Concept of Preference*, 40 *ECONOMICA* 241 (1973) [hereinafter Sen, *Behaviour and the Concept of Preference*]; Amartya Sen, *Choice, Orderings and Morality*, in *PRACTICAL REASON* 54, 61 (Stephan Körner ed., 1974) [hereinafter Sen, *Choice, Orderings and Morality*]; Amartya Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 *PHIL. & PUB. AFF.* 317 (1977) [hereinafter Sen, *Rational Fools*].

8. This Comment uses the terms "self-interest" and "welfare" interchangeably.

9. By "preference," I mean whatever a judge favors doing for whatever reason, including following institutional rules. Of course, a judge need not prefer to follow these rules.

A second basic problem with the economic approach exists. Even if the decision that would reveal a judge's preference and maximize her welfare perfectly coincides with the behavior that her judicial obligations require in a particular case,¹⁰ economic models still fail to provide an accurate *explanation* of judicial decision making. This inability is attributable to economic theory's failure to recognize the distinguishing feature of judicial behavior—what H.L.A. Hart compellingly describes as relating to a rule from the *internal point of view*.¹¹ Insofar as a judge so relates to the rules of her trade, it is the institutional rules of judging—not the judge's preferences or self-interest—that provide the reason for her decision.¹²

In *Overcoming Law*,¹³ Richard Posner anticipates and attempts to meet this challenge to the economic analysis of judicial behavior by assuming away the problem of obligation and reducing judicial motivation to self-interest.¹⁴ This Comment demonstrates that Posner's method neglects Hart's concern with the internal aspect of obligatory social rules. Consequently, Posner's jurisprudence is incompatible at the theoretical level with the liberal ideal of the rule of law.

Finally, this Comment argues that Posner's approach is anti-empirical. This is a result of the methodological necessity imposed by the self-interest theory of practical rationality upon which he implicitly relies. This reality contradicts his "interest in the world of fact."¹⁵ Thus, his assertions notwithstanding, Posner's theory of judicial behavior is no more empirically grounded than the traditional, liberal jurisprudence whose conception of the judge he derides.

Nevertheless, this disconnection does not absolve adherents of liberal legal philosophy from the responsibility of empirically testing their own understanding of judicial behavior. Rather, both Hart's and Posner's answers to the question of why judges follow the institutional rules of judging need to be tested empirically through social scientific inquiries that disclose the realities underlying judicial practices. In particular, in addition to observing judicial choice behavior, investigators need to persuade judges to introspect about and communicate their experiences of themselves and each other on the bench. While this approach would undoubtedly be dismissed as naive silliness by empirically-oriented economists,¹⁶

10. Thus, Sen's critique does not apply to that judge in that instance.

11. See H.L.A. HART, *THE CONCEPT OF LAW* 56-57, 88-90, 115-16 (2d ed. 1994). For a discussion of the internal point of view, see *infra* notes 27-29 and accompanying text.

12. See *id.*

13. RICHARD A. POSNER, *OVERCOMING LAW* (1995).

14. See *id.* at 109-44.

15. *Id.* at 109.

16. For example, in "the most influential work on economic methodology of this century," Milton Friedman responds to "criticism[] of the maximization-of-returns hypothesis on the grounds that businessmen do not and indeed cannot behave as the theory 'assumes' they do." Milton Friedman, *The Methodology of Positive Economics*, in *THE PHILOSOPHY OF ECONOMICS: AN ANTHOLOGY* 180, 199

introspection and communication nevertheless have an obvious and legitimate role to play in legal and social scientific inquiries that endeavor to understand whether and why judges follow institutional rules.

Part I of this Comment articulates Hart's jurisprudential view of judicial behavior, focusing on his identification of the internal point of view and his development of the concept of obligation. Part II describes the economic view of judicial behavior compelled both by the theory of revealed preference and the economist's practice of identifying welfare with preference satisfaction. Part III draws from the work of Sen and Hart to articulate a philosophical critique of the economic analysis of judicial behavior. Part IV identifies the jurisprudential problems with Posner's attempt to meet this challenge. Finally, after showing that Posner's approach is anti-empirical by methodological necessity, Part V addresses the relevance of empirical evidence to this theoretical debate.

I

HART'S JURISPRUDENTIAL VIEW OF JUDICIAL BEHAVIOR

The practice of adjudication imposes an obligation on judges to respect certain constraints on the determinants of their decisions. These constraints manifest themselves as the institutional rules of judging required by the doctrine of *stare decisis*, as well as accepted principles of statutory construction and constitutional interpretation. While the boundaries they prescribe are often unclear or even indeterminate, and while they are more or less precise depending on the area of law at issue, judges nevertheless cannot choose simply to ignore relevant precedents when they deliberate over a case before them; nor can they decide to interpret a statute or the Constitution in any way they see fit. To be a judge is not to be a legislator with life tenure; judges, unlike legislators, cannot choose simply to enshrine their preferences in the law.

This point is conceptual rather than empirical: It is not that judges cannot or do not ever allow their own preferences to determine their decisions, but rather that judges who do so are not engaged in the practice of adjudication because their behavior is illegitimate.¹⁷ The question of

(Daniel M. Hausman ed., 2d ed. 1994). He writes, "The evidence cited to support this assertion is generally taken either from the answers given by businessmen to questions about the factors affecting their decisions—a procedure for testing economic theories that is about on a par with testing theories of longevity by asking octogenarians how they account for their long life—or from descriptive studies of the decision-making activities of individual firms. Little if any evidence is ever cited on the conformity of businessmen's actual market behavior—what they do rather than what they say they do—with the implications of the hypothesis being criticized, on the one hand, and an alternative hypothesis, on the other." *Id.* (emphasis added).

17. To be more precise, a judge's behavior is illegitimate insofar as she allows her own preferences to determine her decisions and those preferences do not consist in following the institutional rules at issue. A judge whose decision-determining preferences consist in following the rules of her trade is not behaving illegitimately when she makes choices that reveal her preference for

judicial legitimacy is particularly acute in a democracy such as the United States in which federal judges enjoy life tenure and are appointed rather than elected.¹⁸ These observations are elementary, and yet fundamental to both the jurisprudential and lay understanding of what it means to be a judge. Thus, it is hardly surprising that the work “universally regarded as the most significant contribution to legal philosophy of this century,”¹⁹ H.L.A. Hart’s *The Concept of Law*,²⁰ incorporates them as basic rule-of-law values.

Hart argues that a minimum condition necessary for the existence of a legal system consists in its rules of adjudication²¹ being “effectively accepted as common public standards of official behaviour by its officials.”²² Officials must “appraise critically their own and each other’s deviations as lapses.”²³ Applying an accepted rule of law involves a thought on the part of a judge that

what he does is the right thing both for himself and for others to do: he [has a] view of what he does as a fulfilment of a standard of behaviour for others of the social group. He [thinks] of his conforming behaviour as “right,” “correct,” or “obligatory.” His attitude, in other words, [has] that critical character which is involved whenever social rules are accepted and types of conduct are treated as general standards. He [shares] the internal point of view accepting the rules as standards for all to whom they apply.²⁴

According to Hart, judges in any legal system must possess this reflective critical attitude.²⁵ Otherwise, the unity and continuity that any legal system logically must possess would disappear. Arbitrary and contradictory judicial decisions would result in social chaos.²⁶

The judicial thought process described above consists of two elements, namely (1) the internal point of view associated with social rules (also called standards of behavior), and (2) the phenomenon of obligation. Hart’s treatment of both concepts warrants close consideration.

following the rules insofar as the rules—and not her preferences—are what determine her decision. *See infra* notes 73-76 and accompanying text.

18. *See* U.S. CONST. art. III, § 1, cl. 2.

19. JEFFRIE G. MURPHY & JULES L. COLEMAN, *THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 31 (1984).

20. HART, *supra* note 11.

21. Hart identifies rules of adjudication as those secondary rules that “confir judicial powers and a special status on judicial declarations,” determining whether or not primary rules have been broken. *Id.* at 97. Such rules specify the individuals who are to adjudicate as well as “define the procedure to be followed.” *Id.*

22. *Id.* at 116.

23. *Id.* at 117.

24. *Id.* at 115.

25. *See id.* at 57.

26. *See id.* at 116.

Hart distinguishes a social rule from a general habit that exists among members of a social group partly in terms of the internal aspect of the former:

if a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole. A social rule has an 'internal' aspect, in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record.²⁷

A certain (minimum) number of people subject to a social rule regard it as a standard of behavior for all who conform to it.²⁸ They conceive the rule as not only a sign that certain people will behave in a particular way, but also as a *signal* and a *reason* for them to behave that way.²⁹ They accept this internal aspect of rules from the internal point of view.

The statement that a person is under an obligation presupposes the existence of a rule. Not all rules, however, give rise to obligations; rather, rules impose obligations "when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great."³⁰ More specifically, Hart identifies three factors that distinguish rules of obligation or duty from other rules:

- (1) "the insistence on importance or *seriousness* of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations";
- (2) "[t]he rules supported by this serious pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it"; and
- (3) "the conduct required by these rules may, while benefiting others, conflict with what the person who owes the duty may wish to do. Hence obligations and duties are thought of as characteristically involving sacrifice or renunciation, and the standing possibility of conflict between obligation or duty and interest is, in all societies, among the truisms of both the lawyer and the moralist."³¹

Concerning the third factor, Hart notes that in "[t]he figure of a bond binding the person obligated, which is buried in the word 'obligation' . . . the social pressure appears as a chain binding those who have obligations so that they are not free to do what they want."³² Judges

27. *Id.* at 56.

28. *See id.*

29. *See id.* at 89-90.

30. *Id.* at 86.

31. *Id.* at 87.

32. *Id.* (emphasis removed).

“are not free to do what they want” when they render decisions because they are subject to institutional rules of judging that make following *stare decisis* and the accepted principles of statutory construction and constitutional interpretation a standard of behavior and an obligation.³³

II

THE ECONOMIC VIEW OF JUDICIAL BEHAVIOR

Modern economic theory conceives of actual judicial behavior as rational behavior, which it defines as maximization of a judge's self-interest.³⁴ This *self-interest theory* of rational choice is premised on two

33. My exclusive focus on Hart's theory of adjudication in this Comment should not obscure the fact that most jurisprudential treatments of judicial behavior are similar in their insistence that judges decide cases on the basis of internalized obligations. For example, although Ronald Dworkin's theory of law as integrity conflicts sharply with Hart's in several respects, they agree that the practice of adjudication requires judges to regard themselves as obligated to respect certain constraints on the determinants of their decisions. See RONALD DWORKIN, *LAW'S EMPIRE* (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*].

According to Dworkin,

[J]udges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community. They try to make that complex structure and record the best these can be.

Id. at 255. Dworkin emphasizes that not just any judicial interpretation of the political structure and legal doctrine of a judge's community can count as the best constructive interpretation; rather, the judge's interpretive theory will contain the dimension of *fit*, his convictions about which

will provide a rough threshold requirement that an interpretation of some part of the law must meet if it is to be eligible at all. . . . *That threshold will eliminate interpretations that some judges would otherwise prefer*, so the brute facts of legal history will in this way limit the role any judge's personal convictions of justice can play in his decisions.

Id. (emphasis added). Not only do a judge's convictions about fit determine whether a given interpretation counts as an eligible interpretation; additionally, the issue of fit helps the judge to distinguish among eligible interpretations, for “even when an interpretation survives the threshold requirement, any infelicities of fit will count against it . . . in the general balance of political virtues.” *Id.* at 256.

While different judges will set this threshold differently, a judge who conceives law as integrity must accept that the actual political history of his community will sometimes check his other political convictions in his overall interpretive judgment. If he does not—if his threshold of fit is wholly derivative from and adjustable to his convictions of justice, so that the latter automatically provide an eligible interpretation—then he cannot claim in good faith to be interpreting his legal practice at all.

Id. at 255. In other words, the judge whose interpretive theory lacks the dimension of fit is not subject to constraints she is obligated not to violate when she renders decisions. Such a judge is not engaged in the practice of adjudication.

Indeed, it is because Dworkin's concept of law ties law to adjudication—to the present justification of coercive force—that the content of law is “sensitive to different kinds of institutional constraints, special to judges, that are not necessarily constraints for other officials or institutions.” *Id.* at 401. Among the constraints Dworkin discusses, two are of the familiar doctrinal sort, namely strict precedent (i.e., *stare decisis*) and legislative supremacy (which informs the practice of statutory interpretation). See *id.*

34. To be more precise, there are two predominant ways in which standard economic theory characterizes rational behavior. The first is to see rationality as *internal consistency of choice*. See SEN, ON ETHICS AND ECONOMICS, *supra* note 7, at 12-15. This is the conception of rationality embodied in what philosophers call the *instrumental theory* of practical rationality. See DEREK PARFIT, REASONS

claims, one regarding the relationship between a judge's choice behavior (i.e., the decisions she renders) and her preferences over outcomes,³⁵ and the other regarding the connection between her preferences and her welfare. In particular, the theory requires that (1) a judge's choice behavior reveal her preference in every decision she renders, and that (2) her welfare be identified with satisfaction of that preference.

A. *Revealed Preference Theory*

The axioms of revealed preference theory in part compel the economic view of judicial behavior. In 1938, future Nobel laureate Paul Samuelson published his fundamental contribution to the approach.³⁶ "[T]he individual guinea-pig," Samuelson would later write, "by his market behaviour, reveals his preference pattern—if there is such a consistent pattern."³⁷ As Samuelson's portrayal of the human consumer as a "guinea-pig" is meant to suggest, revealed preference theory is grounded in the psychological model of behaviorism: It presumes that the only way in which to understand human beings is by inferring their preferences from their non-verbal choice behavior. The author of a standard microeconomics text writes that "in real life, preferences are not directly observable: we have to discover people's preferences from observing their behavior."³⁸

Assuming a judge's preferences remain stable over the time period during which she renders a decision, economists use the revealed preference approach to analyze her behavior as follows.³⁹ Let x and y represent two distinct judicial decisions of a case. If the judge renders decision x instead of y , economists would say that x is *directly revealed preferred* to y , which means that x is chosen over y . Assuming the judge is *optimizing*, or choosing the decision she most prefers, the theory of revealed

AND PERSONS 117 (1984). The instrumental theory conceives of a rational agent as a utility maximizer, where utility is nothing but a reflection of preference, whether self- or other-regarding.

The second way in which modern economic theory characterizes rational behavior is to identify rationality with *maximization of one's self-interest* (or personal welfare). See SEN, ON ETHICS AND ECONOMICS, *supra* note 7, at 15-22. Philosophers call this approach the *self-interest theory* of practical rationality. See PARFIT, *supra*, at 3. This Comment focuses exclusively on the self-interest theory because, as will become evident from the discussion of Kornhauser, *see infra* notes 44-47 and accompanying text, it is this theory that economists typically employ in their analyses of judicial behavior. The major philosophical difference between the two theories is that only the self-interest theory needs to be supplemented by a theory of human welfare. For further discussion of this issue, see *infra* notes 41-42 and accompanying text.

35. By "preference," I mean whatever a judge favors doing, whether it be following precedent, advancing her material self-interest, or furthering a political or ideological agenda.

36. See Paul A. Samuelson, *A Note on the Pure Theory of Consumer's Behaviour*, 5 *ECONOMICA* 61 (1938); Paul A. Samuelson, *A Note on the Pure Theory of Consumer's Behaviour: An Addendum*, 5 *ECONOMICA* 353 (1938).

37. Paul A. Samuelson, *Consumption Theory in Terms of Revealed Preference*, 15 *ECONOMICA* 243, 243 (1948).

38. HAL R. VARIAN, *INTERMEDIATE MICROECONOMICS* 117 (4th ed. 1996).

39. The following paragraph draws from VARIAN, *see id.* at 117-21.

preference holds that the economist can draw a definitive conclusion concerning the judge's preference between these two possible decisions. Because she rendered decision *x* when *y* was available, for this judge *x* is in fact actually preferred to *y*. Thus, the revealed preference theorist's conceptual movement from revealed preference to actual preference follows as a consequence of her assumption of optimizing behavior.⁴⁰

B. *Welfare as Preference Satisfaction*

The self-interest theory of rational choice demands "an *external* correspondence between the choices that a person makes and the self-interest of the person."⁴¹ Thus, in addition to the revealed preference assumption that choice reveals preference, the self-interest theory needs to be supplemented by a theory of human welfare.

In studying judicial behavior, the economist constructs this theory by adding to the revealed preference foundations previously discussed the assumption that judges are *exclusively self-interested*. A self-interested judge, *SJ*, prefers decision *x* to *y* if and only if *SJ* believes that *x* is strictly better for herself than is *y*. The economist next adds the assumption that judges have *perfect knowledge*. It then follows that *SJ* prefers *x* to *y* if and only if *x* is *in fact* better for him or her. For the economist, therefore, how well off the judge is corresponds exactly to how well satisfied her preferences are. The self-interest theory thus identifies welfare with preference satisfaction.⁴²

C. *Linking Choice and Welfare*

Taking both claims together, modern economic theory relies on the correspondence of choice and welfare through the intermediary of preference. In particular, it conceives "welfare as a numerical representation of preferences revealed by individual choices."⁴³ This theoretical framework commits the economist to interpreting any decision a judge renders as the product of her self-interest: She chooses to render decision *x*; therefore, she prefers it to the alternatives, and it maximizes her welfare. Such is the fundamental logic that underlies the economic view of judicial behavior.

40. *See id.*

41. SEN, ON ETHICS AND ECONOMICS, *supra* note 7, at 15. As related in note 8, this Comment uses the terms "self-interest" and "welfare" interchangeably.

42. *See* Daniel M. Hausman & Michael S. McPherson, *Economics, Rationality, and Ethics, in THE PHILOSOPHY OF ECONOMICS: AN ANTHOLOGY* 252, 260-61 (Daniel M. Hausman ed., 2d ed. 1994).

43. Sen, *Choice, Orderings and Morality*, *supra* note 7, at 61.

D. Kornhauser on *Stare Decisis*

Lewis Kornhauser⁴⁴ corroborates this economic picture of judicial decision making in his discussion of a difficulty facing the economic modeler of *stare decisis*. The problem

concerns a conflict between the economic and legal view of behaviour. Jurisprudential accounts of *stare decisis* treat the practice as *obligatory*. Economic models, by contrast, assume that each agent acts to further her own interests. [Principal-agent] models that seek to explain or justify *stare decisis* . . . offer an interpretation of *stare decisis* at odds with the understanding of the practice that is internal to it (i.e., shared by participants in the practice).⁴⁵

In contrast to jurisprudential discussions such as Hart's, which distinguish obligation from interest-fulfillment, economic models typically provide an equilibrium interpretation⁴⁶ of *stare decisis* in which lower court judges adhere to the decision in prior cases because doing so maximizes their welfare, given the interests of the superior court.⁴⁷ Judges follow precedent because—and only because—it is in their interest to do so. As was just shown, the self-interest theory of rational behavior commits the economist to this account of judicial decision making. It requires the economic analyst to infer that a judge's welfare is maximized by whatever decision she renders because the notion of judicial preference does not possess an ontological status apart from judicial choice. Likewise, the notion of judicial welfare does not have any non-preference-dependent meaning. The judge's preference is whatever the judge chooses, and her personal welfare is whatever satisfies her preference.

44. Lewis Kornhauser is an economist and Alfred and Gail Engelberg Professor of Law at New York University. His work includes extensive economic modeling of judicial behavior. See, e.g., Lewis A. Kornhauser, *Adjudication by a Resource Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605 (1995); Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63 (1989); Lewis A. Kornhauser, *Modeling Collegial Courts I: Path Dependence*, 12 INT'L REV. L. & ECON. 169 (1992); Lewis A. Kornhauser, *Modeling Collegial Courts II: Legal Doctrine*, 8 J.L. ECON. & ORG. 441 (1992).

45. Lewis A. Kornhauser, *Stare Decisis*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 512 (Peter Newman ed., 1998).

46. The most commonly used solution concept in game theory is the *Nash equilibrium*, which is a profile of strategies in a game in which no player has any incentive to change her behavior, given the strategies of the other players. For a formal definition and discussion, see MARTIN J. OSBORNE & ARIEL RUBINSTEIN, A COURSE IN GAME THEORY 14-15 (1994).

47. See Kornhauser, *supra* note 45, at 512.

III

A CRITIQUE OF THE ECONOMIC ANALYSIS OF JUDICIAL BEHAVIOR

A. *Sen's Critique of Economic Theory*

As Kornhauser's observation suggests, a serious conflict exists between the jurisprudential and economic views of judicial behavior. Part of this incompatibility is structurally analogous to Amartya Sen's seminal critique of the behavioral foundations of economic theory.⁴⁸ Sen's objections concern the inadequacy of the self-interest theory of rational choice in modeling human behavior:

Quite a lot of the high-brow economics, which is impressive and helpful in many respects, assumes that the basic problems have been understood in the central case; it accepts the appropriateness of the standard general equilibrium model, with everyone pursuing their [sic] self-interest, given tastes and technology. You then skillfully introduce imperfect competition, ignorance, uncertainty; you may bring in learning, signaling; you can do disequilibrium dynamics. It is assumed that there is no deep problem with the basic story. The extensions and variations may, thus, look like consolidating battles, the main war having been won, and the high ground already secured. *But the high ground is not secure at all. The most basic element of such modeling, namely the motivation of human beings, is not well addressed. Once we try to understand the challenging issue of human motivation, we enter one of the most neglected areas of economics.*⁴⁹

Sen labels "the assumption of revelation"⁵⁰ underlying the revealed preference approach⁵¹ and the identification of welfare with preference satisfaction⁵² "a robust piece of evasion"⁵³ because "choice may reflect a compromise among a variety of considerations of which personal welfare may be just one."⁵⁴ Thus, the issue of human motivation remains unresolved "except in the purely definitional sense."⁵⁵

48. See *supra* note 7.

49. Amartya K. Sen, *quoted in* Arjo Klamer, *A Conversation with Amartya Sen*, 3 J. ECON. PERSP. 135, 147 (1989) (emphasis added).

50. Sen, *Behaviour and the Concept of Preference*, *supra* note 7, at 244.

51. This is the assumption that choice reveals preference. See discussion *supra* notes 36-40 and accompanying text.

52. The text focuses on Sen's criticism of the identification of welfare with preference satisfaction. His criticism of the revealed preference assumption of revelation is not only that a person's choice behavior might not reveal her true preference, but also (less obviously) that agents in certain strategic environments (e.g., the Prisoners' Dilemma) can do better in terms of their actual preferences by acting *as if* they have different preference orderings than the ones they actually have. Sen, *Behaviour and the Concept of Preference*, *supra* note 7, at 247-53; See Sen, *Choice, Orderings, and Morality*, *supra* note 7, at 59-61.

53. Sen, *Rational Fools*, *supra* note 7, at 323 (emphasis removed).

54. *Id.* at 324.

55. *Id.* at 326.

Sen replaces the economist's practice of definitional egoism with philosophical analysis by distinguishing between the concepts of *sympathy* and *commitment*:

The former corresponds to the case in which the concern for others directly affects one's own welfare. If the knowledge of torture of others makes you sick, it is a case of sympathy; if it does not make you feel personally worse off, but you think it is wrong and you are ready to do something to stop it, it is a case of commitment.⁵⁶

While the welfare of the sympathetic agent is not entirely self-centered, her choice behavior is nevertheless welfare-enhancing and thus self-interested.⁵⁷ Consequently, sympathy can be reflected in economic models that do not rule out externalities by adjusting the individual's objective function so as to incorporate the positive externality.⁵⁸

In contrast, the case of commitment proves deeply problematic. Whereas sympathy relates the welfares of different people, commitment relates choice to anticipated levels of welfare: "One way of defining commitment is in terms of a person choosing an act that he believes will yield a lower level of personal welfare to him than an alternative that is also available to him."⁵⁹ Behavior based upon commitment is fundamentally not self-interested, for the committed agent makes choices she knows will decrease her own welfare.⁶⁰ Thus, commitment involves "counter preferential choice," destroying the "crucial assumption that a chosen alternative must be better than (or at least as good as) the others for the

56. *Id.*

57. *See id.*

58. *See id.* at 326-28. A *positive externality*, or *external benefit*, obtains when the benefits of a market exchange spill over onto parties other than those explicitly engaged in the transaction. An externality derives its name from the fact that it is external to the market. *See COOTER & ULEN, supra* note 2, at 40-42. Concerning the discussion in the text, a positive externality is present because a sympathetic agent receives benefits from the mere fact of another's happiness for which she does not pay.

59. Sen, *Rational Fools, supra* note 7, at 327.

60. For an example of commitment, consider voting. The act of voting imposes costs (e.g., the opportunity cost of one's time, the expenditure on gas required to reach the polls) with no corresponding material benefits (assuming one does not obtain benefits from the expressive act of voting), since the probability that one's vote will be decisive in a large election is essentially zero. Yet, many people vote in national elections, perhaps because they regard it as their civic duty to do so. Insofar as that is the reason why they vote, their voting constitutes a classic case of commitment, for they intentionally engage in welfare-reducing activity.

For a more extreme example of commitment, consider the behavior of the political activist who goes on a starvation diet as a form of protest. Given her ideals, it may appropriately be said that she prefers to starve herself, but it would be very strange indeed to regard her behavior as welfare-enhancing. Rather, it is both linguistically and factually more accurate to describe this situation as one in which the activist deliberately chooses to reduce her own well-being because of her commitment to her cause.

Besides these examples, the phenomenon of commitment is important in understanding the economics of charitable contributions, and it is absolutely central to the problem of work motivation. *See id.* at 333.

person choosing it."⁶¹ The committed agent's welfare decreases when she chooses. According to the self-interest theory, however, such a welfare-reducing choice is not possible.

Orthodox economic theory relies on the correspondence of choice and welfare through the intermediary of preference. Commitment undermines this correspondence by "driv[ing] a wedge between personal choice and personal welfare."⁶² While the agent's choices do reflect her ultimate preferences in this situation, her preferences no longer wholly determine her personal welfare. Commitment severs the "basic link between choice behavior and welfare achievements in the traditional models."⁶³

Committed behavior violates one component of self-interested behavior as defined in economic theory, namely *self-welfare goal*, which requires that an agent's exclusive goal be the pursuit of her personal welfare.⁶⁴ Sen is arguing that a perceived personal duty or sense of responsibility may cause a person to maximize some objective other than her personal welfare. The wholly self-centered economic agent, *homo economicus*, amounts to nothing more than a "social moron," a "rational fool."⁶⁵ In reality, a human being is both a social and a moral animal; she is responsive to social norms and rules of conduct, and she may engage in modes of behavior that cannot adequately be captured in economic models grounded in the self-interest theory of rational choice.⁶⁶

B. *Relevance to Judicial Behavior*

With Sen's critique in mind, it is apparent that the phenomenon of judicial obligation may impact the structure of economic theory in a manner analogous to commitment. Recall Hart's vivid image⁶⁷ of a "chain binding those who have obligations so that they are not free to do what they want."⁶⁸ Insofar as a judge meets her obligations, so that her decision making is legitimate, the connection between a judge's choice behavior (i.e., the decision she renders) and her welfare may fail to exist.

This divergence may occur for either of two reasons. First, a judge's choice may not reveal her preference.⁶⁹ A judge who prefers decision *x* to decision *y* should and may nevertheless choose *y* in situations in which

61. *Id.* at 328.

62. *Id.* at 329.

63. *Id.* in the *as if* scenario described in note 52, the wedge is driven between choice and preference: Whereas the agent's preference corresponds with her welfare, her choice behavior corresponds with neither because she is acting *as if* she has another preference ordering over outcomes. In this case, as in the case of commitment, the connection between choice and welfare is severed.

64. See SEN, ON ETHICS AND ECONOMICS, *supra* note 7, at 80-83.

65. Sen, *Rational Fools*, *supra* note 7, at 336.

66. See Sen, *Behaviour and the Concept of Preference*, *supra* note 7, at 250-53.

67. See *supra* note 32 and accompanying text.

68. HART, *supra* note 11, at 87.

69. See *supra* note 35.

doing so is required by an obligation to follow precedent or accepted principles of statutory construction and constitutional interpretation. The judge may think decision *x* is “fairer,” favors a more sympathetic party, or advances her political views, but she should and may nevertheless render decision *y* in order to meet her judicial obligations.

Alternatively, even if a judge’s decision does reveal her preference, her welfare may not be identifiable with satisfaction of that preference. This identification will fail to exist in situations in which the judge consciously makes welfare-reducing decisions, again out of respect for the doctrine of *stare decisis* or other principles of judicial interpretation. In either of these scenarios, the judge’s personal welfare may decrease when she renders her decision. The practice of adjudication may drive a wedge between a judge’s choice behavior and her welfare achievements, thereby severing the link between the two in models of judicial behavior. Sen aptly captures the crux of the matter: “Preference can be defined in such a way as to preserve its correspondence with choice, or defined so as to keep it in line with welfare . . . but it is not in general possible to guarantee both simultaneously. Something has to give at one place or the other.”⁷⁰

The above argument is carefully qualified through use of the word “may” for a reason. It is conceivable that the decision that would reveal a judge’s preference and maximize her welfare might perfectly coincide with the decision that her judicial obligations require in a particular case before her.⁷¹ In such a situation, the judge’s choice would in fact be revealing her preference and maximizing her welfare, thereby fortuitously fulfilling the structural requirements of the self-interest theory.⁷²

Nevertheless, even in this case, economic theory still fails to provide an accurate *explanation* of judicial decision making.⁷³ When a judge follows the obligatory rules of judging in making a choice that reveals her preference and maximizes her welfare, it is still the rules and not her preferences that explain her behavior insofar as she remains engaged in the practice of adjudication. The institutional rules of judging, not the judge’s preferences, provide the *reason* for her decision. This is what it means for

70. Sen, *Behaviour and the Concept of Preference*, *supra* note 7, at 259.

71. This might happen either because the judge’s preference is coextensive with her judicial obligations, or because her preference happens to be consistent with the decision that her obligations require.

72. Thus, a crucial way in which obligation differs from commitment is that while the latter is necessarily counter preferential, the former is not. My conception of obligation mirrors that of Hart. He writes that the conduct required by rules which give rise to obligations “may, while benefiting others, conflict with what the person who owes the duty may wish to do.” HART, *supra* note 11, at 87 (emphasis added). Similarly, he refers to the “standing possibility of conflict between obligation or duty and interest.” *Id.* at 87 (emphasis added). Acting in accordance with one’s obligations does not necessarily result in counter preferential choice.

73. This point is informed by the notion of right reasons for action in Kantian ethics, according to which moral assessment concerns itself not with an agent’s action, but rather with her reasons for action.

a judge to be bound by rules from the internal point of view: She conceives them as imposing a standard of behavior to which all judges—herself included—must conform.⁷⁴ She interprets the rules as a *signal* to decide the case in the manner they require.⁷⁵

To be bound by rules from the internal point of view is to be obligated to follow them regardless of one's personal preferences. If a judge finds herself in a situation in which following the rules is preference-revealing and welfare-maximizing, she is surely fortunate, but it is still the rules—not her preferences—that *account* for her decision insofar as she remains bound to the former from the internal point of view. Thus, the judge's choice behavior, while maximizing her anticipated personal welfare, would be unaffected were her preferences to change so that the decision required by the institutional rules ceased to maximize her welfare.

Of course, it would be impossible to ascertain solely through external observation what causes the decision in a case in which a judge maximizes her welfare through following the institutional rules. This evidentiary problem illustrates why the internal point of view is so opaque to economic analysis. The revealed preference approach constitutes a behavioral theory; i.e., it is grounded in the psychological model of behaviorism.⁷⁶ This being the case, its investigatory domain is entirely external to the inner world of the judge. The internal point of view, on the other hand, indicates a phenomenon that resides within the judge's psyche. Economic analysis misconceives judicial motivation because it is incapable of penetrating the place where all of the jurisprudential action is unfolding.

What if, however, judges actually prefer to meet what Hart mistakenly calls their "obligations"? This assertion maintains that judges prefer following the institutional rules of judging because doing so is constitutive of what makes judging an enjoyable activity. If this claim is valid, it necessarily follows that legal philosophers incorrectly characterize judicial behavior as obligatory. Richard Posner makes just such an argument in *Overcoming Law*.⁷⁷ Close scrutiny of his "pragmatic" approach reveals how, when applied to judicial behavior, the economic method compels a jurisprudence that offends the idea of the rule of law.

74. See HART, *supra* note 11, at 56.

75. As Kornhauser notes, "[o]bligation differs from . . . interest because of the nature of the reason the agent has for conforming her behaviour to the obligation." Kornhauser, *supra* note 45, at 512. Or, as Edward F. McClennen puts it, "being guided by rules involves behaving in a certain manner for the reason that it is required by the rule in question." Edward F. McClennen, *Pragmatic Rationality and Rules*, 26 PHIL. PUB. AFF. 210, 211 (1997).

76. See *supra* notes 36-38 and accompanying text.

77. See POSNER, *supra* note 13, at 126-35.

IV OVERCOMING POSNER

In a chapter of *Overcoming Law* that addresses the economic modeling of judicial behavior (entitled "What Do Judges Maximize?"⁷⁸), Posner is concerned with "proposing a theory of judicial behavior focused on the 'ordinary' appellate judge with secure tenure."⁷⁹ Throughout the chapter, he is explicit about his reason for focusing on the "ordinary" judge as opposed to the "judicial titan." He writes, "By treating judges as ordinary people, my approach makes them fit subjects for economic analysis; for economists have no good theories of genius. Fortunately for economic analysis, most law is made not by the handful of great judges but by the mass of ordinary ones . . ."⁸⁰ Elsewhere he refers to "the universalist claims of the economic theory of human behavior."⁸¹ He alludes to his concern to provide "a robust demonstration of the applicability of rational-choice theory to judges."⁸² Finally, he concludes by stating that he has "tried in this chapter to show how economics . . . can help us to a disciplined understanding of . . . intensely human factors in adjudication."⁸³ In short, Posner contends that legal scholars can use economic theory to explain and predict judicial behavior *because much judicial behavior is at bottom self-interested*. Thus, he considers as possible arguments in the judicial utility function such factors as salary, leisure-seeking, reputation, the consumption value of voting, popularity, prestige, and reversal avoidance.⁸⁴

Nevertheless, Posner acknowledges that "most judicial decisions do have a 'ruled' quality," and he recognizes that he bears the burden of demonstrating how this reality "is consistent with utility maximization."⁸⁵ His argument is that judges do not have an obligation to follow the institutional rules of judging such as *stare decisis*; rather, similar to games whose rules are constitutive of a pleasurable activity, judges enjoy following the rules of their trade:

The pleasure of judging is bound up with compliance with certain self-limiting rules that define the "game" of judging.

. . . .

. . . A person might cheat at tennis because he saw an advantage from winning, but if at all reflective he would realize that his pleasure from playing the game itself was diminished, that

78. *See id.* at 109-44.

79. *Id.* at 109.

80. *Id.* at 110.

81. *Id.* at 112.

82. *Id.* at 135.

83. *Id.* at 144.

84. *See id.* at 117-120.

85. *Id.* at 133.

he was trading off that pleasure against another source of utility. The judicial game has rules that lawyers learn in law school and then in practice or teaching. Both self-selection and the careful screening of federal judicial candidates help to assure that most lawyers who become federal judges will be lawyers who enjoy this particular game. They are therefore likely to adhere, more or less, to the rules limiting the considerations that enter into their decisions. This is just Wittgenstein's point that rules bind because they are accepted, rather than being accepted because they bind. Nothing *in* a rule imposes an obligation to follow it. The decision to obey comes from outside, from force or socialization or the fact that the rule is constitutive of a pleasurable activity.

. . . [M]ost judicial decisions do have a "ruled" quality. The analogy to games helps show how this is consistent with utility maximization and how it therefore does not presuppose heroic self-abnegation on the part of the judges.⁸⁶

Posner's reconciliation of judicial behavior with the demands of economic theory results in a philosophically impoverished jurisprudence. Notice in the quote above that Posner characterizes a judge's responsiveness to rules in terms of obedience ("the decision to obey"). By arguing that she "obeys" the institutional rules of judging because they are constitutive of a pleasurable activity, he reveals the inaccuracy of his claim that his "discussion of judging as a game is related to H.L.A. Hart's emphasis . . . on the internal perspective."⁸⁷

Hart demonstrates how "the simple, Austinian formula of a general habit of obedience to orders fails to reproduce or distorts the complex facts which constitute the minimum conditions which a society must satisfy if it is to have a legal system."⁸⁸ This is because the notion of a "general habit of obedience" need not incorporate the internal point of view:

What makes 'obedience' misleading as a description of what . . . courts do in applying an accepted ultimate rule of recognition, is that obeying a rule (or an order) *need* involve no thought on the part of the person obeying that what he does is the right thing both for himself and for others to do: he need have no view of what he does as a fulfilment of a standard of behaviour for others of the social group. He need not think of his conforming behaviour as 'right', 'correct', or 'obligatory'. His attitude, in other words, need not have any of that critical character which is involved whenever social rules are accepted and types of conduct are treated as general standards. He need not, though he may, share

86. *Id.* at 131, 133 (citation omitted).

87. *Id.* at 132 n.42.

88. HART, *supra* note 11, at 112.

the internal point of view accepting the rules as standards for all to whom they apply.⁸⁹

Posner's thesis that judges obey rules because the rules are constitutive of the pleasurable activity of judging fails to embody the internal aspect of rules that the notion of obligation presupposes. It fails to reflect "the whole distinctive style of human thought, speech, and action which is involved in the existence of rules and which constitutes the normative structure of society."⁹⁰ Posner's judges need not "share the internal point of view accepting the rules as standards for all to whom they apply."⁹¹ Instead, they need "obey" these rules "for their part only" because they enjoy doing so.⁹² They need not be critically concerned that judges who deviate from these rules because they may not enjoy following them have lapsed from common standards of judicial behavior. But if judges obeyed rules "for their part only" and made no criticisms of those who did not, social anarchy would ensue. As Hart points out, under these circumstances

the characteristic unity and continuity of a legal system would have disappeared. For this depends on the acceptance, at this crucial point, of common standards of legal validity. In the interval between these vagaries of judicial behaviour and the chaos which would ultimately ensue when the ordinary man was faced with contrary judicial orders, we would be at a loss to describe the situation.⁹³

Arbitrary and contradictory judicial behavior would result in social chaos.

Defenders of Posner's view might respond that real judicial systems avoid such disastrous consequences by selecting only those judges who enjoy the "game" of judging, so that individual judges need not be concerned with others' deviations. But no system of selection operates flawlessly, and the claim that one does would require an argument and serious evidence. But even assuming it were perfect, it still seems most reasonable to presume that if personal enjoyment obtained through obedience (and not through external pressure imposed by obligatory institutional rules as well as internal guidance provided by the judge's sharing the internal point of view) were the only check on judicial deviations from rules, we would see much more flouting of the rules by judges than in fact exists: The very low price of deviation would induce a very high judicial demand for it. For if the self-interested pursuit of enjoyment exclusively determined judicial behavior, then judges would be "fit subjects for economic analysis,"⁹⁴ and thus their behavior would be sensitive to prices.

89. *Id.* at 115-16.

90. *Id.* at 88.

91. *Id.* at 115.

92. *Id.* at 116.

93. *Id.*

94. POSNER, *supra* note 13, at 110.

Nevertheless, this argument constitutes only a prediction of likely consequences that I cannot empirically corroborate. More important to the theoretical debate with which this Comment has concerned itself is the fact that a theory which holds that judges obey rules because they enjoy doing so is incompatible with a jurisprudence that takes seriously the idea of the rule of law. According to Posner's theory of judicial behavior, the relevant rules do not provide the *signal* for the judge to decide a case in the manner they require; instead, the judge's self-interested pursuit of enjoyment constitutes the *reason* for her decision. Such an explanation of judicial decision making is repugnant to the idea of a judge's being faithful to her office. This notion of faithfulness requires the judge to place the relevant rules and principles above her merely private preferences; it requires her to decide cases on the basis of the former regardless of the contents of the latter. The economic analysis of judicial behavior abandons this basic judicial value at the theoretical level in order to render economic theory applicable to the analysis of judicial behavior. The only conception of judicial behavior compatible with the economic approach wholly contradicts the most basic jurisprudential and lay understanding of what it means to be a judge.

Posner seems to be aware of how fundamental the issue of a judicial obligation to follow institutional rules is to the viability of the economic analysis of judicial behavior. He is not explicit about what is at stake, but his insistence that judges are not obligated or duty-bound to follow rules⁹⁵ suggests that he knows what consequences follow insofar as they are. Although Posner cites Sen's *Rational Fools* article⁹⁶ in a footnote concerning an ancillary issue of electoral voting,⁹⁷ he does not confront the deeper implications of Sen's critique for his own argument. Similarly, he notes in another footnote that his analogy of judging as a game is related to Hart's emphasis "on the internal perspective. The game player, viewing the rules from within, considers himself bound by them."⁹⁸ Nevertheless, his account totally fails to capture what it means for a judge to be "bound" by rules from the internal point of view. He brushes up against crucial jurisprudential issues in footnotes without adequately engaging them. Doing them justice would require him to abandon his primary commitment to demonstrating the viability of the economic analysis of judicial behavior.

This criticism notwithstanding, this Comment regards Posner as a sympathetic figure in the unfolding drama of legal scholarship. He is not one of those overly zealous defenders of neoclassical economics⁹⁹ who

95. See *id.* at 11, 133.

96. See Sen, *Rational Fools*, *supra* note 7.

97. See POSNER, *supra* note 13, at 120.

98. *Id.* at 132 n.42.

99. The dominant form of modern economic theory, which is the body of theory this Comment engages, is known as neoclassical economics.

literally believes that the world is composed of utility maximizing, anti-social automatons—Sen's "rational fools."¹⁰⁰ For example, he acknowledges that people sometimes act out of a sense of duty¹⁰¹ or public interest.¹⁰² He appropriately values the enterprise of explaining and predicting judicial behavior because of the possibility it presents for improving human welfare. Additionally, he understandably looks to economics as a potentially viable source of sound predictions, for that discipline can lay claim to the best formal modeling approach known to social science. In short, Posner does the best job accounting for judicial behavior that anyone could given the assumptions to which he is committed.

Nevertheless, the self-interest theory of rational choice suffers from serious, structural limitations. These require Posner, in order to make use of it for his purposes, to sacrifice the jurisprudential significance of what it means to be a judge (i.e., sensitivity to obligatory institutional rules) to the demands of economic theory. In essence, he alters the nature of the phenomenon to be explained in a way that renders economic analysis competent to explain it. As Hart would put it, he achieves uniformity at the price of distortion.¹⁰³

In doing so, Posner unwittingly demonstrates the falsity of the imperialistic claim advanced by some economists that economics can explain and predict *all* human behavior in *every* context.¹⁰⁴ Sen has shown that orthodox economic theory cannot account for behavior arising from commitment. This Comment has demonstrated economic theory's inability to analyze judicial behavior in a manner that renders such behavior consistent with basic rule-of-law values: Economic models cannot make any sense of

100. For example, George J. Stigler, a staunch defender of neoclassical economics and the winner of the 1982 Nobel Prize in Economics for his contributions to price theory, industrial organization, history of economic thought, economics of information, economics of regulation, and law and economics, writes: "Economic logic centers on utility-maximizing behavior by individuals. Such behavior may be found in every area of human behavior. . . . Man is eternally a utility-maximizer, in his home, in his office—be it public or private—in his church, in his scientific work, in short, everywhere." GEORGE J. STIGLER, *THE ECONOMIST AS PREACHER AND OTHER ESSAYS* 21, 35 (1982). Elsewhere, he judges American society to be "rational," for it is "constituted as it is of some 230 million utility-maximizing individuals." George J. Stigler, *Economists and Public Policy*, in *AMERICAN ENTERPRISE INSTITUTE, IDEAS, THEIR ORIGINS, AND THEIR CONSEQUENCES: LECTURES TO COMMEMORATE THE LIFE AND WORK OF G. WARREN NUTTER* 86 (1988).

101. See POSNER, *supra* note 13, at 120.

102. See *id.* at 126.

103. See HART, *supra* note 11, at 38.

104. As documented *supra* note 81 and accompanying text, Posner refers to "the universalist claims of the economic theory of human behavior." POSNER, *supra* note 13, at 112. Similarly, George Stigler, discussed *supra* at note 100, advocates an "extension of the theory of rational behavior to all areas of man's behavior." Stigler, *supra* note 100, at 96. Elsewhere, Stigler writes: "Economics is the study of all purposive human behavior. . . . [It] is an imperial science: it has been aggressive in addressing central problems in a considerable number of neighboring social disciplines, and without any invitations" George J. Stigler, *Economics—The Imperial Science?*, 86 *SCAND. J. ECON.* 301, 302, 311 (1984); see also GEORGE J. STIGLER, *MEMOIRS OF AN UNREGULATED ECONOMIST* 191-205 (1988).

what it means for a judge to be faithful to her office. Despite this reality, Posner endeavors to render judicial behavior compatible with the demands of economic theory. This Comment has attempted to reveal the philosophical cost associated with this maneuver—namely, abandonment at the theoretical level of a commitment to the liberal ideal of the rule of law.

V

THE RELEVANCE OF EMPIRICAL EVIDENCE TO THIS THEORETICAL DEBATE

Posner would probably not be disappointed to learn that his theory of judicial behavior falls short of the liberal ideal. After all, he focuses his analysis on the “ordinary” judge as opposed to the “judicial titan” who has occupied “center stage in the drama of Anglo-American jurisprudence” because he believes that “most judges are, in fact, ordinary.”¹⁰⁵ Thus, “[t]he shift of focus from the extraordinary to the ordinary judge exemplifies the pragmatist’s interest in the world of fact.”¹⁰⁶ In other words, Posner might dismiss the foregoing argument as irrelevant because he dismisses the traditional jurisprudential view of the judge as out of touch with empirical reality. Indeed, the “law” to which the title *Overcoming Law* refers “is a professional totem signifying all that is pretentious, uninformed, prejudiced, and spurious in the legal tradition. A pragmatic approach can help to demolish the totem. Economic analysis of law can help put better things in its place”¹⁰⁷

Posner claims his concern is only that his theory matches the facts. Contrary to critics who argue that “law and economics replaces legal conceptualism with economic conceptualism, evaluating legal outcomes by their conformity to economic theory but still keeping well away from facts,”¹⁰⁸ Posner argues that his “kind of pragmatist . . . is *empirical*. [He] is interested in ‘the facts’”¹⁰⁹ He writes that “[t]he economist is committed to testing his theories empirically and discarding them if they are falsified by data.”¹¹⁰

Given his stated commitment to empirics, one might expect Posner in a chapter he entitled “What Do Judges Maximize?” to identify what in fact it is that judges maximize; i.e., we would expect him to begin with some sort of empirical account of the realities of judicial practice. Nevertheless, recall that Posner’s theoretical commitments preclude a genuinely empirical, fact-finding enterprise.¹¹¹ Instead, he is concerned with “proposing a theory of judicial behavior focused on the ‘ordinary’ appellate judge with

105. POSNER, *supra* note 13, at 109.

106. *Id.*

107. *Id.* at 21.

108. *Id.* at 2.

109. *Id.* at 5.

110. *Id.* at 19.

111. See *supra* notes 78-84 and accompanying text.

secure tenure.”¹¹² The problem is that he does not provide any evidence to support his contention that “most judges are, in fact, ordinary.”¹¹³

Why does Posner proceed in such an anti-empirical fashion when he is so interested in empirics? The answer is already evident: He intends to argue that economic theory can be used to explain and predict judicial behavior because much judicial behavior is at bottom self-interested. Given the task he sets out to accomplish, the methodology he employs is necessary: Rather than starting with “the facts” of actual judicial practice and theorizing from the bottom up, he must start with economic theory and assume¹¹⁴—rather than prove—the existence of a particular type of “facts,” namely only those that are compatible with using economic theory to model judicial behavior. Thus, as noted earlier,¹¹⁵ Posner only considers self-interested motivations as arguments in the judicial utility function.¹¹⁶ He leaves as a “task for future research” the disentangling of “self-interest from other sources of judicial practices.”¹¹⁷ He does not suggest how this task is to be accomplished, nor does he specify what contribution the economist qua economist could possibly make to its completion.

In response to such criticism, Posner would likely emphasize that the empirical stage comes after the theoretical stage. A utility function is a “device for generating hypotheses”¹¹⁸ that economists subsequently subject to empirical testing with the aid of econometric analysis. Nevertheless, Posner does not acknowledge the crucial fact that *the revealed preference underpinnings of utility theory severely restrict what can count as an argument in the judicial utility function*. This reality accounts for the criticism of law and economics as conceptualist¹¹⁹ and reductionist¹²⁰ that Posner insists is so unwarranted.¹²¹ He writes that “[n]othing in economics prescribes an individual’s goals.”¹²² As discussed earlier,¹²³ however, this claim is not the whole truth: The component of self-interested behavior that economic theory requires known as *self-welfare goal* demands that an agent’s exclusive goal be the pursuit of her personal welfare. In order for the modeling project to succeed, an agent must not be understood to be

112. POSNER, *supra* note 13, at 109.

113. *Id.*

114. For example, he writes, “I assume that the judge has nonmonetary incentives to do judicial work.” *Id.* at 117. Similarly, he states, “[V]iews concerning the public interest undoubtedly affect judicial preferences . . . I assume, only insofar as decisions expressing those views enhance the judge’s utility.” *Id.* at 118.

115. *See supra* note 84 and accompanying text.

116. *See* POSNER, *supra* note 13, at 117-20.

117. *Id.* at 126.

118. *Id.* at 111 n.4.

119. *See id.* at 2.

120. *See id.* at 15.

121. *See id.* at 15-16.

122. *Id.* at 16.

123. *See supra* note 64 and accompanying text.

able to pursue a welfare-reducing goal. Thus, while Posner insists that economics is "[f]ar from being reductionist,"¹²⁴ his chapter on judicial behavior is rife with the economist's practice of reduction.

This tendency is especially evident in his explanation of how the "ruled" quality of judicial decisions "is consistent with utility maximization."¹²⁵ He does not provide any evidence to establish the validity of his argument that judges follow rules because doing so is constitutive of the pleasurable activity of judging.¹²⁶ The story he tells is merely plausible. We simply do not know whether Posner's account accurately portrays the realities of judicial practice. He is certainly correct to point out that "[n]othing *in* a rule imposes an obligation to follow it."¹²⁷ Nevertheless, it does not follow from this observation that "the fact that the rule is constitutive of a pleasurable activity" constitutes the "outside" source determining "the decision to obey."¹²⁸ What about the alternatives of "force" or "socialization" that he mentions¹²⁹ and dismisses without explanation? What about other possibilities?

Indeed, the alternative of "force" speaks to the issue of obligation. As related earlier,¹³⁰ Hart claims that "[r]ules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great."¹³¹ If judges follow rules because of social pressure (exerted by government officials, the news media, the academy, the citizenry, etc.), then it is more likely the obligations imposed by the institutional rules of judging that determine judicial behavior, not the fact that the rules are constitutive of a pleasurable activity. But Posner does not face the question of the existence of a judicial obligation to follow rules in an empirical fashion. An affirmative answer to this question devastates his case for the economic analysis of judicial behavior. This reality might account for his reductive method of starting with theory instead of facts and assuming only those facts compatible with the use of theory. Thus, his assertions notwithstanding, Posner's theory of judicial behavior is no more empirically grounded than the traditional, liberal jurisprudence whose conception of the judge he derides.¹³²

Nevertheless, this disconnection does not absolve adherents of liberal legal philosophy from the responsibility of empirically testing their own

124. POSNER, *supra* note 13, at 15.

125. *Id.* at 133; *see also supra* notes 85-86 and accompanying text.

126. *See* POSNER, *supra* note 13, at 131-33.

127. *Id.* at 133.

128. *Id.*

129. *Id.*

130. *See supra* note 30 and accompanying text.

131. HART, *supra* note 11, at 86.

132. *See* POSNER, *supra* note 13, at 20-21.

understandings of judicial behavior. Frederick Schauer is surely correct to distinguish Hart's *conceptual* claim that the internal point of view identifies "what it is to *be* a judge" from the testable, and disputable, *empirical* claim that "all of the people who wear robes and are called judges by society" are in fact judges in this sense.¹³³

The truth of the matter is that both Hart's and Posner's answers to the question of why judges follow the institutional rules of judging need to be tested empirically through social scientific inquiries that disclose the realities underlying judicial practices.¹³⁴ Unlike Posner's approach, these investigations need to begin with the facts, not theory. Researchers must discipline themselves to let the facts fall where they may, unconstrained and untainted by any requirements for theorizing. In particular, investigators need to not only analyze judicial behavior (i.e., external indicia), but also persuade judges to introspect about and communicate their experiences on the bench.

This suggestion is not as naive as it may at first appear. I recognize the force of Schauer's observation that

judicial ambition is a topic that is rarely discussed, especially by the judges who may have it. And even for a non-judge, raising the topic of judicial self-interest in the company of judges is something like discussing steak tartare at a convention of vegetarians. Federal District judges do not talk about their desire to become judges of the Court of Appeals, and Court of Appeals judges do not talk about their aspirations to the Supreme Court. Whatever else this judicial silence may signal, it certainly indicates that researching the topic of judicial ambition or self-interest would be extraordinarily difficult

....

. . . Even under conditions of confidentiality, which have their own methodological problems, I suspect that few judges will admit to having very much self-interest in reputation or promotion.¹³⁵

Nevertheless, this concern is not the whole story. To begin with, Schauer may end up being pleasantly surprised: Some judges may be honest about their motivations¹³⁶ if investigators ask them under conditions of

133. Frederick Schauer, *Judicial Incentives and the Design of Legal Institutions* 17 (Apr. 1998) (unpublished manuscript, on file with the *California Law Review*) (presented at the *Rationality and Society* Workshop Series, School of Law, University of California, Berkeley (Boalt Hall)).

134. As Schauer notes, "Hart has helped us to understand what the internal point of view is, but the question of how many judges within a given system actually have the internal point of view in the Hartian sense is not a question that can be answered with philosophical—as opposed to empirical—tools." *Id.* at 18.

135. *Id.* at 7, 18.

136. Even assuming judges are exclusively self-interested, judicial motivation surely must entail concern with issues other than advancement to a higher court. *See* note 84 and accompanying text. It is therefore peculiar that Schauer focuses exclusively on this consideration in the quote above.

confidentiality and as part of a research program that seeks to advance the state of knowledge of the judiciary. Additionally, while few judges may admit to being personally motivated by self-interest, many may be willing to point out the presence of self-interested motives (insofar as they exist) in their colleagues on the bench and in the judicial profession in general (again, assuming confidentiality). Finally, if significant difficulties in application constitute a sufficient condition for abandoning a research technique, then the economist's practice of inferring judicial motivation from external indicia also needs to be scrapped. After all, Sen has demonstrated the limitations that are inherent in the economic approach in general, and this Comment has demonstrated that these problems are especially salient when economists use economic theory to analyze judicial behavior. What Sen writes of economists applies equally well to Schauer: He has "been prone, on the one hand, to overstate the difficulties of introspection and communication, and on the other, to underestimate the problems of studying preferences revealed by observed behaviour."¹³⁷

In any event, Posner appears to favor an introspective and communicative approach when, in support of his claim that "most judges are, in fact, ordinary,"¹³⁸ he notes approvingly that "[w]e are beginning, at last, to get a glimpse from judges of some of the unvarnished realities of a judicial career."¹³⁹ What he does not appreciate, however, is what an anathema such a method of knowledge acquisition is to the economic research paradigm dictated by revealed preference theory. As discussed earlier,¹⁴⁰ the revealed preference approach is grounded in the psychological model of behaviorism: It presumes that the only way in which to understand human beings is through inferring their preferences from observations of their non-verbal choice behavior. Sen captures the implications of this world view for empirical research in economics when he writes that the "thrust of the revealed preference approach has been to undermine thinking as a method of self-knowledge and talking as a method of knowing about others."¹⁴¹ The idea that choice behavior constitutes the only real source of information on judicial preference and welfare precludes the execution of comprehensive empirical work on judicial motivation. In reality, there are numerous ways in which a judge can reveal a preference. Thus, introspection and communication have an obvious and legitimate role to play in

137. Sen, *Behaviour and the Concept of Preference*, *supra* note 7, at 258.

138. POSNER, *supra* note 13, at 109.

139. *Id.* at 109 n.1 (referring the reader to RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990); Frank H. Easterbrook, *What's So Special about Judges?*, 61 U. COLO. L. REV. 773 (1990); and Patricia M. Wald, *Some Real-Life Observations about Judging*, 26 IND. L. REV. 173 (1992)).

140. See *supra* notes 36-38 and accompanying text.

141. Sen, *Behaviour and the Concept of Preference*, *supra* note 7, at 258.

legal and social scientific research that endeavors to understand whether and why judges follow institutional rules.

CONCLUSION

If the traditional jurisprudential understanding of what it means for a judge to be faithful to her office is a myth, then it is not a problem for the economic analysis of judicial behavior that economic theory is incompatible with the liberal view. If, on the other hand, there is more to the idea of the rule of law than the hard-core legal realist believes exists,¹⁴² then it is a fundamental problem for defenders of the economic approach that their method rejects liberal values out-of-hand at the level of theory. In order to resolve this question, legal and social scientific researchers need to get judges to start meditating on and talking about the realities of their trade.

In empirically studying what judges are “really” like, we are not necessarily faced with a choice between the judge as Dworkinian Hercules¹⁴³ and the judge as the “ordinary” self-interested maximizer of economic theory—between Posner’s “judicial titan”¹⁴⁴ and Sen’s “rational fool.”¹⁴⁵ Posner presents us with a false duality. While this Comment has not provided the rigorous empirical evidence that would be necessary to validate the following claim, it seems reasonable to suppose that the vast majority of real judges are located somewhere along the continuum between the stark images provided by these ideal types.

This observation bodes well for the potential realism of the rule-of-law values discussed in this Comment. While they are incompatible with the structure of economic theory, they are not the stuff of some heroic mythology. As compared with Dworkin’s jurisprudence,¹⁴⁶ Hart’s makes far fewer demands on the judge’s capabilities. It is therefore much more likely to be grounded in social reality. One need not be Hercules to be sensitive to the internal aspect of obligatory rules: Being Herbert will do just fine.¹⁴⁷ Thus, Hart’s jurisprudential view of judging could be very much

142. See EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 74-94 (1973).

143. Hercules is Dworkin’s “philosophical judge,” his “lawyer of superhuman skill, learning, patience and acumen.” RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105 (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*]. Hercules reappears in various places in Dworkin’s *Law’s Empire*. See generally DWORKIN, *LAW’S EMPIRE*, *supra* note 33.

144. POSNER, *supra* note 13, at 109.

145. Sen, *Rational Fools*, *supra* note 7, at 336.

146. See generally DWORKIN, *LAW’S EMPIRE*, *supra* note 33.

147. Herbert is the wholly human—yet in my estimation still quite admirable—philosophical judge who often disagrees with Hercules. (For the benefit of those readers who are not familiar with Dworkin’s intended reference, “Herbert” is H.L.A. Hart’s first name.) See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 143, at 125.

consistent with a relatively humble, “intensely human”¹⁴⁸ understanding of judicial behavior that empirically may emerge.

148. POSNER, *supra* note 13, at 144.