

**Symposium: New and Critical Approaches to Law and Economics (Part I)**  
**The Economics of Race and Gender**

**RATIONALITY IN LAW AND ECONOMICS SCHOLARSHIP**

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I present you two stories. The first one: "A man is searching for his watch at night under the light of a lamppost and people ask him, 'Why do you search here if you do not know whether you lost the watch here or somewhere else?' The man answers: 'Well I search here because here I have the light.'"

The second story is: "A king wants a map of his kingdom, and asks the prime minister for a map. The prime minister comes back with a map, let us say with a scale 200,000:1, and the king is very upset; he cannot see his palaces, his towns, his castles and so on. Therefore, the King asks for a different map at a bigger scale . . . The story goes on until finally the Prime Minister comes back with a map 1:1." That is totally useless. Can the debate on full rationality (neoclassical economics) and bounded rationality be represented metaphorically by these two stories? [\[FN1\]](#)

Introduction

Judge Richard A. Posner, the doyen of the law and economics movement, is probably the leading proponent of the hypothesis that legal subjects act as if they were economically rational. Over the years, however, Posner's conception of rationality has devolved from end-means reasoning by a conscious individual human actor, to unconscious instinct which is nevertheless beneficial to an individual subject (animal or human), to the mechanistic reproductive activity of individual genes which may or may not be beneficial to either the organism of which the gene is a part--or even to the gene itself. Indeed, all that seems to be left of the "rational" component of Posnerian rationality might be the positive normative connotations of the term itself.

At the turn of the millennium the law and economics \*148 movement is over a quarter of a century old. It is time to unpack Posner's rational choice baggage to see what remains inside. I seek to explicate the internal contradictions of Posner's account of rational choice theory and will contrast his attempt to bolster his theory through the adoption of arbitrary and ad hoc ancillary hypotheses with the methodology of social science. I challenge Posner's presentation of himself as a proponent of mainstream economic theory.

This project is divided into three parts. This Article contrasts Posner's conception of rational choice theory with those of a number of Nobel Prize laureates who accept some variation of the rationality postulate--Gary Becker, Paul Samuelson, and George Stigler--as well as two who are critical of rational choice literature--Amartya Sen and Herbert Simon. I also tentatively offer some suggestions from Lacanian psychoanalytic philosophy as to the appeal of certain notions of "rationality."

A later article, *Just So Stories*, [\[FN2\]](#) contrasts the methodology that Posner claims to follow and the one he actually follows. Posner claims to be following standard economic practice by endorsing the well-known scientific methodology known as "falsification" as explicated by Nobel laureate Milton Friedman. In fact, Posner has posited a highly idiosyncratic interpretation of the most controversial and little followed portion of Friedman's famous essay *The Methodology of Positive Economics* [\[FN3\]](#)--that which Friedman's numerous critics call the F-twist or the unreality principle. [\[FN4\]](#) This is the proposition that the validity of a scientific theory does not depend on the reality of the underlying assumptions. [\[FN5\]](#) In any event, Posner does not, in fact, follow his own falsification methodology, but slips into the easier methodologies of abduction and verification.

A third article, Fear of Freedom, [FN6] examines the standard account of economic rationality and contrasts it to another account \*149 of rationality developed by the continental speculative philosophic tradition associated with Immanuel Kant, W.G.F. Hegel and, in modern times, Jacques Lacan and Slavoj Zizek. I do not argue that the neo-classic economic conception of rationality is false. It is an extremely elegant theoretical construct that seems to capture a true aspect of human nature. But, it is a partial truth. Moreover, the limitations of economic thought manifest a fundamental hatred of freedom by its practitioners. Traditionally, economics sees rationality as the process by which the subject chooses the means to achieve his pre-given ends. As Posner says, "A preference can be taken as a given, and economic analysis proceed as usual, even if the preference is irrational." [FN7] Speculative theory, in contrast, conceives of rationality as the process whereby the subject formulates what his ends are or should be. [FN8] The rationality postulate of economics was formulated as an attempt to predict and, therefore, bind behavior and to avoid the random unpredictability associated with irrationality. Speculative theory understands rationality as being rooted in an essential human freedom and, therefore, the source of spontaneity.

I criticize neither the study of economics nor the application of economic analysis to legal issues, nor even the rationality postulate itself. I am, however, critical of the hijacking of the terms "economics" and "rationality" by one wing of the legal academy which increasingly threatens to be a source of bad law based on bad economics.

This Article will not sway the proponents of the self-styled "law and economics" movement. Indeed, Posnerian theory has made itself impregnable to outside critique by adopting the rhetoric of scientific theory while abandoning its methodology. Indeed, one of the appeals of the law and economics movement has been precisely the aura of scientific certainty and objectivity that it has given to legal analysis and normative policy making. Law reviews are frequently filled with impressive looking binomial formulae purporting to prove whatever proposition is being presented. And yet, despite its claim to scientific status, this \*150 scholarship is almost entirely devoid of the types of methodological discussions and internal criticism typical of scientific literature. The practitioners of the "science" of law and economics rarely engage in empirical research. [FN9] Typically, non-falsified theories are applied to untested assumptions in order to produce non-verifiable conclusions. In other words, at the turn of the millennium, law and economics has all of the characteristics of a cult.

Nevertheless, although it is frequently attacked in law reviews, particularly from scholars self-identified with the critical left, law and economics has not merely prevailed, it has thrived. One reason for this is that much of the criticism by legal scholars has taken the form of romanticism--a philosophical viewpoint which unwittingly repeats the errors of utilitarianism. [FN10] The critical left tends to take legal economics' claim to rationality at face value and, therefore, frequently engages in the self-defeating strategy of attempting to form rational arguments against rationality. [FN11] A truly critical analysis shows, however, that as used in legal economic literature, "rationality" has become an empty, if not contradictory, \*151 term. Nevertheless, there are powerful psychoanalytic reasons why both law and economics, and the romantic critique continue to be so seductive despite their failures.

Another reason why law and economics scholars and their critics consistently fail to communicate may be fundamental differences in goals. Law and economics is a policy science--it seeks to give advice to legislators, judges or others in power as to what the law should be in order to achieve certain societal objectives. As such, it must both identify what these goals should be (such as pareto optimality or wealth maximization), and predict how legal and economic subjects will respond to incentives or disincentives created by the law. In other words, the policy scientist seeks to use law to manipulate the behavior of the persons who are subject to its power. There is nothing wrong about this per se--it is the very nature of legal policy making.

The speculative theorist or critical legal scholar, in contrast, seeks not so much to give advice to the government as to understand the position of the governed--those who are subjected to the law. Hence, the critical position is not that of the legislator or judge, but that of the attorney who counsels and represents clients. By understanding how the law affects her and her client, the lawyer and critical scholar can seek to better integrate the individual legal subject within the legal system--whether with other legal subjects through contract, or with the government through compliance. Through understanding, she seeks to free the legal subject from manipulation by the law. The legal subject who understands the law can now either freely submit to the law, seek to manipulate the law for her own individualistic and subjective goals, or seek to change the law. In Lacanian discourse theory, the critical scholar speaks a discourse of the Hysteric, whereas the legal economist speaks a discourse of the University. [FN12] In the

former, one stands in the position of the person subjected to the law, who addresses the flaws in the law itself. In the latter, one stands in the position of the legal expert, who addresses the instrumental purpose of the law. As neither addresses the other directly, communication fails. Consequently, the critical scholar who says, in effect, "look what the law is \*152 doing to me" is never effectively heard by the policy scientist who can only respond "this is the purpose of the law."

## I Rationality

### A. Terms of Art

In colloquial English, the word "rational" refers to use of reason. [FN13] Typically, it is thought of as the self-conscious logical process which separates humans from animals. [FN14] In the words of the eminent economic historian and theorist of economic methodology, Mark Blaug, "[i]n common parlance, rationality means acting with good reasons and with as much information as possible or, in somewhat more formal terms, consistently applying adequate means to achieve well-specified ends." [FN15] Nobel laureate Herbert Simon has noted that the traditional definition of rationality (as opposed to the rationality postulate of economics, which he criticizes) concentrates on the process by which choices are made. [FN16] Philosophers, theologians and scientists have debated what it means to be rational--or self-conscious--for centuries.

Neo-classical economists have adopted the word "rationality" as a term of art to describe the characteristic behavior of economic subjects. By doing so, they have given the term a variety of new meanings. This is partly justified on the grounds that every scholarly discipline and profession necessarily must develop \*153 definitions that are more precise than those used in colloquial conversation. As I shall discuss, the Lacanian theory that I apply is notorious for its highly complex and seemingly idiosyncratic re-definition of common words. [FN17]

There are dangers to this approach, however. In the words of Gary Lawson:

The most sophisticated law and economics scholars, exemplified by Judge Richard Posner, do in fact employ a coherent and robust conception of social efficiency, but at the cost of cutting the term "efficiency" loose from its ordinary-language moorings and thereby raising a serious danger of equivocation. [FN18]

The same can be said of their use of the term "rationality."

This Article argues that Posner goes further than merely equivocating. He continues to use the term "rationality," although he defines it in a way which is completely different not only from the neo-classical economic sense, but also from the colloquial and speculative philosophical senses, presumably because he wants to trade on the positive normative connotations of these other senses. This is to be contrasted with the Lacanian re-definition of common words which, while being admittedly annoying and potentially confusing, is intentional and serves a specific purpose. As discussed below, [FN19] Lacan was attempting to capture the conflation between certain concepts that we make in our unconscious. This Article explores these definitions.

### B. Standard Accounts

As expressed by Blaug:

[T]he most characteristic feature of neoclassical economics [is] namely [ ] its insistence on methodological individualism: the attempt to derive all economic behavior from the action of individuals seeking to maximize their utility, subject to the constraints of technology and endowments. This is the so-called rationality postulate, which figures as a minor premise in every neoclassical argument. [FN20]

Blaug contends that the rationality postulate has become so strongly embedded in economic theory, "that some have \*154 seriously denied that it is possible to construct any economic theory not based on utility maximization." [FN21] Despite its centrality, however, the status of the rationality postulate in economic theory is unclear. Amartya Sen suggests that it is not even clear whether the economic rationality requirement is an axiom to be assumed or a hypothesis to be falsified. "If today you were to poll economists of different schools, you would

almost certainly find the coexistence of beliefs (i) that the rational behaviour theory is unfalsifiable, (ii) that it is falsifiable and so far unfalsified, and (ii) [sic] that it is falsifiable and indeed patently false." [FN22]

According to Blaug, many economists "argue[ ] that it would be futile to criticize the rationality postulate and that, in any case, all criticisms of it are misguided. It is certainly true that the treatment of rationality as a metaphysical proposition has gradually become the standard orthodox defense of any criticism of the rationality postulate." [FN23]

Blaug describes the neo-classic notion of rationality as follows:

For the economist, . . . rationality means choosing in accordance with a preference ordering that is complete and transitive, subject to perfect and costlessly acquired information; where there is uncertainty about future outcomes, rationality means maximizing expected utility, that is, the utility of an outcome multiplied by the probability of its occurrence. [FN24]

In a recent essay entitled *A Behavioral Approach to Law and Economics* , [FN25] Professors Jolls, Sunstein, and Thaler (JST) suggest that empirical research by behavioral economists indicates that economic subjects often act in ways that do not fall within the \*155 neo-classical definition of "rationality." In a vociferous reply defending the rationality postulate, Posner wrongly assumes that adding an account of "non-rationality" in market relations would be tantamount to abandoning theory entirely in favor of a mere all-inclusive description of empirical behavior lacking any explanatory or predictive power. [FN26] Although Posner claims to base this conclusion on his analysis that behavioral economics merely describes human actions but has no theory of action, [FN27] his conclusion reflects an implicit assumption that "irrational" means arbitrary or random and, therefore, not subject to theorization. [FN28]

It is Posner's ad hoc attempt to explain perceived anomalies between empirical observations and his research program that retroactively tries to explain everything and, therefore, predicts nothing. In contrast, psychoanalytic theory argues that irrational behavior is not, as Posner assumes, arbitrary. Rather, it is highly predictable--in Lacan's famous formulation, the unconscious is rigidly structured like a language. [FN29]

Posner accuses behavioral economists of asserting a psychological explanatory, rather than an economic theoretical, critique of the rationality postulate. [FN30] He charges that, as such, their critique is not useful in the development of economic theory. It ignores the fact that the purpose of behavioral economics is to examine how economic subjects in fact do act in order to develop a theory that is more accurate both in the descriptive and the predictive sense.

\*156 Surely anyone as well read as Posner would be fully aware that Simon, the father of behavioral economics, has spent his career not merely observing, but theorizing about how economic actors actually make decisions based on the empirical data gathered by behavioral economics. [FN31] Indeed, Simon has been able to expand his theory of decision-making beyond the scope of economics, and is also an eminent theorist of artificial intelligence. [FN32]

In any event, Posner does not purport to be developing economic theory per se. Rather, he attempts to apply the insights of economics to law. For those, such as myself, who do not completely reject the economic approach to law generally, or economic rationality specifically, but find them partial or incomplete, supplementing traditional economic analysis with other disciplines that might be relevant to legal explanation is itself a worthwhile activity.

Moreover, as I have argued extensively elsewhere, Posner's approach implicitly echoes a basic error of the utilitarian approach, which is curiously made equally by its romantic critics. [FN33] Indeed, utilitarianism and romanticism are mirror images. They draw two diametrically opposed, but equally fallacious, conclusions from a shared erroneous assumption about law and market relations. They both assume that market relations are inherently cold, atomistic and "rational." The utilitarian believes that "rationality" is the true essence of human nature and, therefore, tries to analyze all human relations by analogy to the market. The romantic, in contrast, believes that human nature is essentially "irrational" in one way or another. The market is seen, therefore, as an aberration. At best it is a necessary evil which is tolerated, if limited in scope, as a means of providing basic physical needs. At worst, it is a perversion which threatens to undermine \*157 all human relations and to frustrate the achievement of personhood.

The speculative tradition, in contrast, argues that the utilitarian-romantic analysis of law and economics is incorrect for two interrelated reasons. Hegelian philosophy shows us that far from being anti-erotic, market relations are the most basic and primitive form of eroticism. [FN34] Whereas both the utilitarian and the romantic see desire as being external to law, Hegel and Lacan, following a Western philosophic tradition reaching back to Aristotelian virtue ethics, posit that law operates at the level of desire.

Indeed, the rational-irrational dichotomy, adopted equally by utilitarians and romantics, is incompetent. The Hegelian dialectic and the basic understanding of the identity of identity and difference reveals that reason and passion are not inalterably opposed, but two aspects of the same concept. It is true that human beings are rational, as argued by utilitarians. But rationality represents only the "ought" of human nature. This potential can only be actualized through desire. This does not imply, however, that the romantic is correct in assuming that passion is superior to logic. Rather, even at the ecstatic moment of *jouissance*, the subject must preserve a moment of the rationality which makes desire possible, or submerge her personhood in the abyss. [FN35]

As we shall see, Lacanian psychoanalytic theory may account for one of the biggest quandaries within the Posnerian system. If, as Posner (and utilitarianism) asserts, people rationally seek to maximize their happiness, [FN36] however they identify it, why are people so unhappy? Why don't we all become happier as we age until we reach an ecstatic senescence as the penultimate stage in \*158 our passage to eternal paradise? In fact, if one thinks about it, the very system hypothesized by Posner posits that no one can ever be happy. [FN37] If, as Posner suggests, we are hapless creatures who are forever driven to increase our happiness, then, by negative implication, we are never satisfied and always, therefore, relatively unhappy. Modern economists have recognized this problem and have replaced the original concept of cardinal utility with a notion of ordinal utility. [FN38] The notion of ordinal utility reflects the understanding that there may not be any absolute standard of happiness, but it still doesn't explain why we don't see relative increases in utility. Posner can only explain this by means of various market imperfections--although we seek to maximize our happiness as we see fit, not only our resources, but our knowledge of what we want and how to give it are necessarily limited. [FN39]

The psychoanalytic theory of desire and drive, in contrast, offers an explanation, not only of the universal human experience of incompleteness and constant yearning, but also of why we so often act in ways that are calculated to decrease, rather than increase, our happiness. In other words, the hard core of neo-classical economics predicts that people will act to increase their happiness and, therefore, the fact of unhappiness is an anomaly that needs to be explained. In contrast, unhappiness as well as happiness is predicted by the hard core of psychoanalytic theory. This suggests that the psychoanalytic research program may have excess empirical content over the economic research program. If this is so, an economist who adopts the methodology of sophisticated falsification could decide that the former should logically supplant the latter. [FN40]

## \*159 C. Posnerian Rationality

### 1. Context

We are now in a position to contemplate Posner's latest definition of rationality and his related discussions of economic methodology. In this section I shall not attempt to give a comprehensive account of the development of his position over time. I examine his more recent work which has become encrusted with a protective belt designed to protect his hard core from over twenty-five years of academic attack. In the second part of this Article, I compare Posner's degenerating research program with the more pristine conceptions of rationality adopted by a number of economists to demonstrate how the former has degenerated from the latter. In the final section I change tacks and suggest certain insights which Lacanian psychoanalytic theory might bring to the study of economic behavior.

Posner should not be uniquely faulted for modifying his definition of rationality over time. Sen argues that many neo-classical accounts of economic rationality are surprisingly vacuous. The only way the hard core of the rationality postulate could have survived application to the law was through the development of what philosopher of science Imre Lakatos calls a protective belt of auxiliary hypotheses to provide the empirical content the core lacks.

This is one step in the methodology Lakatos calls "sophisticated falsification." [FN41]

Under sophisticated sophistication, in "[c]ontrary to naive falsification, no experiment . . . alone can lead to falsification. There is no falsification before the emergence of a better theory." [FN42] Rather, we should try to develop auxiliaries--possible explanations for the "anomalies"--to protect the hard core of the research program. [FN43] Sometimes, however, the research program begins to degenerate as the protective belt becomes thicker and thicker, and the hard core smaller and smaller, so that the exceptions begin to eat up the rule. [FN44] This is arguably what is happening to economic rationality as used by Posner in legal analysis.

\*160 Mere degeneration is not a sufficient reason for abandonment of a research program, however. The sophisticated falsifier will keep her research program until she can replace it with a new research program having "excess empirical content"; [FN45] that is, a research program having a hard core that explains more than the eroded hard core of the old degenerating research program. [FN46] Blaug finds the neo-classical continuing reliance on the rationality postulate perplexing not because of its failings, but because a number of potentially fruitful alternatives have in fact been suggested by other economists. [FN47] He specifically mentions Simon's theory of "satisficing" drawn from the behavioral economics that Posner damns as non-theoretical. [FN48] Blaug readily admits that these alternatives may not yet have the rigor of the rationality postulate, but this is almost always the case with new research programs and is not, therefore, a reason in and of itself not to adopt one as an alternative. In the final part of this Article, I shall argue that Lacanian theory gives a fuller account not only of economic activity than the rationality postulate generally, but of the persistence of the economic theory of rationality itself. [FN49]

Part of Posner's response to JST's suggestion that economic subjects act in ways inconsistent with the rationality postulate, consists in an attempt to explain how these data can be reconciled with his theory. For example, Posner states:

Some of the insights [JST] ascribe to behavioral economics are already a part of economic analysis of law . . . . Other points they make are new labels for old challenges to the economic model of behavior that owe nothing to behavioral economics in any distinctive sense. Others are best explained by reference to evolutionary considerations that play no role in behavioral economics . . . . [FN50]

In this Article I take no position on the validity of JST's specific critique nor on Posner's response. This is partly because I am not in a position to evaluate the empirical research that JST \*161 present. This is also partly because, although I am sympathetic with the Simonian behavioral economics' attempt to formulate a more accurate theory of economic behavior, I also share Posner's intuition that the policy implications that JST purport to derive from behavioral economics are questionable at best. [FN51]

More importantly, I believe that the two sides are much closer together than they might seem from some of their rhetoric. [FN52] On the one hand, it is not clear whether JST intend to supplant Posnerian rationality, as Posner implies. That is, Posner reads JST as offering behavioral economics as an alternative to his brand of economics and as implicitly defining behavioral economics as "economics minus the assumption that people are rational maximizers of their satisfactions." [FN53] In context, however, JST can be read as merely suggesting that, for Posnerian theory to remain valid, it must account for seemingly anomalous data [FN54]--precisely the task that Posner takes up. On the other hand (as I shall discuss in more detail) Posner arguably does not fully internalize the \*162 implications of adopting auxiliary hypotheses for the application of his theory.

## 2. Definitions

In the most recent edition of his classic text book, *Economic Analysis of Law*, [FN55] Posner defines economics as "the science of rational choice in a world--our world--in which resources are limited in relation to human wants." [FN56] Note that Posner sees economics not as the science of choice per se, but of "rational" choice. An understanding of his view of economics, therefore, requires that he develop a definition of rationality. In his most recent work, Posner gives an admittedly imprecise and non-rigorous definition of economic rationality as "choosing the best means to the chooser's ends." [FN57] He further explains in his textbook that "[t]he task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions--what we shall call his 'self-interest.'" [FN58]

At first blush, two implications might seem to flow from this definition. Posner only accepts one of them. The first, the one that Posner does accept, is that the economic actor seeks to maximize his self-interest (or, utility, in the usual terminology). As we shall see, psychoanalysis argues exactly the opposite--the psychiatric subject frequently seeks not only her unhappiness; she seeks her self-destruction.

The second implication, which Posner rejects, flows from the conclusion that might be implied by his use of the word "choice." "Choice" carries the connotation of free, or at least conscious decision making that characterizes the more common colloquial and philosophic definitions of rationality. Posner, however, expressly states that "[r]ational maximization should not be confused with conscious calculation. Economics is not a theory about consciousness." [FN59] Consequently, Posner rejects the concept that rationality is the unique characteristic that distinguishes man from his animal nature. "Rats are at least as rational as human beings when rationality is defined as achieving one's ends \*163 (survival and reproduction, in the case of rats) at least cost." [FN60] Further, "[T]he concept of rationality used by the economist is objective rather than subjective, so that it would not be a solecism to speak of a rational frog." [FN61]

Rationality means little more to an economist than a disposition to choose, consciously or unconsciously, an apt means to whatever ends the chooser happens to have. In other words, rationality is the ability and inclination to use instrumental reasoning to get on in life. It does not assume consciousness; it certainly does not assume omniscience. Note that, although in this passage Posner uses the term "instrumental reasoning," he has, in fact, abandoned the concept of reasoning entirely. Instrumental or rational "behavior" might be more accurate, in that rationality is no longer conceived of as that capacity that we share with the angels, but with the rats and frogs.

Consequently, although Posner refers to his approach as rational choice theory, in fact, as Simon has noted "rationality, in reference to the process of choice, appears to be disappearing from social science literature." [FN62] That is, rational choice economists do not look at the choosing, but the result of the choice. They conceive of choice as behavior not thought. [FN63]

Accordingly, Simon posits:

Economists have generally used rationality to denote an attribute of an action selected by a choice process, rather than an attribute of the process. . . . "An action is rational to the extent that it is 'correctly' designed to maximize goal achievement, given the goal in question and the real world as it exists. . . ." [FN64]

Simon offers two dichotomies in an attempt to distinguish the neo-classic definition of rationality with, on the one hand, traditional philosophic definitions and, on the other hand, conceptions of rationality favored by empiricists like himself. He calls the first the distinction between substantive and procedural (or objective and subjective) rationality and the second the distinction between bounded and global rationality.

\*164 According to Simon: "Behavior is procedurally rational when it is the outcome of appropriate deliberation. Its procedural rationality depends on the process that generated it. . . . William James, for example, in his Principles of Psychology, uses 'rationality' as synonymous with 'the peculiar thinking process called reasoning.'" [FN65] In other words, because "[p]rocedural rationality is concerned with how the decision maker generates alternatives of action and compares them. . . . It necessarily rests on a theory of human cognition." [FN66]

In contrast, substantive rationality "is concerned only with finding what action maximizes utility in the given situation, hence is concerned with analyzing the situation but not the decision maker." [FN67] That is, substantive rationality concerns behavior, not cognition.

Interestingly, substantive rationality falls within the definition of irrationality adopted by those who use a procedural rationality standard. That is, "behavior tends to be described as 'irrational' in psychology when it represents impulsive response to affective mechanisms without an adequate intervention of thought." [FN68]

The distinction between global and bounded rationality is somewhat different. "Global rationality, the rationality of neo-classical theory, assumes that the decision maker has a comprehensive, consistent utility function, knows all the alternatives that are available for choice, can compute the expected value of utility associated with each

alternative, and chooses the alternative that maximizes expected utility." [FN69]

Simon continues: "Within the framework of global rationality, we assume a given set of alternatives and a given utility function and compute the alternative that maximizes utility (or, in the case of uncertainty, subjective expected utility)." [FN70]

In contrast, "[b]ounded rationality, a rationality that is consistent with our knowledge of actual human choice behavior, assumes that the decision maker must search for alternatives, has egregiously incomplete and inaccurate knowledge about the consequences of actions, and chooses actions that are expected to be \*165 satisfactory (attain targets while satisfying constraints)." [FN71] This means that: "[w]ithin the framework of bounded rationality, we assume that people have some goals and constraints and search for an alternative that reaches the goals, subject to the constraints and within specified limits on the knowledge and computational capacities and skills of the decision maker." [FN72]

The differences between the approaches of global and bounded rationality relate, not merely to different predictions made by different models, [FN73] but to a different attitude toward psychological theory and empirical research. A psychological theory is irrelevant to the model of global rationality since it does not depend on an "understanding of human thought processes." [FN74] In contrast, bounded rationality needs a theory of both sociology and psychology. [FN75] Note that this means that bounded rationality is a subset of procedural rationality because its primary concern is an understanding of how subjects actually make decisions. [FN76]

What I find most interesting about Posner's current views towards rationality is that they seem to be a strange and internally inconsistent combination of neo-classical and bounded views. Posner claims that the rationality postulate, at least as followed by legal economists, has long since moved away from the simplified and elegant neo-classical assumptions of complete information, consistent tastes, etc., and has accepted many of the empirical constraints identified by proponents of bounded rationality. [FN77] And yet, he nevertheless retains the neo-classic insistence that it need not examine the actual process by which decisions are made. In this view, behavior can be rational even though no reasoning process is used at all, as in the case of rational rats and frogs. [FN78] Indeed, as we have seen, Posner criticizes JST precisely on the grounds that, by looking at actual decision making by economic subjects, they are engaging in psychology, \*166 not economics. [FN79] Accordingly, Posner still espouses Friedman's highly controversial thesis that it is unnecessary to test the assumptions underlying an economic theory--in this case the rationality postulate--or even to assert that the assumptions are in fact true. It is enough that the theory can be used to make predictions if we assume that economic subjects act "as if" they were substantively rational. [FN80]

It is precisely Simon's contention, however, that the position espoused by Posner is internally inconsistent. A theory of how rationality is limited by empirical constraints is precisely both a description and a theory of how actual "flesh-and-blood human beings" make decisions and can not, therefore, ignore psychology. [FN81] Moreover, insofar as behavioralists like Simon assert both that the assumptions of global and bounded rationality lead to different predictions and that the predictions of the latter are more accurate than the former, it is not enough to Posner to posit that economic subjects act "as if" they were substantively or globally accurate because they apparently don't. That is, according to Simon "we want economic theories . . . to help guide the actual management and operation of firms." [FN82] In order to do so:

[I]t must be a theory that describes [the operations of firms] realistically, not an "as if" theory. In both its descriptive and its normative aspects, it must describe, and prescribe for, the decision making processes of managers with close attention to the kinds of knowledge that are attainable and the kinds of computations that can actually be carried out. [FN83]

Perhaps more importantly for legal scholars, like Posner, who are trying to give general policy guidance, it is important for economic theory to be both abstract enough to be broadly applicable and concrete enough to be reasonably accurate. As the quote at the head of this Article indicates, [FN84] on one hand, it is traditional for behavioralists to accuse neo-classicists, like Posner, of adopting a theory of rationality that is so abstract that it has little analytic and predictive value when applied to actual facts. On the other hand, as we have seen, [FN85] Posner, as a neo-classicist, aims \*167 the usual accusations at JST's behavioralism--that their approach also lacks analytic and predictive value for the opposite reason; that it so broad and concrete that it degenerates into a mere description that covers any and all possible behavior. The point, according to Simon, is to find the right balance between



abstraction and concreteness, theory and description.

It is not clear how detailed a theory of decision making or of business management we need for political economy. We need to retain those features of theory that make a difference, and discard those that do not. We need also to avoid features in our abstracted theories that will lead us to wrong conclusions at the macro level. [FN86]

Perhaps needless to say (because he is one of the fathers of behavioral economics) Simon argues "that we need a theory rather different from, and far more concrete than, received neoclassical doctrine." [FN87] He thinks that it is "obvious common sense" that the goals of economics "requires building an adequate, empirically based, theory of bounded rationality--that is, of procedural rationality--and applying the theory systematically to phenomena at both micro and macro levels. . . . [Further,] [t]hey must be shaped and tested by the sharpest empirical methods that we can devise." [FN88]

Posner may or may not be correct in his assessment that, at least as presented by JST, bounded rationality does not yet meet this standard. But, it is hard to defend his decision to both adopt many of the constraints on rational behavior (such as partial information and limitations on calculating abilities) developed by empirical economists while rejecting their proposition that economists must study how economic subjects actually make decisions given these limitations.

### 3. Maximization

Posner, like most "rational choice" economists, assumes that the proposition that choosing the best means to a chosen end means that rational subjects are maximizers of their desiderata--utility in the case of households and profit in the case of firms. As we have seen, Simon, in contrast, posits that actual decision makers, who implicitly or explicitly understand the limits of their \*168 knowledge and cognitive capacity, do not seek to maximize anything when they make rational choices. He has coined the term "satisficing" to describe the actual observed decision-making process. [FN89] Although Posner does not refer to Simon's terminology specifically, he does try to reconcile certain "satisficing" behavior within his version of rational maximization. [FN90] Whether or not he is successful in doing so, one will arrive at different predictions of economic behavior depending on whether one assumes that economic subjects generally maximize or satisfice.

What does Posner mean to posit that an economic subject engages in rational choice (or in my formulation, rational behavior)? "The concept of man as a rational maximizer of his self-interest implies that people respond to incentives--that if a person's surroundings change in such a way that he could increase his satisfactions by altering his behavior, he will do so." [FN91]

### 4. Irrational Tastes and Market Imperfections

One might think, since economic rationality ordinarily refers to action that would maximize satisfaction, that in order to be predictable and falsifiable economics would require some theory of human satisfaction. The familiar caricature of homo oeconomicus as the autonomous, self-interested individual in the state of nature posited by classical liberal theory immediately springs to mind. But, in order to protect his hard core rationality postulate, Posner claims to have thrown over any such presuppositions of economic preferences. The "economic analysis of law . . . long ago abandoned the model of hyper-rational, emotionless, unsocial, supremely egoistic, nonstrategic man (or woman)." [FN92] This abandonment happened, for example, in order to account for the empirical observation that people often seem to act in ways that do not seem self-interested.

All that is required to understand altruism as a form of rational self-interest is the assumption [or in Lakatosian terminology, the auxiliary hypothesis] of interdependent utilities. If your welfare enters positively into my utility function, then I can increase my own welfare by increasing your welfare; and if it enters negatively, then I can increase my welfare by reducing \*169 yours. [FN93]

In other words, when we observe an economic actor doing something that does not seem to benefit that actor, and might even cost that actor, but which benefits (or harms) another, we will say that the actor has a preference for the pleasure (or pain) of the other, so, by helping (or hurting) the other, the actor is not acting altruistically in the usual

understanding of the term, but is selfishly maximizing his own utility.

But, Posnerian economics cannot develop a theory of preference formation precisely because his definition of rationality excludes the process of making choices. Posner continues: "preferences cannot be divorced from emotion, or emotion from their stimuli, and so instrumental reasoning cannot be thought pervaded with irrationality merely because a frequent goal of such reasoning is a preference that we would not have if we were not emotional beings." [FN94] In other words, it is not a critique of Posner's theory of rationality that economic subjects often have bizarre tastes and pursue "crazy" goals so long as subjects can be shown to consistently pursue these goals.

It is, in fact, far from clear that mainstream economists are willing to take this step. For example, many neo-classic economists posit that the condition that preference be consistent and non-variant implies that one's preferences not be affected by empathy with others--that empathy is itself an externality or market imperfection. [FN95] Indeed, it is a standard critique of neo-classical theory that to so expand the definition of economic preferences is to rob the theory of all explanatory and predictive power--by definition everything man (or frog) does serves his preferences because, by definition, his preferences must include everything he does. Consequently, Paul Samuelson tries (arguably unsuccessfully) to redefine preferences in terms of what people tend to actually choose (which is frequently self-interest understood in the usual greedy sense) [FN96] and Gary Becker tries to get beyond the arbitrary nature of defining preferences in terms of individual emotions or "taste" by identifying a number of supposedly very broad, universal human preferences. [FN97]

**\*170** The traditional version of the rationality postulate assumes that economic actors have a well-defined, ordered, consistent and transitive set of preferences. [FN98] That is, not only does the economic actor know that he prefers alternative A over B over C ad infinitum, he also knows that if he would choose A over B and B over C, then he would also choose A over C. This assumption has long been criticized for being either empirically or theoretically unlikely, or both. A truly ordered set of preferences would require perfect self-knowledge, memory and calculating skills, which are obviously beyond any empirical human being. Additionally, it might imply the type of conscious choice that Posner claims to have rejected. Moreover, we often observe behavior in ourselves and others that seems to reveal an inconsistent set of preferences.

Posner adopts a number of auxiliaries in order to account for this. First, Posner must obviously reject the suggestion that any empirical human being has the type of knowledge posited by the traditional ordered preference hypothesis--such knowledge would only exist in some form of "perfect market." Actual markets are characterized not by perfection but by scarcity. Information is often, or usually, not readily, instantaneously and costlessly available. This implies that economic actors are forced to act with imperfect information; thus, they may fail to take and act upon that which is in their best interest because of ignorance (or a misunderstanding) with respect to the consequences of their action. It further implies that it may also be rational not to seek whatever information would be necessary in order to make an informed decision. That is, if search "costs are positive" [FN99] the economic actor may calculate that the expected costs of obtaining such information would exceed the expected costs to the actor of guessing incorrectly. As Posner himself acknowledges, people are not omniscient, but incompletely informed decisions are rational when the costs of acquiring more information exceed the likely benefits in being able to make a better decision. A fully informed decision in such circumstances--the sort of thing a **\*171** person makes who cannot prioritize his tasks--would be irrational! [FN100]

Consequently, Posner modifies his hypothesis that economic subjects act rationally by adding, in effect, that an economic subject acts to maximize his satisfaction "as he understands it given available information" (with availability defined to include relative costs).

Before we move on to Posner's next auxiliary, let us pause and note potential internal inconsistencies that have cropped up in Posner's definitions. He claims to have rejected a theory of rationality that requires "consciousness" or subjectivity in favor of an "objective" rationality. This would seem to imply an "objective" standard of means and ends. For example, as we have seen, he has suggested that rats are "rational," in that they seek the objective ends of survival and reproduction. Moreover, as we shall soon discuss, Posner will soon shift to proposing a theory of objective rational behavior genes maximizing their chances of replication. And yet, when he turns to actual behavior by empirical economic actors, Posner adopts a completely subjective standard of rationality based on the idiosyncratic preferences and knowledge of individual human subjects. As I shall now discuss, the next set of

auxiliaries that Posner adopts to deal with anomalies caused by the observation of seemingly inconsistent or self-destructive "preferences" by economic actors, will actually increase the internal inconsistency of his theory in other ways.

## 5. Multiple Personalities

Posner has proposed that these anomalies might be explained by adopting one of two potentially inconsistent auxiliary hypotheses about the identity of the subject of economics. Traditionally, the subject of micro-economics has been the individual of classical liberalism (which has been the subject of Posner's analysis so far) or aggregates of individuals such as the family (see Becker) or the firm (see Coase). Posner suggests that, instead, economic rationality might be explained as identifying a subject smaller than the individual. That is, Posner posits that each individual is, in effect, a macro-subject housing a number of distinct micro-subjects. By doing so, seemingly inconsistent behavior by one macro-subject can be explained as consistent behavior by two **\*172** micro-subjects having inconsistent, subjective preferences. Behavior that is to the detriment of the interests of (or even destructive to) the macro-subject might be explained in terms of behavior that might serve the self-interest of one or more micro-subjects inhabiting the macro-subject. Unfortunately, it is not clear how to reconcile the behavior of the two classes of potential micro-subjects proposed by Posner.

The first class of micro-subjects is a rejection of classical liberalism's founding conceptualization of the person as single, unitary, self-identical entities--the autonomous individual. Perhaps, "the person is a succession of separate selves, 'time sharing' the same body; each self is rational, but each has its own interest and they are not identical across the selves." [\[FN101\]](#) Posner initially suggested this hypothesis as part of his analysis of aging. [\[FN102\]](#) There may be no inconsistency for a subject to have a preference for reckless, "fast living" when he is a young man and for a long, healthy life when he grows old because the young man and his older self are, in effect, two different subjects who happen to colonize the same body at different ages.

More recently, however, Posner has gone further and suggested that perhaps the macro-subject could house another set of micro-subjects simultaneously. In other words, the person who demonstrates a preference for immediate sensuous pleasure by eating a hot fudge sundae for lunch, but who demonstrates a preference for self-control and weight loss by feeling regretful an hour later, may not be demonstrating irrational behavior and inconsistent tastes. Rather we might re-conceptualize the person as being simultaneously inhabited by multiple sub-subjects all of whom "are rational but . . . have inconsistent preferences." [\[FN103\]](#) One of these selves just happens to prefer immediate gratification and one just happens to have long-term goals such as beauty or health. In Posner's words

Explaining such behavior in rational-choice terms may nevertheless be possible, but it may require abandoning a tacit assumption of most economic analysis--that the self is a unity--in favor of a conception of the person as a locus of different selves. All the selves are rational but they have inconsistent preferences. Examples are a young self versus an old self . . . a pre-accident self unwilling to spend heavily on accident insurance\***173** versus a post-accident self that would have liked the pre-accident self to buy a lot of accident insurance; and in the case of the chocolate, a present-oriented self that lives for the moment and a future-oriented self. . . . The assumption of a unitary self is not inherent in the concept of rationality in economics; it is merely a convenient assumption in most situations that economists analyze. [\[FN104\]](#)

In other words, the economic subject might be a psychic battleground, upon which multiple micro-selves with warring inconsistent tastes compete for temporary dominance over the macro-subject. This approach seems to be a sort of poor man's psychoanalysis, reflecting the vulgarization of Freud's theory that the psyche is divided among the id (roughly understood as animal instinct), the ego (our conscious self-identity) and the super-ego (the conscious). Unfortunately, Posner's theory is as ad hoc as it is crude. As I introduce in the closing part of this Article, [\[FN105\]](#) psychoanalytic theory does agree that the person is a divided entity (a split subject) comprised of the subject, the ego ideal, the ideal ego, the superego, etc. Moreover, psychoanalytic theory following Hegel goes further to suggest that each of these psychic sub-parts each contains its own logically necessary self-contradiction. But the implications of such internal contradiction are not, as Posner assumes, that "irrational" human behavior is unpredictable. Rather, psychoanalysis purports to explicate the structural rules or grammar of the unconscious. Following the speculative tradition it is rationality, not irrationality, that accounts for spontaneity.

Posner's crude auxiliary of the split psyche merely explains seemingly inconsistent behavior. He needs another auxiliary to explain behavior that seems to be inconsistent with the self-interest of either the individual person, or her constituent psychic components. That is, it is one thing to explain why one might engage in a risky but pleasurable activity despite our desire for a long and healthy life, and another thing to explain behavior that only seems risky but not pleasurable.

## 6. Evolutionary Biology

Posner offers more auxiliaries, which he draws from evolutionary biology. Behavior that seems irrational in our twentieth century industrial economy may have been rational behavior in the \*174 hunting-gathering communities in which our ape-like ancestors evolved into early man. Or, more radically, this behavior might not even have been hypothetically rational for our ancestors in the sense of serving their individual self-interest. It might, instead, have served the self-interest of our ancestors' genes.

This theory has been popularized by Richard Dawkins under the catchy phrase "the selfish gene." [\[FN106\]](#) Dawkins does not, of course, argue that genes themselves are self-conscious or have the ability to form a "selfish," or indeed any other type of, intent. Rather, evolutionary biologists posit that genes function in a way that we would consider selfish if engaged in by a self-conscious entity. A successful gene is one that survives; obviously, if a gene doesn't survive, it disappears. Insofar as a successful gene behaves in such a way as to serve its goal of survival, one might say that a Dawkins' "selfish" gene is a Posnerian "rational" gene.

The way a gene survives is through replication; the creation of exact reproductions of itself. Through the process of evolution, genes created "survival machines for themselves to live in." [\[FN107\]](#) Human beings are, from this point of view, merely complex survival machines. [\[FN108\]](#)

Because the evolutionary function of human beings as survival machines is to help our constituent genes survive, each of us is programmed to act in such a way that would further the replication of the genes of which we are comprised. Consequently, evolutionary biology rejects the common explanation that people or animals are altruistic because evolution serves the survival of the species. [\[FN109\]](#) It challenges the popular notion of evolution as the survival of the fittest species or individuals. [\[FN110\]](#) Species and individuals are mere pawns in the survival game played by genes. \*175 Human behavior is to be explained by the fact that we are each merely a colony of genes. The fact that we think of ourselves as separate unique individuals, not colonies, is because "[s]election has favoured genes that cooperate with others" as a single survival machine. [\[FN111\]](#)

Evolutionarily speaking, relatively little time has passed from the time hominids first appeared up until today. Moreover, human intelligence and technology have enabled us to cope with problems caused by our genetics, thereby slowing down the evolutionary process. This suggests not only that our behavior was initially genetically programmed at the time the human genome was originally created, but also that no significant upgrades to this programming have yet been released. Consequently, although our genetically programmed behavior may not serve our own individual self-interest, the same behavior, if it had been engaged in by our hairy grandams, might have served their self-interest, understood as survival and reproduction. For example, the common tendency to over-indulge in sweet, fatty foods, which seems irrationally self-destructive to the health of modern man, might have been perfectly rational behavior for the ape-woman desperately searching the veldt for food having sufficient calories to maintain her health and that of the children she was carrying, suckling and rearing when the only readily available sweets were nutritious fruits. [\[FN112\]](#)

At first blush, the proposition that human beings are survival machines might seem to suggest that individuals should be expected to act selfishly as autonomous individuals--always taking as much as they can, never caring about others, reproducing as frequently as possible and generally seeking their own welfare and survival. [\[FN113\]](#) Perhaps, if we accept the concept that survival \*176 means replication, we might stretch this to expect that individuals will act to further the well-being and survival of their off-spring. In fact, however, we observe all sorts of behavior that seems either self-destructive or altruistic in both humans and non-humans.

Evolutionary biology tries to explain this by hypothesizing that to say human beings are survival machines does not

mean that we are programmed for our own individual survival. Rather, we have been "built" to help our constituent genes survive. Consequently, our individual selfishness must always be subordinate to the selfishness of our genes. Accordingly, there might be circumstances when we are programmed to engage in behavior that not only does not help us as individuals, but which might actually be destructive to us.

Because each individual shares genes with other individuals to which he or she is related, one strategy for a gene's survival is to program the individual in which it is located to engage in behavior likely to insure that his or her relatives survive and reproduce. [FN114] Classic examples of this type of selfish altruism are colony insects such as bees and ants. If one thinks of evolution as the survival of the fittest individual, the activities of worker insects who sacrifice their lives when their colony or queen is attacked seem perfectly altruistic and inconsistent with Darwinian nature, red in tooth and claw. This activity, however, looks consistent with the selfish gene theory because all individuals in the colony, other than the male drones, are identical twin sisters (the drones are brothers of the female colonists who, therefore, share half the genes of their sisters). Each individual sister is programmed by her constituent genes to sacrifice herself for the colony or the queen (the only sister with the ability to reproduce). This makes it more likely that some of her carbon copied genes, which are housed in her twin sisters, survive and replicate.

Posner, at times, recognizes the difficulty of explaining the seemingly irrational behavior of modern individuals in terms of \*177 the rationally selfish behavior of our modern genes. Instead, Posner must make reference to hypothetically rational behavior by our ancestors' genes.

We need only imagine the kind of cognitive equipment that would be optimal in the prehistoric environment to which early man adapted: when thinking oriented to the distant future or to understanding low-probability events or to balancing immediate impressions against subtler inferences would have had only limited survival value; when language was in so rudimentary a state that a picture was indeed worth a thousand words (hence the availability heuristic, as illustrated by the reaction to horror movies, the "seen" live lobster, and pornography); when optimism was essential to keep one going in conditions of wretched adversity; and when emotionality in such forms as moralistic indignation was indispensable to the making of credible commitments essential to survival (emphasis added). [FN115]

Note, Posner does not suggest that we consult anthropologists who study the limited fossil evidence we have of the way primitive hominids actually lived-- it is sufficient for non-specialists to "imagine" what life might have been like. In other words, if the devoted Evangelical Christian seeks to make moral choices by asking herself "What would Jesus do?," Posner tries to explain moral behavior in others by asking himself, "What would Fred Flintstone have done?"

For example, according to Posner, it is "rational" for an individual to take care of his or her own immediate family members because he or she shares so many genes with them. Consequently, loving and protecting one's children, siblings, nieces and nephews serves the end of gene replication. One would also expect, therefore, that our affection for our relatives would be proportional to how closely related they are. Because a child receives half of its genes from each parent, a gene can bet that by programming a parent to save the life of his or her child, there is a fifty-fifty chance that she will also save one of the gene's replicants. Consequently, mothers are programmed to love their children. The wager becomes more risky when fewer genes are shared between the person in which the gene is housed and the person who is the object of the person's altruism. This matches our observation that the most intense emotional relation many people experience is the parent-child bond, often followed by \*178 sibling affection, and that many people feel complete indifference to their distant cousins.

Under this reasoning, however, it would be irrational on both the individual and genetic level for people to care for individuals who are not closely related. This is not merely because the survival of such other individuals would not positively help the replication of our specific genes. Insofar as individuals compete for scarce resources, the survival of others who do not share a specific individual's genes might make the successful replication of those genes less likely. Why then, do individuals frequently act altruistically to strangers? Why do adoptive and step-parents often love their charges as much as their biological offspring? Why do my eyes well up with tears whenever I see a sappy television commercial depicting adorable children? [FN116]

Posner hypothesizes that this is because when our ancestors evolved from ape to man, they "lived in tiny, isolated

bands" [FN117] consisting of one extended family. Consequently, as an empirical matter, it was likely that each individual was closely related and, therefore, shared genes with virtually every individual in which she came into close contact. [FN118] If the child our ancestress saw was not her own child, it was probably her niece or nephew. Caring for one's niece, who shares one-quarter of her genes, would be a means of replicating some of her genes (albeit not as good a means as taking care of her own child). Consequently, our genes "rationally" chose the strategy of making all (or most) adult humans feel tender-hearted towards all (or most) human children. [FN119]

This strategy does not seem to be rational to either the individual or the selfish gene today in New York City. There is little chance that I share a significant percentage of my genes with the \*179 adorable toddler smiling at me from across the subway car. But evolutionarily speaking, too little time has passed since my ancestors descended from the trees for me to have evolved out of the instinct to smile back. [FN120] Posner must admit that evolutionary biology predicts behavior that may have been "rational then [but] may not be entirely rational now." [FN121]

Posner attempts to explain a number of commonly observed and seemingly irrational behaviors which behavioral economists and other critics believe serve as the boundary to, [FN122] if not the outright falsification of, the rationality postulate. In addition to altruism, Posner offers explanations of such classics cited by JST as the sunk-cost fallacy, [FN123] the endowment effect, [FN124] the preference for fairness and the propensity for moral indignation; [FN125] all based on hypothesizing what life might have been like for Fred and Wilma--or more accurately, Lucy and her mate \*180 ("Ricky?"). [FN126] That is, the subject of economics is not the living subject, nor merely the pre-historic, but is our pre-human ancestors.

## 7. Auxiliaries

To recapitulate, Posner's definition of the word "rationality," which started as ends-means reasoning, whereby economic actors seek to maximize their desiderata (usually known as utility) by choosing among an ordered and consistent series of preferences (now means) depending on the context: (i) unconscious animal instinct serving some objective end such as survival or reproduction; (ii) uninformed choice among unknown or inconsistently ordered idiosyncratic, subjective preferences; (iii) competing choices made by various selves having differing preferences yet inhabiting the sane body; (iv) behavior of an economic actor that may or may not serve the ends of that actor but would have served the ends of our primeval hominid ancestors, as dimly imagined by non-specialists like Posner; or, more accurately (v) behavior of an economic actor which may or may not serve the ends either of that actor, that actor's genes, or the ends of the actor's primeval hominid ancestors, but which may have served an appropriate replicative strategy of the genes of the actor's primeval hominid ancestors.

At some points, Posner suggests that evolution and rationality are not one and the same theory, but are separate, but equally true, accounts of human behavior. He states that "rational-choice economics and evolutionary biology [are] systems of thought that have parallel structures." [FN127] But, then, he asserts that, in fact, they are both forms of rational choice theory-- asserting that they are both "founded on the concept of rationality \*181 that [he] defined at the outset." [FN128] As I have said, by Posner's definition, the unconscious mechanistic "selfish" gene is a "rational" one. And yet, Posner accuses his critics of adopting ad hoc, inconsistent and unfalsifiable hypotheses! [FN129]

It is hard to imagine a definition of rationality further from the standard ones. Why, then, does Posner continue to insist on calling his description of human nature "rationality?"

## 8. Semantics and Connotations

Am I merely quibbling about semantics? Who cares what Posner calls his concepts, one might argue, so long as he specifies his definitions and uses them consistently. Why can't he maintain, like Humpty Dumpty, "When I use a word . . . it means just what I choose it to mean--neither more nor less?" [FN130] Even admitting arguendo that Posner is consistent in his usage (although my foregoing discussion challenges this assertion) one might criticize such radical nominalism [FN131] which uses common words in idiosyncratic ways as not being misleading and,

therefore, not conducive to communication and debate. Indeed, for similar reasons Sen critiques much of the economic debate about rationality as taking place in an "enchanted world of definitions." [FN132]

The point is that Posner did not formulate new terminology for his new conception of economic behavior, he chose to use existing terminology in a new way. I suggest that he did so because of ambiguity, not clarity. That is, he wishes to trade in on the powerful normative connotations of conventional uses of the word "rationality," even as he wishes to distance himself from the conventional denotation.

As previously discussed, traditionally the term rational connotes the "higher," logical, and uniquely human capacity to reason. But, more than this, it connotes sanity. [FN133] To act irrationally is to act insanely. Consequently, to say some action is "rational" \*182 is not merely a descriptive term, but a highly normative one. Not only should one act rationally because reason tells one to do so, but to act otherwise is madness.

True, there is a competing tradition that defends certain "non-rational" sources of "knowledge" and action such as intuition, emotion, empathy, spirituality, or divine inspiration, as equal to or even superior to logical thought. These traditions are, however, generally considered antithetical to scientific investigation. As I discuss in *Just So Stories*, economics claims to be a social science; law and economics claims to bring scientific methodology and certainty to law. Consequently, when Posner refers to economic rationality, he is not only implying that economic actors do act this way, or that they should act this way for good reasons, or even that it would be insane or unreasonable for them to act this way, but also that law and economics can show by objective reason that this is the case.

An excellent example of this rhetorical move can be seen in Posner's conclusion to *Rational Choice, Behavioral Economics and the Law*. Posner has characterized JST's assertion that empirical research suggests that people frequently do not act in accordance with the traditional economic rationality postulate, but tend to deviate from it in fairly consistent and measurable ways, as saying that people are irrational. [FN134] As we have seen, Posner tries to save the rationality postulate by building auxiliaries designed to show either how this behavior can be interpreted within the rationality postulate, or how the rationality postulate can be redefined to include this behavior. [FN135] Ignoring the fact that JST's project may be consistent with much of Posner's response (they seem to be arguing not that the rationality postulate should be abandoned, but that it needs to account for apparent empirical anomalies), Posner's statement that JST are asserting that humans are irrational would only follow if, and only if, one first adopted Posner's idiosyncratic definition of rationality.

But Posner goes even further and surreptitiously sneaks a more colloquial definition (and all of its connotative baggage) back into his argument. First, he argues that to accept the JST suggestion that people are economically "irrational" means that \*183 human behavior is totally unpredictable. [FN136] No predictive economic theory could, therefore, be grounded on their description of decision making. [FN137] This assertion ignores JST's suggestion that deviations from Posnerian rationality seem to be quite consistent, systematic and, therefore, should be predictable (even if they have not yet developed a theoretical account of why people act this way). But, more importantly, it ignores Posner's own arguments made earlier in his article that behavior is "rational," in the sense that it serves "ends" even if the ends it serves are (i) the totally idiosyncratic, subjective, and emotional preferences of individual economic actors that are inconsistent with the more traditional "objective" economic assumptions of self-interested atomistic individualism, (ii) inconsistent preferences of different psychological selves warring for control over a split economic subject, (iii) ends not of the individual economic actor herself but of her ancient ancestors, and even (iv) nobody's ends, but only the mindless mechanical evolutionary tendency toward self-replication of the economic actor's ancient ancestor's genes.

I posit that this definition of "rationality" probably lacks any predictive value because it is hard to think of any behavior that could not retroactively be explained by one of these four mechanisms. Indeed, only one of the four Posnerian mechanisms arguably could have predictive potential because it is ostensibly grounded in objective standards--the observable behavior of genes. However, as JST accurately state, and as *Just So Stories* discusses, the evolutionary biological argument developed by Posner is totally a matter of the retroactive mode of thinking which Charles Sanders Peirce called "abduction," not the forward looking logic of deduction or induction. [FN138] As an ad hoc and post hoc explanation, Posner's theory would have no predictive value if he really took his definitions seriously.

Posner tries to distinguish himself from JST as follows:

Rational-choice economics makes the analyst think hard. Faced with anomalous behaviour, the rational-choice economist . . . doesn't respond, "Of course, what do you expect?" Troubled, puzzled, challenged, he wracks his brains for some theoretical extension or modification that will accommodate the seeming anomaly to the assumption of rationality. From these efforts have come the advances in economic theory \*184 listed in the preceding paragraph. [FN139]

As JST point out, "Posner seems to think that the fact that it is possible to tell a rational choice consistent with the data is sufficient to establish that this explanation is the correct one. This is obviously a fallacy." [FN140] As discussed in Just So Stories, "abduction" is the attempt to explain anomalies through the imaginative telling of potentially explanatory stories. [FN141] Abduction is hypothesis formation, not hypothesis testing, let alone proof. Another means, such as falsification, verification or meta- abductive theory is needed for this latter purpose. [FN142] Posner, following Friedman, declares that the value of the rationality postulate lies in its predictive power, and accuses JST of confusing explanation and prediction. [FN143] In fact, however, abduction is precisely a retroactive explanation of behavior not a prediction. [FN144]

One should not disparage abduction when used correctly. The first stage in the development of a scientific theory is the formation of a hypothesis to be tested. [FN145]

## 9. Rationality as Sanity

In any event, Posner does not, in fact, take his auxiliaries seriously but reverts to traditional notions of rationality. The implicit definition of economic rationality, which Posner actually applies, is the traditional one of conscious, logical reasoning aimed at achieving certain objectively determined ends--namely economic efficiency understood as the maximization of utility or wealth! At one point in their article, JST suggest that since empirical research suggests that economic actors might deviate from economic rational behavior under certain circumstances (that is, they make decisions that can result in economic efficiency) government \*185 regulation might be appropriate to cure this "market failure."

Posner replies that this would not only be totalitarian, but "nothing in JST's analysis exempts 'experts' from the cognitive quirks, from weakness of will, or from concerns with fairness. The expert, too, is behavioral man. Behavioral man behaves in unpredictable ways. Dare we vest responsibility for curing irrationality in the irrational?" [FN146]

Note that Posner is implicitly relying on the identification of rationality with reason and sanity. Posner implies that if we accept the JST proposition that people deviate from Posner's definition of rationality under some circumstances, this is equivalent to saying that all persons are in all cases unreasoning and arbitrary. He accuses JST as treating "the irrationalities that form the subject matter of behavioral economics as unalterable constituents of human personality. All their suggestions for legal reform are of devices for getting around, rather than dispelling, our irrational tendencies . . . ." [FN147] That is, rationality is not just a property that people do display, it is one that they should display.

In contrast, Posner's economic actors are "rational" in the traditional sense. He states, "[E]ven if as I believe the sunk-costs fallacy has biological roots, it should not be impossible to educate people out of it." [FN148] In other words, despite his arguments throughout his article that the behavior he identifies can be accounted for within his definition of rationality, we now see that, in fact, he (like JST) really identifies this unconscious, subjective, inconsistent and instinctual behavior as irrationality. Rationality is not a brute fact about behavior, but a reasoning process that can be learned. The rational man is he who will consciously and logically identify his own proper economic ends and determine the best means of achieving them and will cultivate self-control precisely in order to control his base animal passions.

## II Economists on Rationality



Posner speaks as though he were the voice of economics. He typically begins descriptions of his economic theory with lead-ins \*186 such as "economists define rationality as . . ." or the like. In fact, real economics is from the monolith that Posner would have us believe. As in any social science there are many schools of economics, and great differences of opinion exist within each school. My complaint is not so much that Posner confines his analysis to only one school of economics--the Chicago branch of neo-classical price theory which has dominated the Nobel prizes for economics in recent times. This is to be expected. But Posner does not merely fail to discuss the differences within this school; his description of economics has become so highly idiosyncratic that it no longer (if it ever did) reflects the views of any identifiable main stream economist.

This Part briefly introduces what a number of Nobel laureates in economics have said about economic rationality to serve as a foil to Posner. Four of these, Gary Becker, Ronald Coase, Paul Samuelson and George Stigler work within the neo-classical framework, and all but Samuelson are associated with the Chicago school. I compare Posner to Milton Friedman, another Chicago Nobel laureate, in *Just So Stories*. Just as the last section frequently cites the criticism of Nobelist Herbert Simon, the father of behavioral economics, as a foil to explain neo-classical rationality, this section frequently makes reference to the work of another Nobel laureate, Amartya Sen. This is not because I am a Senian. It is because Sen, while no wild-eyed radical, is more critical of the neo-classic tradition than the others. This Part also relies to a large extent on Mark Blaug's classic history, *The Methodology of Economics or How Economists Explain*.

This discussion is not designed as a comprehensive survey of rationality theory in economics. Rather, it is a brief introduction to the diversity of scholarship in this area. The first section discusses the standard neo-classic ideal of rationality adopted, modified or critiqued by these economists. The second turns to Becker's rather startling rewriting of this ideal in light of perceived empirical challenges. I suggest that Becker can be interpreted to intuit some of the insights of Lacanian psychoanalysis, explicated in the last part of this Article.

## A. The Neo-classic Model

### 1. Utility Maximization

As already introduced, Blaug states that the classic rationality postulate sees economic subjects as individualistic utility maximizers. \*187 [FN149] Becker states that the economic concept of rationality only requires "that individuals maximize welfare as they conceive it, whether they be selfish, altruistic, loyal, spiteful, or masochistic." [FN150] Economists believe that "behavior is forward-looking, and it is also assumed to be consistent over time." [FN151] Economics "does not assume that individuals are motivated solely by selfishness or material gain. [In this view, economics] is a method of analysis, not an assumption about particular motivations." [FN152]

As I have stated elsewhere, what characterizes "economic rationality is, therefore, not necessarily selfishness narrowly defined, but . . . the ability to know what one wants and how to get it." [FN153] In the words of Frank Knight, economically rational persons are supposed to "'know what they want' and to seek it 'intelligently.' . . . They are supposed to know absolutely the consequence of their acts when they are performed, and to perform them in the light of the consequences . . ." [FN154]

Becker states the rationality postulate as follows: "[A]ll human behavior can be viewed as involving participants who [1] maximize their utility [2] from a stable set of preferences and [3] accumulate an optimal amount of information and other inputs in a variety of markets." [FN155]

Stigler lists three characteristics of the neo-classical rational economic subject: "1. His tastes are consistent. 2. His cost calculations are correct. 3. He makes those decisions that maximize utility." [FN156] By consistent, Stigler means well-ordered and transitive. That is, if, at a given set of prices, A prefers A over B, and B over C, not only will A consistently choose A over B, she will also consistently choose A over C. [FN157] Stigler claims that the requirement that cost calculations are correct is equivalent to \*188 stipulating that consumers can do "proper arithmetic" and "is so obvious as to be vulgar". [FN158] Nevertheless, Stigler admits that empirical research indicates that people are, in fact, poor at comparing non-monetized costs. [FN159] Finally, "utility maximizing"

means that when given the choice of two "market baskets," the rational economic subject will choose the one he prefers. [FN160]

This conceptualization of rationality has some obvious similarities with Posner's. First, both definitions involve maximization of some desiderata, usually called utility. [FN161] Second, "preferences" or "tastes" are ostensibly pre-given or outside the basic rationality postulate. As explained by Sen, "preference may be seen as 'prior' to choice: we may try to choose what we prefer." [FN162] In other words, there is no accounting for tastes in the sense that they are what they are. [FN163] The neo-classical economist can never say what one should prefer. It necessarily follows from this that, as Posner realizes, the neo-classicist must admit the possibility of altruistic preferences. [FN164] As discussed in the next section, it is not \*189 clear, however, how one can, in fact, accommodate sympathy or antipathy within the neo-classical system. Consequently, neo-classicists (and Posner) usually assume that economic actors tend to have narrowly selfish preferences as an empirical matter. Third, the neo-classical definition, like Posner's, does not require that economic actors' preferences be conscious. Consequently, as I discuss in *Just So Stories*, Posner adopts Friedman's controversial proposition that the rationality postulate only requires that economic subjects act "as if" they had certain preferences and made calculations. [FN165]

Nevertheless, the neo-classic model differs from Posner's in some very important, if not as obvious, ways. First, despite his protests to the contrary, by adding the possibility that empirical persons might be a battle ground upon which micro sub-selves compete for dominance, Posner has, in effect, completely rejected the neo-classical hypothesis of consistent and well-ordered tastes--at least insofar that this is considered a falsifiable proposition. Any and all seemingly inconsistent choices made by any empirical individual (or group of individuals) can always be explained retroactively as a series of consistent choices of sub-selves who temporarily and contingently win control over the individual at different times (or in terms of a hypothesized primeval ancestor). That is, unless and until Posner can develop a hypothesis as to when and how one sub-self prevails over another sub-self (as he has with respect to his analysis of the preferences of young selves versus old selves) or determines how he could test his evolutionary musings, Posner's "theory" remains completely unpredictable, inconsistent and non-falsifiable, as JST correctly argue. [FN166]

Second, while Posner labels uninformed decision making as rational, and even declares that, given the costs of gathering information, it can actually be irrational for an economic subject to be fully informed, the neo-classic model suggests that the economic subject does have the information necessary for her to make choices. Third, and most importantly, by adding socio-biology to his model, Posner departs from the neo-classical postulates of proper calculation as well as utility maximization.

## \*190 2. Samuelson; Revealed Preferences

Paul Samuelson's revealed preference theory (RPT) is an attempt to protect the rationality postulate by purging "the theory of consumer behavior of the last vestiges of utility by restricting it to operational comparisons between value (quantity times price) sums." [FN167] RPT is included within this section on the mainstream or hard core of the rationality postulate, rather than in the next section on alternatives to the traditional rationality postulate, because RPT merely challenges what is to be measured and how. [FN168] Indeed, one need not agree with Samuelson's claim that there is a meaningful distinction between RPT and utility theory. Blaug goes so far as to suggest that, despite Samuelson's attacks on Friedman's theory and methodology (which Posner claims to follow), that "there are no vital methodological issues at stake." [FN169] "In the final analysis, Samuelson is almost as defensive about economics as is Friedman." [FN170]

Samuelson traces the erosion of the concept of "utility" in economic theory from a Benthamite substantive and measurable something actually experienced by an economic subject to a purely ordinal notion of preference by which consumers choose more or less of something. [FN171] He asserts that "[f]rom its very beginning the theory of consumer's choice has marched steadily towards greater generality, sloughing off at successive stages unnecessarily restrictive conditions." [FN172] Specifically, by "discrediting . . . utility as a psychological concept [they] robbed it of its only possible virtue as an explanation of human behavior in other than a circular sense, revealing its emptiness as even a construction." [FN173] This leads to the circular result that "the consumer's

market behavior is explained in terms of preferences, \*191 which are in turn defined only by behavior." [FN174] Nevertheless, he thinks that modern utility theory does place meaningful "restrictions upon demand functions and price-quantity data . . . [which] could be refuted or verified under ideal observational conditions." [FN175] Consequently, he wished to preserve the fruitful heart of utility theory by having it slough off "the last vestiges of the utility analysis." [FN176]

Traditional utility theory argues that people make choices because they have preferences (suggesting that there might be a distinction between what one actually chooses in any given situation and one's true subjective preferences). Samuelson tries to do away with the need to understand this inner subjective experience by arguing that the only economically meaningful preferences are those that are revealed in choice. Samuelson restricts the economic study of human behavior "to operational comparisons between value (quantity times price) sums." [FN177] Sen explains the difference in this way:

Preference may be seen as 'prior to choice: we may try to choose what we prefer. This is indeed the natural sequence in reflective choice, seen from the first-person point of view. However, from the point of view of the outside observer the opposite sequence may be the natural one: we observe the person's choices and surmise his or her preferences from these choices. There are, of course, cases that run counter to each of these interpretations. [FN178]

Under RPT, therefore, "preference here is simply defined as the binary relation underlying consistent choice. In this case 'counter-preferential' choice is not empirically different, but simply impossible." [FN179] In Samuelson's own words, revealed preference means: "By comparing the costs of different combinations of goods at different relative price situations, we can infer whether a given batch of goods is preferred to another batch; the individual guinea-pig, by his market behaviour, reveals his preference pattern --if there is such a consistent pattern." [FN180]

As Sen suggests, RPT reduces economic rationality to \*192 consistent choice. I will address what it means for choice to be consistent--and the implication of Samuelson's qualification is addressed in the next section.

Samuelson's three postulates of RPT [FN181] are that: (i) "confronted with a given set of prices and with a given income, our idealised individual will always choose the same set of goods;" [FN182] (ii) "the consumer's behaviour is independent of the units in which prices are expressed;" [FN183] and (iii) "the individual always behaves consistently in the sense that he should never 'prefer' a first batch of goods to a second at the same time that he 'prefers' the second to the first." [FN184]

Further, although Samuelson claims to do away with subjective utility completely, he never succeeds in doing so. Samuelson does not seem to go all the way to accepting a radical behaviorist approach, which only looks at action because it denies any ability to have knowledge of subjective experience (or even holds that subjective experience is illusional). [FN185] Rather, he always insists that choice reveals one's actual preferences [FN186]--that one knows what another person (and perhaps oneself) really prefers through his deeds, not his words. In Sen's words "The rationale of the revealed preference approach lies in the assumption of revelation and not in doing away with the notion of underlying preferences, despite occasional noises to the contrary." [FN187] That \*193 is, to use the word "preference" solely to describe external acts with no reference to the conscious or unconscious mental state of the actor "would appear to represent an elaborate pun." [FN188] Given that Samuelson insists that consumer behavior is based on preferences that are revealed by choices, Samuelson leaves himself open to Sen's questions as to whether preferences are indeed revealed by choice, or, indeed, what it means to say that a preference is revealed by a choice. If, as Sen suggests, that sometimes preferences may not be accurately revealed by choice, or that a choice might sometimes diverge from a preference, then a RPT economist needs to develop a theory either as to when such a divergence would occur and a methodology for discovering consumers' true preferences, or alternately, develop a theory as to why economic policy should give credence to actual choices rather than to actual preferences.

Sen amusingly illustrates how preferences may not be revealed via choice by proposing that Buridan's famous ass is, essentially, the patron saint of RPT. [FN189] In the well known story, the ass, who is located equidistant between two identical stacks of hay, starves to death because he cannot choose between them. Sen, however, argues that if the ass were truly indifferent between the two stacks, he would have flipped a coin or otherwise have made a random choice. The problem is that this would have deceived Samuelson, who would have concluded that the ass had revealed his preference for the chosen haystack. Consequently, the noble ass, not wishing to deceive anyone,

"died for the cause of revealed preference." [FN190] Tragically, the martyred ass, more saintly than intelligent, failed in his goal. By choosing neither haystack, the revealed preference theorist may have been led into thinking, incorrectly, that the ass preferred starvation to life, when in fact he preferred truth over life and was willing to suffer starvation as the price of his ideals!

In other words, one's choices might indicate something other than one's preferences. One might, like St. Ass, be truly indifferent between any number of potential choices. One might choose option X, not because she wants X, per se, but because she has some long term goal that will be furthered by her choice of X today. One might choose X, not because of one's preference for \*194 X, but because of one's sympathy (or antipathy) for, and commitment to, another person. I will return to some of these issues when I turn to the ideal of consistency.

RPT would seem to have some similarities and some differences with Posner's theory. [FN191] Having abandoned any attempt to account for the subjective state of mind and experience of economic subjects, Samuelson's approach is not the same as, but is not necessarily inconsistent with, Posner's claim that behavior can be rational, even if it is totally unconscious and instinctual. Moreover, Samuelson's abandonment of the proposition that economic subjects seek to maximize their own utility (or some other subjective desiderata) does not necessarily imply, but may be consistent with, Posner's proposition (drawn from social-biology) that sometimes people might act in a way that not only does not serve their utility, but might also be positively detrimental to it (i.e. because the behavior might have served the interests of our primeval ancestors or our primeval ancestors' genes). That is, RPT does not purport to argue why people make certain choices, it just hypothesizes that when people make certain choices they tend to make them consistently.

Alternately, although Samuelson's attempt to eliminate utility from an understanding of consumer behavior at first blush seems to reflect Posner's assertion, following Friedman, that economic theory does not require that economic subjects actually be rational, so long as they act "as if" they were rational, there is in fact an important difference. [FN192] If one were to take Posner at his word, then Posner would be proposing a radically behavioralist program. As described by Hicks, "the econometric theory of demand does study human beings, but only as entities having certain patterns of market behaviour; it makes no claim, no pretence, to be able to see inside their heads." [FN193]

Consequently, Samuelson is one of the most virulent opponents of Friedman's "as if" approach to the rationality postulate, which he ridicules as the F-twist. [FN194] Samuelson thinks that the \*195 purpose of scientific theory is not merely prediction, but also description. [FN195] The accuracy of assumptions underlying a theory are not merely relevant to its validity, they are one of the tests of its validity.

Moreover, as we have seen, Samuelson never totally abandons the belief that economic subjects have subjective preferences, or that they make conscious choices, as can be seen in his insistence that these preferences can be revealed through action. Samuelson shares Posner and Hicks's suspicion that there may be no reliable direct way to look into the human head, but, unlike Posner and Hicks, Samuelson retains a belief that there might be an indirect way of doing so. To put this in the vernacular, Samuelson believes that one cannot trust an individual's self-serving statements of his preferences unless he "puts his money where his mouth is" and acts on them. That is, economics is a study not of what people prefer, but of how they act on their preferences. This is not merely a difference in rhetoric. As Samuelson himself realized, it could make a difference for welfare economics, which is essential for the development of legal policy based on economic theory. [FN196] Samuelson's desire to do away with any direct connection with utility in price theory seems to be drawn primarily from methodological considerations.

In Sen's words:

[O]ne reason for the tendency in economics to concentrate only on the 'revealed preference' relation is a methodological suspicion regarding introspective concepts. Choice is seen as solid information, whereas introspection is not open to observation. . . . Even as behaviourism this is peculiarly limited since verbal behaviour (or writing behaviour, including \*196 response to questionnaires) should not lie outside the scope of the behaviourist approach. Much of economic theory seems to be concerned with strong, silent men who never speak! One has to sneak in behind them to see what they are doing in the market, etc., and deduce from it what they prefer, what makes them better off, what they think is right, and so on. [FN197]

Samuelson ends his earliest explication of RPT with the following paragraph:

I have tried here to develop the theory of consumer's behaviour freed from any vestigial traces of the utility concept. In closing I should like to state my personal opinion that nothing said here in the field of consumer's behaviour affects in any way or touches upon at any point the problem of welfare economics, except in the sense of revealing the confusion in the traditional theory of these distinct subjects. [FN198]

In other words, Samuelson only argues that the confusing concept of the individual maximization of subjective utility is not needed for price theory because the proposition of downward sloping demand curves only requires postulates of consistent choice. In contrast, welfare economics is traditionally concerned with maximization of the aggregate utility (or wealth) of society, among other goals, such as fair distribution. Consequently, the elimination of utility considerations for one sub-set of economics has no necessary implication for other sub-sets of economics. Indeed, insofar as Samuelson speaks in terms of the revelation, as opposed to the non-existence, of preferences, he implicitly preserves the concept of subjective utility for the purposes of welfare economics.

The biggest potential disagreement between RPT and Posner would seem to revolve around consistency. As already suggested, Posner's insistence that tastes can be totally subjective and irrational, his suggestion that the economic subject might be a battleground on which different sub-selves having different tastes compete for temporary dominance, and his hypothesis that sometimes economic subjects may act not to maximize their own personal utility, but might serve some now obsolete purpose, all suggest the possibility of objectively inconsistent behavior. If, however, as Posner insists, one goal of the economic theory of consumer behavior is prediction, some requirement of consistency would seem to be necessary. To follow this analysis we \*197 need to consider in more detail what "consistency" could mean in this context.

### 3. Well-ordered and Consistent Preferences

As we have seen, many, if not all, neo-classical economists include the requirement that tastes be well-ordered and consistent as one, or in the case of Samuelson, the only, element of economic rationality. Nevertheless, the descriptions of consistency in the literature I discuss tend to be literally limited to a few sentences, as though the concept were self-evident. As is often the case, the most careful analysis of the meaning of a concept comes not from a proponent, but from a critic of the concept--in this case Sen. Sen aims his critique at RPT specifically, but most of it is applicable to the conception of consistency as part of rationality generally. As Sen notes, RPT is unusual in that "[w]hile consistency is taken in economic theory to be a necessary condition of rationality, it is usual to supplement that requirement by some substantive view as to what the individual would maximize. The regularity of consistent pursuit of self-interest is a frequently used assumption of rational behaviour." [FN199]

Proponents of consistency implicitly [FN200] or expressly require that preferences be transitive (what I have called well-ordered). Again, this means that, if the economic subject chooses A over B and B over C, then he will choose A over C.

Samuelson's RPT only demands consistency of choices subject to budget constraints of the type faced by consumers in competitive markets. [FN201] Obviously, this does not exhaust the type of economic choices consumers make. Posner has argued that many, if not most choices, including for example the choice of a spouse, have an important economic aspect requiring cost-benefit analysis. [FN202] This is a widely held view among economists. [FN203] In the \*198 absence of express monetized markets choices can be analyzed as taking place in shadow and hypothetical markets. Consequently, Sen thinks that if consistency should be considered an axiom of economic theory (i.e. as part of the rationality postulate), then it should be demanded with respect to all economic choice. [FN204] Nevertheless, Sen suggests that Samuelson's limitation may have a methodological justification. If we take consistency as a hypothesis that is to be tested empirically, then one might wish to limit the hypothesis to phenomena that can be reliably observed and tested. [FN205] This, of course, is consistent with Samuelson's insistence on studying only those preferences that are revealed in actual market choices. Both the limitation on consistency and on revealed preferences are based on assumptions about the unreliability of direct evidence of mental states and the relative ease of measuring market behavior. I have already questioned the first assumption, and will now raise some questions about the latter.

What does it mean to make consistent choices in the market? It is overly simplistic to say that if one chooses A

over B on one occasion, then it would be inconsistent to choose B over A on another occasion. Surely it does not mean that one must do precisely the same thing everyday. As Sen suggests, no one would seriously propose that it would be inconsistent or economically irrational if one ate steak on one night and fish the next. [FN206] It only begs the question, however, to suggest that we can add a preference for variety to the model. How would we distinguish (and therefore empirically test) a consistent and predictable preference for variety and inconsistent, quixotic and unpredictable behavior?

Another question is: What do we do about changes in fashion or other tastes? Was I economically inconsistent and irrational to have bought flat mules during the summer of 1999 because Vogue said they were in style when I have favored spiked heel pumps in the past? Once again, positing that one might have a consistent preference for being in fashion merely begs the question. As shall be discussed below, because his "new home economics" is concerned largely with the formation of preferences, \*199 Becker is a notable exception. [FN207]

As we have seen, Posner has tried to deal with some issues of consistency by positing that the true economic subject is not the individual, but warring sub-selves inhabiting the individual. This "solution," however, only aids in explaining certain apparently inconsistent tastes. In my opinion, Posner's approach has the most intuitive appeal in the original context in which it was developed--explaining changes in behavior over a lifetime. Posner suggests that one's young self is, in a meaningful way, a different person from one's old self (having different physical capabilities and needs, a different life span, etc.). We tell young people not to engage in certain pleasurable activity because it will have a harmful effect when they are old--but why should a young person care about the old person that he or she may or may not eventually become? Indeed, if the pleasurable, albeit risky, behavior were to result in the death of the young subject, then the old subject would never come into existence. Consequently, the young subject might intelligently discount the hypothetical preferences of this potentially non-existent future self. This approach, of course, raises its own sub-problems, such as what would be a consistent rate of change of preferences over time, but we might be able to make certain general statements about predictable changes in preferences with age among the population as a whole. Indeed, Posner's approach does fit with many of my stereotypes of the young and the old, as well as my own individual experiences of myself as a young girl and a middle aged woman.

In my opinion, Posner's approach has lesser appeal in explaining why we engage in behavior that we soon regret (as in my example of the dieter who could not resist the hot fudge sundae). The appeal to me is that, although Posner's model is crude, it at least intuits the psychoanalytical proposition that the subject is not unitary, but split. The problem is, of course, that, even if each of Posner's sub-selves is consistent, he has no theory as to when or how a micro-self wins dominance over the macro-self. Without such a theory he has no account of what it would mean for the macro-self, who is the party who actually engages in market transactions that reveals his preferences, to be acting consistently.

Posner's approach has no purchase, however, in explicating \*200 how to reconcile variety and fashion with consistency. It does not seem plausible to say that when I go to the grocery store and decide to buy fish because I had steak yesterday I am inhabited by two sub-selves, one of whom prefers steak (who won the battle for domination yesterday) and one of whom prefers fish (who is in control today). Nor does it make sense to say that recently a new flats-loving sub-self wrested control of my psyche from its former stiletto-loving dictator. Rather, the love of variety means that the same self who wanted steak yesterday wants fish today precisely because she had steak yesterday. The love of fashion means that the same self who made me wear heels last year made me wear flats this summer precisely because flats were in fashion and heels look so "last year." The fish eater will no doubt soon want to eat something different. Recent fashion magazines declare that heels are coming back, so that by the time you read this Article I might very well be wearing 4- inch stilettos.

There may or may not be solutions to the problems of variety and fashion within the rationality postulate. As discussed below, [FN208] it is precisely these problems of consistency that both lead Becker and Stigler to posit consistency only with respect to categories that are extremely broad and caused Becker to study how specific tastes change.

A more serious problem might be how to reconcile the requirement of consistency with interpersonal and "moral" preferences. I am not re-raising the issue of whether we can account for altruism and morality by adding a "taste" for it. I am instead raising the broad range of issues that Sen has analyzed under the terms sympathy and

commitment. [FN209]

Traditionally, economic theory has assumed that individual preferences were independent--that is, even if one has a preference for altruism, and even if one's taste might change over time because of the influences of fashion and advertising, the economic subject still makes decisions based on her own preferences. Sen suggests that our subjective experience sometimes leads us to make choices not because of our own preferences but because of the preferences of others. Posner rather glibly suggests that we could protect the rationality postulate by merely positing that tastes are interdependent. [FN210] He does not, however, \*201 examine the difficult question as to how this could be done.

Sen uses the term "sympathy" to mean that one's well-being is somehow dependent on that of another, positively or negatively (negative sympathy can also be called antipathy). [FN211] "Commitment" refers to the extent one does something one does not feel one wants to do or does not do something one feels one wants to do because of a principled reason. [FN212] The existence of sympathy and commitment complicates the ability to define consistency, and challenges the presumption that preferences are revealed by choice. For example, suppose I enjoy a strong drink but refrain from ordering my usual martini at lunch because one of my students walks into the restaurant and I feel embarrassed. Or, I have a make-over in a department store and buy a lipstick I really don't want because I feel intimidated by the saleswoman. Am I being consistent in my preferences?

Once again, Posner's solution of adding a preference for appearances to my psyche and stating that I am consistently comparing two different market baskets--for example, a drink enjoyed in private and a drink observed by a student [FN213]--does not really answer the consistency question. Indeed, Posner is engaging in precisely the type of behavior of which he accuses JST. He is abducting an ad hoc explanation for observed behavior after the fact. At some level of specificity, no two market baskets are every completely identical. Without a theory as to when and under what circumstances economic subjects can be expected to incorporate other people's tastes, or principles, into their choices, Posner cannot predict behavior (supposedly the definition of a theory). Rather, Posner's approach can explain absolutely anything and, consequently, explains nothing.

Even if one were able to develop a theory that would predict this behavior (thereby both making it appear predictable and consistent), the existence of sympathy-antipathy and commitment has implications for economic policy. First, it would put into question the basic tenet of RPT--that one's choices actually reveal one's preferences. Rather, it reveals, if anything, \*202 conflicting preferences. Second, and more importantly, even if one rejects RPT, the existence of sympathy-antipathy and commitment would put into question the entire "invisible hand" mechanism of neo-classical welfare economics.

As we have seen, both utilitarianism and its wealth maximization variant hold that the goal of an economic system is the maximization of society's aggregate desiderata (utility or wealth). The invisible hand thesis suggests that this will occur in an efficient market in which each economic subject separately seeks to maximize her own personal desiderata. Sen suggests, however, that economic subjects may sometimes (or frequently, or even usually) act in a manner that does not maximize the goods and services they prefer (i.e. that would instead maximize their personal utility or wealth). If so, will their actions result in the maximization of aggregate utility?

To conclude that it would have this result, one would once again have to include in the utility calculus the economic subjects' "preferences" for sympathy-antipathy and commitment. For example, we would have to be willing to say that an individual's utility would be maximized even if he buys (forgoes) goods and services he does not prefer because of the "pleasure" he obtains (or "pain" he avoids) by achieving (avoiding) public approbation for his actions. This would be an example of what Sen condemns as the "enchanted" land of definitions, where economists idiosyncratically define common terms. In this case, utility (satisfaction, happiness) has been redefined as dissatisfaction. This allows economists to use the rhetoric of utilitarianism and the positive connotations associated with a philosophy based on human happiness, to support a system that has little to do with human happiness.

The implications of sympathy-antipathy and commitment for wealth maximization are, obviously, even stronger.

## B. Modifications within the Neo-Classical Model

Despite Posner's suggestions to the contrary, many mainstream economists have found the traditional account of economic rationality to be wanting. Accordingly, although they continue to speak within the traditional vocabulary of rationality, they have implicitly modified their personal definitions in subtle but interesting ways. This section concentrates on two of these modifications. On one hand, Ronald Coase adopts an extremely **\*203** strict definition of rationality, but argues that no empirical economic subject can meet this definition. On the other hand, Gary Becker, in conjunction with George Stigler, argues that economic subjects are indeed rational, but this is because they adopt a very general definition of rationality. Surprisingly, despite their differences, both of these approaches imperfectly reflect certain insights about human behavior that can be drawn from Lacanian theory.

### 1. Coase; Irrationality as Transaction Cost

I have argued elsewhere extensively [\[FN214\]](#) that Coase's famous article, *The Problem of Social Cost*, [\[FN215\]](#) should not be read in law-and-economics literature, as it usually is, as an analysis of the perfect market ideal, or a call to amend or interpret law in such a way as to minimize transaction costs. Rather, it is an attempt to develop a new paradigm for defining economic costs and causation. Coase argues that economics implicitly import the legal definition of costs as changes in the status quo of existing rights. Instead, he believes economic costs should be seen as anything that prevents the achievement of the economic ideal of the perfect market.

As Coase posits, "[w]ith zero transaction costs, producers would make whatever set of contractual arrangements was necessary to maximize the value of production." [\[FN216\]](#) As correctly described by Jules Coleman, the Coase theorem can be seen as a definition of what it is to act rationally. [\[FN217\]](#) "To act rationally . . . is to promote allocative efficiency [by, in the cases discussed by Coase] . . . put[ting] resources to their profit-maximizing use." [\[FN218\]](#)

**\*204** At first blush, Coase might seem to be merely repeating Posner's weak definition of rationality as "choosing the best means to the chooser's ends"; [\[FN219\]](#) "assuming that man is a rational maximizer of his ends in life, his satisfactions--what we shall call his 'self-interest.'" [\[FN220\]](#) But, when one remembers Coase's definition of transaction costs (anything that prevents the perfect market), then irrationality--understood as acts that do not promote allocative efficiency--is a market imperfection or a Coasean transaction cost by definition. This means that, conversely, rationality must be defined as that behavior that in fact does promote allocative efficiency. Economic rationality cannot, therefore, be limited to choices that serve the individual economic actor's best interests as he sees it.

**\*205** Of course, the implication of adopting such a strict definition of economic rationality is that, rather than assuming that economic subjects are rational, Coase, in effect, is positing that it is impossible for economic subjects to be rational. In my reading, this is, however, consistent with Coase's project. Coase is criticizing his fellow economists for basing economic analysis on the impossible perfect market ideal and then trying to extrapolate from this analysis to real world policy. Coase, in contrast, argues that economists are wrong to use this method, precisely because transaction costs can never be eliminated entirely. [\[FN221\]](#) The perfect market is not merely empirically, but theoretically, impossible. If it could exist, the perfect market would be the end of all markets--all market exchange would cease because all goods and services would have always already flowed to the highest valuing users and all market participants would be satisfied, or, more accurately, be perfectly indifferent. [\[FN222\]](#)

Because the perfect market without transaction costs is impossible, Coase calls for economists to study actual costs in actual markets in order to understand what they are, how they function, and predict what the reduction in any specific actual cost might be. This means that when Coleman characterizes Coase as saying, in effect, that in order to reach an efficient bargain one needs to display certain behavior which we call economic rationality, the necessary Coasean implication is that we should then study actual human behavior to see if it is itself a barrier to bargaining and, therefore, a transaction cost that should be studied.

Consequently, Coase states:

This preoccupation of economists with the logic of choice, while it may ultimately rejuvenate the study of law,



political science, and sociology, has nonetheless had, in my view, serious adverse effects on economics itself. One result of this divorce of the theory from its subject matter has been that the entities whose decisions economists are engaged in analyzing have not been made the subject of study and in consequence lack any substance. . . . We have consumers without humanity, firms without organization, and even exchange without markets. [FN223]

He continues: "There is no reason to suppose that most human beings are engaged in maximizing anything unless it be \*206 unhappiness, and even this with incomplete success." [FN224] Coase thinks the traditional economic treatment of human nature is not an exception, but an exemplar of the flawed approach of traditional economics. "[T]he acceptance by economists of a view of human nature so lacking in content is of a piece with their treatment of institutions which are central to their work." [FN225]

In my reading, Coase is, in effect, saying to economists like Friedman and lawyers like Posner:

You claim to adopt the rationality postulate because it has been a good predictor of economic behavior. In fact, as we all know, economic actors often do not act as predicted by the rationality postulate. We economists should stop making predictions based on assumptions that we know are inaccurate. A more accurate understanding of how human beings actually act in economic transactions should be expected to yield more accurate predictions. Economists should, therefore, stop making predictions and start doing empirical research.

This sounds an awful lot like behavioral economics--precisely the project that Posner condemns!

This is not to say that Coase rejects traditional economic assumptions about human nature out of hand. As indicated in his thoughtful essay, Adam Smith's View of Man, [FN226] Coase does seem to accept that, as an empirical matter, people frequently tend to act in a self-interested way in market transactions--or that markets have a tendency to drive out economic behavior that is not self-interested. [FN227] He also accepts the fact that people often act benevolently, but argues that, while benevolent behavior might be perfectly appropriate in the private sphere, it might be pernicious in the public one. For example, following Smith, he asserts that "[a] politician, when motivated by benevolence, will tend to favour his family, his friends, members of his party, \*207 inhabitants of his region or country (and this whether or not he is democratically elected)." [FN228]

Coase and Smith seem to think that the advantage of the market is not that it allows people to follow their true nature, but that it limits the unintended malevolent effects that benevolent acts could have in the public sphere. That is, the market "is able to use the strength of self-interest to offset the weakness and partiality of benevolence, so that those who are unknown, unattractive, or unimportant, will have their wants served." [FN229] In other words, narrowly self-interested behavior is an effect, not a cause, of market transactions.

To expand on what I think is Coase's (and Smith's) point, capitalism is the appropriate economic system for modern liberal democracies not because both are based on a shared assumption of the atomistic self-interested individual. The individual of liberalism is not intended as an accurate account of empirical human beings, but an abstraction designed to accommodate the liberal vision that public life be characterized by the abstract ideals of equality and freedom, in contrast to traditional societies which are characterized by the concrete actuality of hierarchy and control. Liberalism's goals are served by replacing permanent relations of status with temporary relations of contract in the public sphere, while preserving the possibility for permanent relations of family and affection in the private. "Benevolence," so valued in the private sphere of family and friendship, leads to favoritism, cronyism and vendetta in the public sphere. Feudalism, for example, was a political and economic system based on idealized personal bonds of trust and love between lord and vassal. [FN230] Capitalism, which rewards atomistic profit seeking contractual \*208 transactions, encourages the behavior that makes the liberal democratic state possible.

It would seem to follow that economists studying markets should not assume that people selfishly act to maximize their personal utility (which may or may not include altruistic or "benevolent" preferences). Because Coase argues that no actual market is or can be perfect, economic subjects should not be expected to act perfectly selfishly or rationally as an empirical matter. The Coasean analysis would suggest that while economists might reasonably assume, as Coase does, that economic subjects will be more likely to act selfishly in markets than in their family, for example, accurate prediction would require more empirical evidence as to how they tend to act in any specific type of market.

## 2. Becker and Stigler's Concept of Universal Stable Tastes

In their famous article, *De Gustibus Non Disputandum*, [FN231] Gary Becker and George Stigler strive to defend the traditional rationality elements of ordered, stable and objective preferences from empirical evidence that strongly suggests that tastes are quixotic, changeable and subjective. On one hand, they reconceptualize rationality as such a broad general statement of human behavior that it not only differs from Posner's understanding, it is also arguably of little use in the type of specific policy analysis done by Posner. On the other hand, their reconceptualization has certain vague, but interesting, parallels to the Lacanian concept of the conflict between the true nature of desire and the specific objects of desire.

### a. The New Home Economics

Becker developed his reinterpretation of rationality as part of his "new home economics" in a series of essays, many of which have been reprinted as *The Economic Approach to Human Behavior* [FN232] and *Accounting for Tastes*. [FN233] In Blaug's words:

Traditional theory views the family as a one-person household, maximizing a utility function that is defined on goods and services bought in the marketplace. [Becker's] new economics of the family instead views the family as a multiperson production unit, maximizing a production function whose inputs are \*209 market goods and the time, skills, and knowledge of different members of the family. [FN234]

In other words, Becker argues that one should not identify the economic subject as a single individual. Rather, just as the analysis of the supply curve identifies the economic subject as the firm, not the individuals who own or work for the firm, the analysis of the demand curve should identify the economic subject as the household, not the separate individuals who comprise it. As Blaug indicates in the quote above, the implications Becker creates from this change in focus is that we should not analyze the "consumer" as a person who literally consumes goods, but as a production unit, like a firm. That is, the household is not passive, but active. The difference is that the household seeks to maximize utility rather than profit. "[U]tility does not depend directly on goods and consumer capital stocks, but only on household- produced 'commodities,' such as health, social standing and reputation, and pleasures of the senses. The production of these commodities in turn depends on goods, consumer capital, abilities, and other variables." [FN235]

A complete exegesis of Becker's approach is beyond the scope of this Article and discussion will be limited to those aspects that are directly related to the concept of rationality. [FN236] What we \*210 should note at this time is that, although Becker's identification of the subject with the household differs from the psychoanalysis which emphasizes the individual, it suggests an intersubjective concept of human nature which is consistent with psychoanalysis. As we shall see, Becker's understanding, that utility comes from an individual's position in society, can be seen as an imperfect intuition of Lacan's understanding, that desire is the search for social recognition.

### b. *De Gustibus Non Disputandum*

The title of Becker and Stigler's article has a clever double meaning. First, they evoke the usual sense of the cliché "there is no arguing about taste" (i.e., that tastes are whimsical and subjective) so that one can neither predict another's tastes, nor convince another person to change his taste by rational arguments. Tastes are brute facts, something that is just there and cannot be explained by economics. As discussed, this view has as frequently been taken by proponents of the rationality postulate, including Posner, as it has by opponents. [FN237] For example, proponents of rationality have tried to explain apparent empirical anomalies with the postulate's requirement by an auxiliary hypothesis that perhaps the subject had a "taste" for what might otherwise be irrational behavior, or perhaps the subject's tastes changed. [FN238] As discussed in Part I, Posner has frequently taken a similar approach when he has attempted to explain seemingly economically irrational behavior by suggesting that a subject can have a preference for altruism, or that a single individual could be inhabited by two warring sub-selves having different preferences. [FN239]

But, Becker and Stigler raise this meaning of the cliché only to undercut it. Becker criticizes his fellow economists for assuming that preferences are pre-given and, therefore, "independent of \*211 both past and future consumption, and of the behavior of everyone else" [FN240] when experience shows otherwise. Indeed, are not the entire fashion, advertising and public relations industries based on the assumption that tastes are not only changeable, but manipulatable by outside forces?

Becker and Stigler correctly condemn the traditional approach to pre-given tastes as hopelessly ad hoc. Everything and nothing can be retroactively explained by reference to subjective and changeable tastes and nothing can be predicted or falsified. The rationality postulate absolutely depends on, if nothing else, a requirement of some minimal degree of consistency.

Consequently, Becker and Stigler reinterpret the cliché in a totally novel way that reverses its usual meaning. They contend that "tastes neither change capriciously nor differ importantly between people. . . . On our preferred interpretation, one never reaches this impasse" [FN241] of arguing about tastes, precisely because there are never disagreements! A hypothesized universal and objective set of preferences has obvious advantages to an economist. It permits "the economist [to] continue[ ] to search for differences in prices or incomes to explain any differences or changes in behavior" [FN242] without resorting to ad hoc explanations based on unpredictable changes in taste. In other words, because traditional economics see preferences as subjective and have no theory as to how they arise, the typical economic prediction that contains the express or implicit qualification "assuming no changes in taste" is, in fact, no prediction at all.

They continue:

The ambitiousness of our agenda deserves emphasis: we are proposing the hypothesis that widespread and/or persistent human behavior can be explained by a generalized calculus of utility-maximizing behavior, without introducing the qualification "tastes remaining the same." It is a thesis that does not permit of direct proof because it is an assertion about the world, not a proposition in logic. [FN243]

To paraphrase what I believe is one of Becker and Stigler's points, economists such as Posner claim that the rationality postulate should be maintained even if it is not strictly empirically correct because it is a good predictive tool. But in order to make \*212 predictions based on the rationality postulate, one must either assume that tastes do not change (are consistent over time) or formulate a theory of how changes occur. The fact that economists add the "assuming no changes in taste" qualification to their predictions is an admission that, in fact, they are incapable of making predictions.

How can Becker and Stigler support such a counterintuitive proposition that tastes are universal and stable? We experience differences of taste between ourselves and others on a daily basis. I like my steak bloody rare; some will only eat steak overcooked to a dry cinder; and still others are vegetarians who are repulsed by the very idea of eating steak. Who has not looked at old photographs of oneself and not been amused that one could have possibly thought such ridiculous fashions and silly hair styles ever looked good? Passing consumer fads--Cabbage Patch Dolls, Tickle-me Elmos, Tamagachi, Furbies, Beanie Babies, Pokemon and what ever turns out to be hot next Christmas--seem to be striking evidence of the promiscuity of the consuming public. I am finding that my flats are starting to look tired, and find myself lingering over photos of stilettos in fashion magazines.

### c. Universal Tastes

Just as Becker argued that consumer behavior could be better understood if we changed the level of focus on subjects (i.e., from the individual to the household), so should we change the level of our focus on preferences. That is, if the individual is too small a unit to be studied, so are specific market goods. Becker argues that "people consume commodities, and only indirectly do they consume market goods." [FN244] In other words, people buy specific goods and services only as means for more general ends. It is these general ends that remain constant and universal over time.

Moreover, despite lip service to the contrary, traditional economists implicitly rely on a physicalist notion of

economic activity whereby consumers pay money, or money equivalents, in order to consume material goods. Not only does this de-emphasize the importance of time as a cost, as we shall see, it can mask that the actual nature of the "commodities" desired by economic subjects are not goods at all, but intersubjective relations with other subjects. \*213 They believe that this fuller understanding of economic behavior flows from their redefinition of the economic subject.

This reformulation transforms the family from a passive maximizer of the utility from market purchases into an active maximizer also engaged in extensive production and investment activities. . . . The reformulation households] maximize a utility function of objects of choice, called commodities, that they produce with market goods, their own time, their skills, training and other human capital, and other inputs . . . .

The real income of a household does not simply equal its money income deflated by an index of the prices of market goods, but equals its full income (which includes the value of "time" to the household) deflated by an index of the prices . . . [FN245]

Consequently, the rational economic actor does not maximize her (or, if the actor is the household, its) utility by comparing the prices of specific desired goods. Rather she seeks to minimize her aggregate expenditure of resources, including time, in order to acquire her chosen combination of commodities, of which specific goods are merely examples.

What are these stable universal "tastes" or "commodities?" Here, Becker and Stigler are ambiguous. As quoted above, Becker has suggested "health, social standing and reputation, and pleasures of the senses." [FN246] They do not, however, purport to offer an exhaustive list of universal preferences, nor do they offer a methodology or theoretical framework for drawing up such a list.

In *De Gustibus*, however, they suggest that specific examples of behavior that look like changes in taste can be explained in other terms. In drawing this connection they mention some possible universal tastes in passing. What I find interesting is that, rather than concentrating on such seemingly obvious, but banal, commodities, such as the need for food and shelter, Becker, in particular, concentrates on purely interrelational or intersubjective categories.

For example, Becker cites with seeming approval, if not total agreement, Bentham's

list of fifteen "simple pleasures" which he argued was "the inventory of our sensations." These pleasures, which were supposed to exhaust the list of basic arguments to one's pleasure \*214 (i.e., utility) function are of senses, riches, address, friendship, good reputation, power, piety, benevolence, malevolence, knowledge, memory, imagination, hope, association and relief of pain. [FN247]

Explaining in more detail, Bentham mentions

"the pleasures . . . of being on good terms with him or them," "the pleasures of a good name," "the pleasures resulting from the view of any pleasures supposed to be possessed by the beings who may be the objects of benevolence," and "the pleasures resulting from the view of any pain supposed to be suffered by the beings who may become the objects of malevolence." [FN248]

Becker is even more approving of Marshall's conception of the desiderata of economic behavior in even more abstract and intersubjective terms. Indeed, Marshall claimed to reduce the number of commodities to two: distinction and excellence. [FN249] These commodities are, obviously, much different than the types of categories frequently plotted on utility curves in legal scholarship. "Neither Marshall nor later theoreticians explored the implications of a utility function with so few desiderata, but the household production functions are an attempt to develop a theory of consumer choice consistent with Marshall's contention . . . ." [FN250]

#### d. Preference Formation

The corollary to Becker and Stigler's hypothesis, that tastes for broad classes of commodities are stable, is the proposition that tastes for specific goods and services are in a state of constant change. Since the publication of *De Gustibus*, Becker has studied the formation of tastes and has concentrated on several categories of preferences that seem economically irrational under conventional analysis, such as addiction and habit formation. As Becker notes,

although

Economists usually do not consider why preferences are what they are, . . . it is advisable to discuss habit formation since many writers have claimed that habitual behavior is not fully rational. Although little is known about the mechanisms behind the development of habits, it is not obvious to me that \*215 they are less rational than other preferences. [FN251]

To paraphrase what I believe is Becker's point: conventional economists are not entirely consistent on the subject of rationality. On one hand, they purport to limit the rationality postulate to the choice of means to achieve an end and treat preferences as pre-given. On the other hand, they declare certain choices "irrational," implying that the rationality postulate applies to the formation of preferences. One example of this (which JST and Posner discuss) is the "endowment effect." People frequently ask for more to give up an object in their possession than they would pay to acquire an identical object. [FN252] But how can an economist decry the "preference" for keeping things that one already has, or using things one has already bought, if preferences are by definition pre-given and, therefore, inherently irrational? [FN253]

In Becker's words, "[e]conomists are so conditioned to identifying rational choice with separable preferences that we often call 'irrational' quite rational behavior that is the result of past experiences." [FN254] He defends the family who refuses to sell the house they have lived in for twenty years for half-a-million dollars, even though they "would be unwilling to spend anywhere near that amount for an otherwise equivalent house. Of course, the qualifier 'otherwise' is crucial, since twenty years in the same house presumably [has] built up memories and attachments to that particular house, not to a seemingly 'equivalent' house that is really not equivalent." [FN255]

He admits that other examples of the endowment effect seem more difficult. [FN256] Nevertheless, he contends that economists are \*216 giving up, so to speak, if they ignore this well-known and predictable phenomenon (as Posner arguably does), because doing so would be equivalent to the "all things being equal" qualification that robs the rationality postulate of its predictive value. But neither should they condemn such behavior as "irrational" (as JST arguably do), because such condemnation would be equivalent to abandoning the rationality postulate. Rather, they should try to formulate arguments as to how such behavior might be explained within the rationality postulate. Or, they should try to modify the rationality postulate to account for this behavior. [FN257]

Becker has taken on the latter of these tasks. As I have already suggested, he believes he can do so by changing the economic subject from the individual to the household, and then interpreting the rational utility maximizing household, not as a passive consumer, but as an active producer of its own utility.

Becker chides his fellow economists who concentrate on consumption for having a "narrow conception of 'consumption.' People consume paintings and old rugs and coins simply by looking at them occasionally, and they may value such objects more over time as they grow attached to them." [FN258] Whether Becker's new home economics is successful is beyond the scope of this Article. Nevertheless, this point is very well taken. Based on my feminist theory, deriving from Lacan and Hegel, I have suggested elsewhere that it is more helpful to speak of the economic subject \*217 as "enjoying" rather than consuming her property to reflect the different means through which one can achieve utility. [FN259] I have also analyzed in great detail how this confusion over production versus consumption undercuts Posner's theory of wealth maximization. [FN260]

As is well known, Posner has argued that the law either has, or that it should, develop rules that would maximize the aggregate wealth of society (as opposed to maximizing utility). [FN261] Posner defines wealth as "the value in dollars or dollar equivalents . . . of everything in society. It is measured by what people are willing to pay for something or, if they already own it, what they demand in money to give it up." [FN262] This latter measurement is designed to capture the idea of "consumer surplus," defined as the excess of the subjective utility (use value) property has in the hands of the owner over its objective price (exchange value). [FN263] Nevertheless, Posner's definitions cannot, in fact, truly directly accommodate consumer surplus, precisely because they can only measure exchange value and not the use value created through enjoyment. [FN264] The fact that a person retains possession of an object and does not seek to sell it is strong evidence that he has positive consumer surplus (i.e. his subjective use value in the object is at least equal to or exceeds the objective exchange value). [FN265] Posner ignores the fact, however, that this consumer surplus cannot be measured for the purpose of calculating the aggregate wealth of society under different legal regimes. This is because, as he insists, by definition, subjective use value cannot be

translated into an objective metric. Indeed, the impossibility of valuing subjective taste is one of the reasons Posner gives for preferring a \*218 wealth maximization criteria over utilitarianism. [FN266] Consequently, past consumer surplus can only be retroactively posited after a consumer sells her object sometime in the future. [FN267] That is, the fact that the consumer did not sell her object until that date is some evidence that she must have valued it in excess of the exchange value (had consumer surplus) up to and until the date of exchange.

Posner argues that wealth maximization is ethically superior to utility maximization because the former rewards the cultivation of capacity to produce while the latter rewards the cultivation of the capacity to enjoy. [FN268] And yet, it is the latter that creates consumer surplus. To put this in Becker's terminology, if we think of the household as a rational producer of its utility, then it is perfectly rational for the members of that household to engage in behavior that will increase their subjective enjoyment of their property (such as doing things that will make them more attached to their house) even if it does not make the property any more valuable from an objective market standpoint. [FN269]

The problem, in Becker's mind, is that economists have not come to grips with the fact that the rationality postulate--thought of as choosing the means to an end--is, in fact, inextricably linked to the choice of ends. That is, one cannot make predictions based on the rationality postulate unless one, in fact, knows what people's preferences are and understands how they are formed and changed. He specifically argues that his new home economics, which sees households not as consumers but as producers of their utility, helps explain how specific tastes are formed. Habits (including their extreme form of addiction) can, in Becker's opinion, be understood in terms of the building up and investment of "consumption capital" and, as such, cannot \*219 only be explained by the rationality postulate, but can be predicted by it. [FN270]

In *Fear of Freedom*, I argue that speculative theory agrees with Becker's general conclusion that rationality relates to preference formation, so I will not analyze Becker's specific account here. [FN271] His analysis on consumption capital and "habit" is also beyond the scope of this Article.

#### e. Style

This subsection is limited to an analysis of one of the universal stable tastes which Becker and Stigler discuss at some length in *De Gustibus*--the taste for "style" or social position. [FN272] What interests me is that the Becker-Stigler analysis seems to see some of the insights of Lacanian theory, discussed in the final part of this Article, as through a glass darkly. As is the case of all things reflected in a looking glass, the image presented is often distorted, if not totally reversed.

Becker and Stigler confront directly the seemingly most obvious evidence for the capriciousness of tastes--fashion. Not only do fashions frequently change sharply from year to year, the public's taste seems to be heavily influenced by the advertising and public relations of the fashion industry, and the dictates of the doyennes of society, fashion editors and celebrities. How can one say tastes are constant when flat mules are all the rage in the summer of 1999, although stilettos were everywhere in 1998 and, according to the fashion press, heels will be high again by the end of 2000? Why are middle class suburban white teens in the midwest wearing the extra-wide trousers popularized by black urban gangsta rappers in the mid-nineties, when the rappers (and their hip wanna-be fans on the two coasts) have already largely abandoned this look?

"The obvious method of reconciling fashion with our thesis is \*220 to resort again to the now familiar argument that people consume commodities, and only indirectly do they consume market goods, so fashions in market goods are compatible with stability in the utility function of commodities." [FN273] This commodity of the fashion industry, that they call style, seems to be "social distinction: the demonstration of alert leadership, or at least not lethargy, in recognizing and adopting that which will in due time be widely approved." [FN274]

I mention in passing only one potential cavil with this specific claim, because I wish to concentrate on what I think is its strength. Becker and Stigler claim that tastes are not merely stable but universal. While it might seem plausible that all human beings have some taste for social distinction, it seems less plausible that they all have the same taste for it. For example, some people are obsessed with the latest fashion, spend a tremendous amount of time and money competitively trying to be ahead of the trend and will stop wearing a fashion the moment it starts being

worn by the general populace. [FN275] Other equally fashion conscious people try studiously to achieve a look of classic elegance beyond fashion. Some people are "anti-fashion" and seek to stand out by consciously dressing against the trend. Many want to fit in and will wear only what their peer group is already wearing. [FN276] Some seem indifferent to fashion, happy to wear whatever is in their closets until it wears out regardless of changes in fashion, but equally happy to wear fashionable clothes \*221 bought for them by others and to buy whatever a salesman tells them is appropriate when they need new clothes. Some are fashion victims who try, but always fail, to appear fashionable. And others seem totally oblivious that fashion exists. Many of us fall into different categories on any given day.

My point is that as many social animals divide up into alpha, beta, gamma, etc. individuals (to exploit the fashionable lingo of socio-biology), with different groups having different levels of dominance and passivity, it seems at least possible that different people have (whether by nature or nurture) different individual "tastes" for different positions in the social hierarchy. Perhaps no one (but the mentally ill) wants to be at the bottom of the hierarchy, but some people probably care about being a leader more than others. Others may affirmatively not want to be leaders, but want to be located comfortably in the upper middle of the hierarchy. Without belaboring this point, one might try to argue that perhaps all individuals have a starting universal taste for high status, but different capacities for achieving this. It is easier for an aggressive, rich, well-educated and physically attractive person to rise, than it is for a passive, poor, ill-educated and ugly one. The reason why the former achieves high status and the latter does not may not so much suggest that the former wants the status more than the latter, but that it is less expensive (in the sense of the necessary expenditure of resources) for the former to achieve status than the latter.

## 5. Changes in Fashion

Becker suggests that one of the most important universal stable preferences (or commodity) is the "taste" for social distinction--that is, the desire to have a recognized position in the social hierarchy. In individual market transactions, this taste manifests itself in the wish to acquire specific goods and services. These goods and services are, however, mere examples, or tokens, of the true object of desire. This taste for social distinction is objective in two ways. First, Becker asserts that it is objective in the sense of being universally experienced to some extent by all humans. Second, it is objective in the sense that it is not merely subjective, but intersubjective. If what we seek is social recognition, then our tastes actually come to us from outside of us--we wish to acquire that which others want as a means of acquiring their esteem.

\*222 Note that since specific objects are merely examples or tokens of the universal commodity "preferred" by the economic subject, no acquisition of any specific object can ever satisfy the economic subject. Consequently, as Becker and Stigler expressly recognize, "style" is never something that can be permanently achieved--the race for recognition is always in progress and can never be won.

This commodity--it might be termed style--sounds somewhat circular, because new things appear to be chosen simply because they are new. Such circularity is no more peculiar than that which is literally displayed in a race--the runners obviously do not run around a track in order to reach a new destination. Moreover, it is a commendation of a style good that it be superior to previous goods, and style will not be sought intentionally through less functional goods. Indeed, if the stylish soon becomes inferior to the unstylish, it would lose its attractiveness. [FN277]

One of the most brilliant aspects of Becker and Stigler's analysis is precisely that it shows that changes in fashion are not merely consistent with a stable, unchanging universal taste, but are required by it! The fact that that which is desired is social recognition means precisely that no specific fashion can ever fulfill this desire. Today's fashion must inevitably become passe and be superseded by tomorrow's token of distinction. In other words, empirical observations of changes in fashion do not falsify the hypothesis of stable preferences, but verify it!

Moreover, although Becker and Stigler do not expressly reach this conclusion, their analysis may be generalized to make an important point about wealth maximization. Although many proponents of neo-classical economics argue that the goal of economics is to maximize the aggregate amount of human happiness in the world, by its own logic, economic subjects are defined as essentially unfulfilled and unhappy by nature. [FN278] I have already quoted Coase's quip that the only thing people seem to maximize as an empirical matter is unhappiness. [FN279] Consequently, \*223 contemporary economics tries to get around this problem by rejecting the concept of happiness

or utility, per se, in favor of one of relative utility. Happiness is always incomplete and can always be increased by another trade.

Becker and Stigler's theory tries to go further in explaining this phenomenon. No specific object in the market can ever substitute for the universal commodity for which it is only a token. If specific objects could substitute, then we would expect to observe most people becoming happier and happier as they got older and had accumulated more and more trades, each increasing their utility. In fact, according to neo-classical theory, if we were ever successful in maximizing our utility, then the caucus race of trade would stop. But, this will never happen because the perfect market (i.e. the conditions that would result in utility or wealth maximization) is both empirically and theoretically impossible. [FN280] We are lucky that this is so, because economic subjects are not hypothesized as being deliriously happy in the perfect market, but perfectly indifferent.

Another interesting insight of Becker and Stigler is that style, or social distinction, requires constant change, but cannot be characterized as just any change. [FN281] "[T]he newness must be of a special sort that requires a subtle prediction of what will be approved novelty, and a trained person can make better predictions than an untrained person." [FN282]

This leads to a seeming paradox. On one hand, no individual fashion is set by any specific economic subject--since style is social distinction, the decision as to what is fashionable can only be made intersubjectively by "fashionable" society as a whole. On the other hand, style is never set intersubjectively by society generally because, in order to be considered fashionable, the fashion plate can never follow current fashion, but must always be seen as leading future fashion. In a peculiar way, one never achieves style in the present, stylishness is only a retroactive reconstruction of what must have happened. One cannot know that a novelty was fashionable until it is generally adopted and is no longer new--once it is no longer fashionable. Who sets fashion if it is neither the fashion plate nor society generally? We sense that \*224 "they" do; some hidden "Other" who determines what we should do, what we should desire.

The foregoing description makes Becker and Stigler's theory sound anti- intuitive if not ad hoc and self-contradictory. For social engineers like Posner, probably the most serious problem with it is that it posits principles so broad that it may be of little use in predicting specific economic behavior. Arguably all it predicts is that a market society will be in a constant state of flux. Although it predicts change, it cannot even predict a predictable rate of change so that manufacturers can, for example, be reasonably sure of selling a certain number of new clothing items each year to account for changes in taste. In fashion, for example, sometimes it is fashionable to resist changes in fashion. In other words, the new home economics correctly predicts that market transactions will occur, and that economic subjects will choose specific goods and services, but cannot predict what those transactions and what those goods and services will be.

There is a theory of consistency, stability and predictability that consistently predicts unpredictable instability. As Blaug has argued, although Becker has claimed to make more specific predictions about household behavior, he has only been able to do this by smuggling in the type of ad hoc assumptions about particular tastes that his theory is supposedly designed to avoid. [FN283]

Despite whatever limitations the Becker-Stigler approach may have for economic prediction, it does offer some striking insights into human nature and economic activity consistent with Lacanian theory. This includes the recognition that true desire is not subjective, in terms of being totally internal and idiosyncratic to the subject. Rather, desire is more generally the desire for intersubjective recognition. Although we act as though we desire specific objects, these objects are only examples or temporary tokens that stand in for our true desire for universal commodities. As a result, economic subjects are always in a state of unfulfillment--utility is always to be increased in the future. Since our desire is always intersubjectively imposed upon us, paradoxically, nobody and everybody is the author of desire. Accordingly, we posit a hypothetical non-existent Other as the source of our desire. The demands of the desire for style is paradoxical because style requires that the fashionable always be that which society generally doesn't anticipate, yet fashion is the anticipation of \*225 what society will do in the future. Fashion, therefore, both orders "Change!" and "Don't Change!" Or, more accurately, the moment one obeys the order to change, it changes its order to "Don't Change!" and the moment one obeys the order not to change, it orders "Change!" The subject is caught in an unending circle of unchanging change.



#### IV The Lacanian Economics of Desire

This is the monstrosity in love, lady: that the will is infinite, and the execution confined: that the desire is boundless, and the act a slave to limit.

William Shakespeare, *Troilus and Cressida*, III.ii.

French psychoanalyst Jacques Lacan added the insights of speculative philosophy to Freudian theory, thereby combining the two great European traditions in the study of human subjectivity. [FN284] This Part proposes that Lacanianism might be particularly useful in helping economists develop a fuller understanding of their practice. This is partly because both theories have their origin in classical liberalism--Kantianism, in the case of Lacanianism, and Benthamite utilitarianism, in the case of neo-classical economics. Both of these traditions emphasize the concept of the free, autonomous, rational individual. The continental theoretic tradition differs from neo-classical economics in that the former views the liberal individual as only the beginning, not the end, of the analysis. Following Hegel, Kant's sharpest critic and most faithful successor, speculative theory posits the autonomous individual as a true moment of subjectivity but only one moment, and, therefore, an incomplete account of human nature. Although speculative theory agrees with liberalism, that the essence of human nature is rationality, the dialectical method reveals that rationality always requires passion as its necessary compliment. Consequently, whereas economists such as Posner can only see irrationality as an unpredictable exception to the norm of rationality, Lacanianism seeks to understand and predict both rational and irrational behavior as variations of a single norm. Of course, \*226 that means that speculative theory requires a different concept of rationality from that accepted by most economists. This concept is, however, arguably more in keeping with Becker's new home economics.

Economists have traditionally claimed that their simple and elegant theory of rationality did not aspire to be a sophisticated psychological theory with an understanding of the unconscious. [FN285] Indeed, as we have seen, Posner criticizes JST's behavioral approach as a psychological, rather than an economic, analysis of the problem of choice. [FN286] Nevertheless, as discussed above, in attempting to apply economics to law, Posner has had to resort to ad hoc speculations as to unconscious motivations and multiple personalities in an attempt to explain away behavior that does not easily fit into the classical conception of rationality. In contrast, Lacanian psychoanalysis is a theory of behavior that stresses the interrelationship of the conscious and unconscious and posits that the subject is itself inevitably split. Rather than this implying randomness, as Posner fears, that the unconscious itself is "structured like a language" [FN287] is one of Lacan's most famous propositions. That is, the unconscious--the irrational--can be understood because it follows certain rules similar to grammar and syntax.

The neo-classical concept of economic rationality, as we have seen, is ends- means reasoning. Economists posit that individuals act to maximize their utility in accordance with their idiosyncratic preferences. Although economic rationality is supposed to be a tool for predicting behavior, it is, in fact, notoriously poor at predicting certain behavior. First, it cannot account for actions that seem to be inconsistent with past actions or those in the economic subject's best interests. Second, having been forced to abandon their traditional concept of narrow, automatic self-interested behavior, law and economics economists, such as Posner, are left with no theory of preferences. These are just deemed to be given. Being unable to predict the ends of economics subjects, Posner is necessarily unable to predict their actions. Both of these problems have led to Posner's current position, whereby he merely engages in retroactive ad hoc speculation to try to explain \*227 past anomalous behavior--such as the economic subject lacked knowledge; or the individual is merely a psychic battlefield inhabited by warring sub-selves having different tastes. Most notably, Posner has tried to reassert the traditional notion of self-interest by making reference to socio-biology and moving the locus of self-interest from the individual to the gene. This is an attempt to have the best of all possible worlds. Posner can now claim that he recognizes that individuals may indeed be altruistic as well as selfish, and then go on with business as usual, analyzing them in terms of selfish behavior.

Becker and Stigler have addressed these problems in a different way. Realizing that the predictability of ends is necessary for the predictability of means, they have sought to develop a theory of ends that accounts for seemingly quixotic observed behavior. Becker and Stigler's theory to date, however, does not account for how subjects form

preferences for their large categories of meta-preferences that they call "commodities." They merely assert that people have certain preferences for such things as sensuous pleasure, "style" and other things as an empirical matter. But, by doing so, they are arguably making the same mistake they chide other economists for making--they are assuming that one can limit the rationality postulate to the choice of means without also examining the choice of ends. Under their account, the choice of the end "style" is pre-rational and, therefore, irrational. By the logic of their own argument, they need to "account" for these tastes. Lacanian theory is precisely a theory as to both how the taste for intersubjective recognition (a category that includes "style") arises and remains constant as well as why the tastes for individual commodities within this general taste are in a constant state of flux.

Lacanian theory addresses these problems of predictability and inconsistency. Although, as I have already mentioned, Becker and Stigler's intuition has some similarity to the psychoanalytical approach, the latter is part of a comprehensive theory of human behavior. Kant and Hegel did not see rationality as merely an analysis of means, given pre-existing ends. Rather, rationality consists precisely of the analysis of what man's ends are and should be. Following within this tradition, psychoanalysis seeks to be an account, not only of how man determines his ends, but how and why he so often mis-perceives them. Indeed, psychoanalysis explains that the reason why people engage in \*228 inconsistent and seemingly self-destructive behavior is not merely conflicting wills or ignorance, but because utilitarianism is incorrect in assuming that subjects seek to maximize their pleasure and minimize their pain. Rather, the pleasure principle is always inextricably linked to the death drive. The theory of *jouissance* explains that the achievement of ecstasy--as opposed to mere pleasure or happiness--is often achieved through displeasure and pain. The theory of the death drive explains how the utilitarian attempt to pursue everyday pleasure can lead to suffering.

Lacanian psychoanalysis is, first and foremost, a science of desire. Lacan's most important contribution to psychoanalysis is his theory of the *objet petit a*--a theory of the relationship between our true desire and the objects we pursue in an attempt to satisfy our desire. [FN288] The desire that drives all psychoanalytic subjects is for wholeness, which, when desire is experienced in the form of Eros, is achieved through intersubjective relations, just as Becker and Stigler intuit. Nevertheless, precisely because this desire is impossible to satisfy, subjects constantly chase substitute objects of desire-- the little others--in the vain hope that achieving these little goals will make them feel complete. Once again, as Becker and Stigler intuit, actual objects of choice are merely commodities, substitutes, or tokens for our true desires. Although our actual desire remains the same, these substitute \*229 objects of desire are constantly changing--as soon as we achieve one object of desire, we necessarily seek out a new one because our true desire is not met. Consequently, psychoanalysis answers the necessary question that economics always conveniently represses: If man always seeks to increase his utility, why is he always unsatisfied? Why does he not become happier and happier with each acquisition? As Shakespeare understood, human desire is infinite, yet human experience is finite. The psychoanalytic subject is never satisfied because subjectivity is nothing but the negative capacity for desire.

Psychoanalysis, as a theory of human behavior, can also account for why economists and lawyers such as Posner continue to cling to certain theories despite empirical evidence to the contrary. They try to satisfy the universal desire of wholeness by suppressing the dynamic--and, therefore, necessarily incomplete--nature of the symbolic orders of law and markets.

Lacan, an infuriatingly obscure writer, is known for his cryptic pronouncements, which almost take on the role of slogans. These propositions are intended to convey a multitude of layered meanings and connotations. The following section attempts to retell certain basic Lacanian concepts in relatively simplistic language that a non-psychoanalyst might understand. Nevertheless, not only is Lacan's prose obtuse, but his theories are complex and paradoxical. To simplify or even reword his theory necessarily risks losing something.

## A. Desire and Drive

### 1. Introduction

To my mind, the most interesting contribution that psychoanalysis might make to economics is its analysis of what people want and what they do. The Lacanian account of desire, its opposite, drive, and the relationship of these

to the superego, suggests answers to questions such as why specific tastes seem to change despite the fact that humans have stable universal desires (i.e. Becker and Stigler's intuition); why people are always unsatisfied so that utility is never maximized; why people continue to engage in acquisitive market behavior despite the fact that they never become more satisfied; and why people often make harmful, rather than beneficial, decisions.

\*230 Desire is a longing for an imagined lost state of wholeness. [FN289] The achievement of desire is one of the meanings of Lacan's term *jouissance*, or enjoyment. [FN290] *Jouissance* should not be confused with pleasure or "utility" in the usual sense of the terms. Indeed, *jouissance* is not pleasurable at all. *Jouissance* is an ecstatic state that often takes the form of pleasure in pain. [FN291] As we shall see, the Lacanian superego is the part of the psyche that governs the subject's relationship to *jouissance*, and desire and drive are two approaches one can take with respect to *jouissance*.

Desire is a response to the hypothesized universal sense of split, alienation and dislocation that characterizes the normal (i.e. neurotic) subject in contemporary Western society. [FN292] I have discussed the sexualized nature of desire extensively and how it figures economic and legal discourse elsewhere [FN293] and shall only briefly discuss it here. I shall instead concentrate on Lacan's theory of the *objet petit a*, which I suggest explains Becker and Stigler's intuition of the relationship between broad, stable universal desires and volatile, idiosyncratic specific tastes. Finally, I turn to \*231 "drive," which is the alternate possible response to the problem of *jouissance*.

## 2. The Sex of Desire

According to Lacan, the two sexes are not defined by anatomy, but are two different ways of responding to the universal sense of disjunction that he confusingly called "castration." [FN294] Of course, Lacan does not deny anatomical difference. Lacanian psychoanalysis is a way of speaking about our experience of our anatomical sexuality. We have no direct contact with our animal, anatomic nature because the moment we think about, or imagine, it we are already reinterpreting biology through the orders of the symbolic, the imaginary and the real. Sexuality is, therefore, a symbolic or linguistic position that is figured by metaphors drawn from our biology.

Most empirical individuals tend to identify primarily with the sexual position identified by his or her anatomy. Nevertheless, each sexual position presupposes the existence of the other and all subjects must oscillate between the two positions. This is necessary, because, in contradiction to most traditional views of sexuality, the two sexes are not compliments, like yin and yang, that fit together to make a harmonious whole. Such harmony only exists in the imaginary, whereas sexuality, desire, law, and economics are located in the constantly changing order of the symbolic. Rather, the two sexes are both failed attempts to deal with castration and achieve wholeness (*jouissance*). As each is only partially successful in its goal, and always partially unsuccessful, the subject must constantly change his or her strategy.

The masculine position is the attempt to deny the fact of castration, whereas the feminine is the acceptance of castration. The masculine subject imagines that in castration, a precious object has been taken away--i.e. that he has a piece missing. Using an intentionally confusing masculine metaphor, Lacan calls the object of desire supposedly lost in castration the "phallus." [FN295] The upshot of this position is that the masculine subject imagines that the lost object could, theoretically, be replaced by a new \*232 object. That is, the masculine subject tries to convince himself that castration might only be a temporary state. Desire is a term of art for this longing to overcome castration by attaining a hypothetical lost object. This masculine form of desire is *eros*--the search for the mate that will make one whole. Such complementarity, of course, only exists in the imaginary, not the symbolic order of sexuality. Consequently, *eros* can only be figured through fantasy.

The feminine subject, in contrast, understands that castration is a permanent state. She feels that what has been lost is not a separate "thing" or object that could be replaced, but a former state of integrity or virginal purity. The lost object is her own self-hood. If the masculine feels that he no longer has what he once had; the feminine feels that she no longer is who she once was. The feminine, therefore, has a different relationship to desire. She seeks not to find a lost object, but to merge back into her former self--to be and ecstatically "enjoy" her true self. Tragically, the only way to do so would be to regress back to the womb, to the state before castration. The feminine desire can devolve into *thanatos*--the depressed desire for death. [FN296]

Elsewhere, I have argued extensively that the two sexuated positions play themselves out in metaphors used in American legal discourse. [FN297] Specifically, in the law of property and contracts, masculine metaphors emphasize the elements of possession and exchange and de-emphasize enjoyment. Losses of property are analyzed in terms of "castration" or, in Constitutional language, "takings." That is, property wrongs are seen as losses of "things" that can be remedied by giving the victim a substitute thing. Under the alternative feminine metaphor, property is seen as that with which one identifies, enters, protects, and ecstatically enjoys. Property wrongs are described in terms of invasion, violation, and pollution. These wrongs are permanent and cannot be cured through damages. Consequently, we can only seek to avoid them through equitable remedies.

The difference between the "masculine" and "feminine" approach to castration and property might explain in part one of \*233 the most well-known and persistent "anomalies" to the rationality postulate; the endowment effect that I have already mentioned. As discussed, it is well-known that people will consistently ask for more to relinquish property within their possession than they will bid for an identical object. [FN298] This phenomena has often been observed not only with respect to highly personal items such as the family home, but experimental data suggests that it is consistently observed even with respect to trivial objects, such as coffee cups. This is one of the examples of "bounded rationality" (i.e. irrationality) cited by JST, and one of the changes in taste that Becker tries to explain through habit.

Posner is correct to chide behavioral economists if, like JST, they merely observe such behavior and declare it irrational; by doing so they have no account of the behavior and no way of predicting it. Posner is equally unsuccessful, however, in proposing ad hoc auxiliaries that try to shove the square peg of behavior into the round hole of the rationality postulate. Becker's attempt to explain the endowment effect through habit might be nothing more than re-naming, rather than explaining, the problem, similar to Moliere's doctor who attempts to explain that the reason why opium puts people to sleep is because it has a "dormative virtue." [FN299]

In contrast, the Lacanian analysis suggests that the "economically rational" approach and the Beckerian habit approach are two sides of the same coin of human nature. The former approach, that commensurates and treats each object as reducible to its exchange value, is the masculine position that lives in the fantasy that losses can be cured (that castration is temporary). The latter, that insists on incommensuration and believes that use value can not be reduced to exchange value is the feminine position that insists that loss is permanent. Both positions are equally true and equally false.

Consequently, psychoanalysis suggests that we should expect to see both types behavior in the same individual because of, rather than despite of, their inconsistency. Moreover, because the two positions relate to the discourse of sexuality, one can expect that subjects are likely to respond one way or another depending on how the question is posed to them. If it is posed in \*234 "masculine" terminology (such as describing a house in terms of an investment), we would expect people to tend to favor exchange. If posed in "feminine" terminology (such as by describing a house in terms of a home, or the locus of tradition and family relationship), we would expect a tendency to resist exchange.

One should not misinterpret my example (in which the "masculine" position looks closer to the traditional notion of economic rationality) as suggesting that psychoanalysis follows the traditional stereotype of males being more rational and females as being more emotional. Lacanian psychoanalysis completely rejects any such simple dualisms. [FN300] As emphasized, the terms "masculine" and "feminine" do not refer to anatomical sexuality but positions that both "sexes" must take on from time to time. The terminology is intended to reflect the fact that we have a tendency to identify these positions with the two anatomical sexes stereotypically, but it is not an endorsement of that tendency. Indeed, psychoanalysis holds that such an identification is, in fact, a deluded conflation.

Second, and more importantly, both of these positions are equally "irrational" and "rational" in the economic sense of the terms. They are "irrational" in that their differences concern the formation of tastes and preferences--which is pre-rational from \*235 an economic standpoint. Once these tastes are formed, both positions are equally rational in pursuing their tastes. For example, once the "feminine" subject has decided that she has a sentimental attachment to her house, she rationally maximizes her utility by refusing to sell it if the exchange value (market price) offered her

is less than her idiosyncratic use value.

One should not infer from this that psychoanalysis suggests that people are irrational and completely manipulable. Quite the opposite. The goal of psychoanalysis is the increase in human freedom through self-knowledge. By helping us understand our unconscious motivations, psychoanalysis seeks to help us make conscious choices. In my example, if one understands psychoanalytic tendencies which favor either exchange or enjoyment, one might better be able to decide which approach is more appropriate for this particular circumstance.

For example, Margaret Radin's theory of "property for personhood" has posited that identification between an owner and at least some forms of property--such as one's home--might serve an important role in the development of personhood. [FN301] Market alienation of such "personal" property could be destructive of personality and should be discouraged. Indeed, she asserts that the very language of alienation is alienating. [FN302] If one is persuaded by such an argument, one might decide on philosophical, moral, or other grounds, that one's emotional attachment to one's home is healthy and appropriate and should be encouraged, not resisted. Similarly, Becker suggests that sentimental attachment, like habit, might be interpreted as the building up of consumer capital that can be used to create utility in the future. If so, the endowment effect with respect to one's home is \*236 completely rational within his definition. [FN303]

Consequently, one might agree with Radin's argument that the "masculine" discourse, privileging the investment value and exchange of the house, might be less appropriate and, if not rejected, subordinated to the "feminine" discourse. [FN304] In contrast, once one understands why one might have a tendency to become attached to things, one might conclude that one's attachment to the free coffee cup, distributed in the experiment described above, to be unhealthy, if not fetishistic, and to be resisted.

### 3. The Desire of Man is the Desire of the Other

Lacan famously declared that the desire of man is the desire of the Other. [FN305] An understanding of this dictum can shed light on Becker and Stigler's intuition that humans have stable universal preferences for intersubjective recognition which they call "style" or status.

Lacan's assertion specifically refers to the desire of the hysteric. This is because the feminine neurosis of hysteria is not an exception, but the most characteristic form of desire. [FN306] As I have explicated in great detail elsewhere, Lacan's concept derives from Hegel's argument that subjectivity can only be achieved through intersubjective relations. [FN307] This is why Lacan called Hegel "the most sublime of hysterics." [FN308] In The Philosophy \*237 of Right, Hegel concentrated on the primitive intersubjective relations of private law (property and contract). [FN309] Lacan expanded this analysis by placing law in the broader psychic order of the symbolic, and concentrating on the more complex intersubjective relations of language and sexuality.

According to Hegel, and Lacan, the atomistic individual posited by classical liberal philosophy is a true moment of human personality, but much too empty and frail a concept to serve as the subject of law, language and sexuality. Moreover, they agree (expressly in the case of Hegel, and implicitly in the case of Lacan) with liberal philosophy that freedom and the ability to bear rights is the essence of human nature, but argue that such concepts can only be potential and abstract in the state of nature posited by liberalism. Freedom and rights can only become actual and concrete within society. [FN310] To oversimplify, although liberalism is based on a conception of a free individual endowed with certain inalienable rights, rights, by definition, presupposes intersubjective relationships. That is, as Hohfeld famously explained, the very concept of a right can only be understood as a right of a specific person enforceable against at least one specific individual of a class of persons--the very concept of a duty requires that there be at least one person who can enforce the duty against the duty bearer. [FN311] The level of personality that can bear legal rights, speak language, and have sexuality is called the "subject."

According to Hegelian dialectic reasoning, that which is potential must seek to become actual (or more accurately, we can only know what is potential retroactively after it becomes actual). [FN312] Consequently, the abstract, atomistic individual posited by liberalism logically seeks to engage in the intersubjective relations \*238 that will make its freedom actual. That is, the abstract individual yearns to become a subject.

The dynamic through which this happens is what Lacan called "love." [FN313] In love, the lover sees in the beloved more than she is. When love is requited, the beloved responds both by living up to the lover's expectations by becoming more than she once was, and by reversing the process, making the lover into a beloved, so that he can become more than he once was. Similarly, the abstract individual seeks subjectivity through legal rights, language and sexuality. Because rights must be enforceable against or by a legal subject, language only exists in the discourse between subjects, and sexuality is a relationship between subjects, the abstract individual must first find subjects who will agree to recognize her as their equal (as a subject). In the hypothetical state of nature, however, there are no subjects, only other abstract individuals. Consequently, the abstract individual must first create other subjects through love. It must see in other individuals more than they are and recognize others as subjects. That is, according to Hegel, unlike liberalism, personhood does not start with the assertion of rights for oneself, but by the granting of rights to others. When the dialectic is successful and law, like love, is requited, the others will then turn around and recognize the first person as one of them--a subject capable of bearing rights, language and sexuality.

In other words, to Hegel and Lacan, rationality and passion are two sides of the same coin. Because logic demands that we go forth in the world and make our freedom actual, logic demands that we give way to love.

Although in colloquial English, the terms "love" and "desire" have similar, if not identical meanings, a Lacanian understanding shows that the relation is strained because love and desire are circular and paradoxical, if not impossible. It is not that we fall in love because we desire; it is love that causes desire. Love cannot be the fulfillment of desire because the fulfillment of desire would be the death of love.

Love requires intersubjective relations. This requires that we enter the symbolic order and attain language, sexuality and law. But it is precisely the submission to the symbolic order that "castrates" \*239 us, makes us feel incomplete and makes us desire. The abstract individual is incapable of love and incapable of being loved precisely because it is abstract and has no recognizable, "loveable" characteristics. The abstract individual has no desire because it is not castrated. The abstract individual is, however, posited to be rational and rationality demands that the abstract individual make itself concrete. Consequently, although the adult subject retroactively looking at her childhood feels that castration is a condition that the Other has imposed upon her, in fact, as a logical matter, the abstract individual of liberalism always freely chooses to submit to the Other precisely so that it can love. But the price demanded of the symbolic order for love is castration and unending desire.

Now we can look more carefully at Lacan's terminology to see the implications this concept of intersubjective relations might have for economics. "The desire of man is the desire of the Other." [FN314] The original French carries the same ambiguous connotations as the English translation. Each subject desires the Other, desires to be desired by the Other, and her desire is determined by the Other. The abstract individual desires to become concrete in order to actualize its potential. This can only be achieved through intersubjective recognition. Through intersubjectivity the subject not only seeks the Other (desires the Other) she seeks to be recognized by the Other (to be desired by the Other) and in order to be recognized, desires to be whatever the Other wants her to be (her desire is imposed upon her by the \*240 Other). Consequently, the hysteric position is the constant questioning of the Other: Che Voui?--What do you want (from me)? [FN315]

Who is this Other? Once again, this is a complex idea. Before going forward, note that I am spelling "Other" with a capital "O," as the English translation of Lacan's "Autre." This, of course, implies that there is also an "other" spelled with a little "o." This little other is the objet petit a, which is the subject of the penultimate section of this Article. [FN316]

Most simply put, the Big Other is alterity--who, or whatever, the subject confronts as different or other than herself. [FN317] Actual other persons can, therefore, stand in the role of the Big Other for certain purposes. But, the Big Other is a more comprehensive concept than this; the initial "Other" that each subject confronts is the person or persons who we retroactively associate with the maternal role. M(O)ther is the Other. As we mature and learn language, however, the Other switches to the paternal role. The Big Other is that which castrated us (or so we retroactively posit).

Remember that castration is the feeling of loss and alienation we feel when we are split and enter the symbolic

order. The Big Other is, therefore, identified with the symbolic order itself--the entire social network of law, language and sexuality that governs our intersubjective relations.

Consequently, when the hysterical subject asks *Che Vouii?* she is not only asking her lover, mother and friends what they want (although she does this as well), she is also questioning her status within the social order. As a Lacanian subject, she can only maintain her subjectivity through recognition in the social order, so she must constantly determine what society recognizes in order to modify her behavior.

Consequently, there might be some psychoanalytic truth to Becker and Stigler's suggestion that there is a stable universal human taste for a position in society. The psychoanalytic account, however, is far richer than the classic economic one because the former merely describes this as a brute fact, while the \*241 latter seeks to formulate a theory of the phenomena so that it can predict as yet unobserved behavior. Most specifically, Lacan's theories of the fictional nature of the Big Other and of the role of the little other help to explain why the search for status takes the form of constant changes in "tastes" for specific commodities.

#### 4. The Big Other Does Not Exist

Despite the emphasis that Lacan places on the role of the symbolic order as the Big Other, in his later work he emphasizes that the Big Other does not exist. [FN318] As previously explained, one meaning of this typically cryptic pronouncement is that the symbolic order is a human creation, not a pre-given natural or "real" fact.

There are several implications of this for economic analysis. First, as suggested above and described in much greater detail elsewhere, [FN319] the symbolic order is dynamic--it is in a constant state of creation and growth. Although the symbolic order is driven by love and creates desire, desire can never be satisfied in the symbolic order. Satisfaction of desire would be merger with the real, and merger with the real is the very destruction of the symbolic order. Consequently, we constantly change the symbolic order in a vain hope that we will eventually get closer to the object of our desire. This requires that we adapt a fantasy, however. Fantasy is how we organize our lives in light of the paradox that our object of desire never has and never will exist, so that we can never get closer to, or further away from, it.

This is the logic of neo-classic economics, which posits that the actual market--which is symbolic in the Lacanian self--is driven by a competitive process that seeks to make the market more "efficient" and, therefore, theoretically more like the ideal of the "perfect market" which is "real" in the technical sense of the term. Luckily for the perfect market, being "real" is not merely empirically, but theoretically, impossible to achieve, because if it could be achieved, all actual "symbolic" market relations would have to come to an end. The perfect market does not exist in the same sense that the object of desire does not exist. No actual \*242 economy, therefore, is nearer to, or further from, this impossible ideal. The idea that we can approach the perfect market, let alone know when we are close to it, is the original fantasy that covers up the whole in economic theory and enables it to function.

Another implication of Lacan's analysis of the symbolic order is the notion that the Big Other is something "other" or totally outside of ourselves is false--a fantasy. Being an intersubjective human creation, each member of society plays a part in the creation of the Big Other. The Big Other does not castrate the subject, the individual castrates herself in order to create her own subjectivity and, in the process, both submits to, and participates in, the creation of the symbolic order. The symbolic order is "extimate"--the universal within us from which we are alienated. [FN320] No individual member of society is in control of the symbolic order, but each has an effect on, and a responsibility for, the symbolic order.

This explains why the hysteric must constantly ask *Che Vouii?* There can be no permanent answer to the question, not only because the symbolic order is in a constant state of change, but also because the symbolic order is not an external "thing," an "other" that one can address. The question must be addressed to the extimate other within our own heart but, as psychoanalysis suggests, this is something to which we do not have direct access.

Because the subject forms her subjectivity by being recognized/loved by the Other, but because the Other can never answer her question as to what it loves, the subject is always guessing. The paradox is, of course, that by

guessing the Big Other's desire, the subject, in fact, creates the Big Other's desire.

This necessarily follows from the Hegelian-Lacanian dialectic of recognition and love. The hysterical question, *Che Vouï?*, is a demand for love: "What can I do to make you love me?" But, rights and love can never be demanded from others because, in \*243 order to be recognized and loved, one must first be loveable. Consequently, we can only grant rights and love others--to first make others into subjects by seeing in them more than there is--in the hope that these newly created subjects will turn around and requite our love. One sees this dynamic played out in everyday life all the time. Nothing kills love more surely than the needy demand for love. As a psychoanalyst friend of mine once said, "Why didn't you call me?" is the question that always answers itself. You can, therefore, only love the other and try to anticipate what the beloved might want you to be.

In other words, the subject does not follow a constantly changing fashion merely because the symbolic order itself is in a state of change. By trying to follow fashion, she actually participates in the creation of the fashion that she attempts to follow. The very universality and stability of the preference/desire for status/recognition creates the dynamic that causes the constant change in specific taste.

This whirlwind introduction to the Big Other brings us to the little other.

## 5. The objet petit a

Perhaps Lacan's greatest insight, and the one most relevant to economics, is that intersubjective relations get played out through object relations. [FN321] Indeed, Lacan considered the objet petit a to be his most important contribution to psychoanalytic theory. Unfortunately, the term usually appears in French because this is one of the few cases in which the connotations of the French term can not be translated into our closely related language. [FN322]

\*244 What is the objet petit a, and what does it mean to say that it functions as a little other? According to psychoanalysis, human desire is the desire for completion, wholeness, the cure of castration, either through the attainment of the lost object of desire or merger back into the real--the destruction of our own subjectivity in the ecstasy of oblivion. Our love that creates our desire, and the desire that inflames our love, is intersubjective recognition in the symbolic order.

It is impossible to achieve our desire within the symbolic order--castration and desire are necessary for subjectivity. We can never know the answer to the question *Che Vouï?* (How can I make you love me?) because love can never be demanded from, but only given to, others. The subject is, therefore, in a constant state of frustration.

Hence, the subject resorts to fantasy in the vain hope of finding a means to achieve satisfaction. Because the subject desires, she retroactively hypothesizes that there must be a cause of her desire--there must be some "thing" or "object" that she wants. If she obtained this "thing," she would no longer desire. Therefore, she searches for this mysterious object that can serve as the cause of her desire. This object, the objet petit a, will serve as the specific other--the little other--that will answer her questions of desire.

Note why this is a fantasy. What we really desire is impossible--wholeness. In fact, wholeness is not a lost something that we once had. Wholeness is, instead, an ideal that we retroactively reconstruct to serve as a contrast to the fact of our incompleteness. The phallus is not just lost, it never existed and never will exist. We create the fantasy of the objet petit a because we desire, but we tell ourselves we desire because of the objet petit a. Consequently, the objet petit a is the "object cause of desire." [FN323] This is not because it actually causes our desire, rather, we act as though it must be the cause of our desire. The objet petit a is an abduction of the "just so" story--a retroactive attempt to explain what has gone before. The object cause of desire follows, rather than precedes, our desire.

Anything perceived as external to our subjectivity can serve as \*245 an objet petit a. An objet petit a can be a specific other person, but it can also be an attribute--such as a breast, or a foot, to give common examples. But it does not have to be a conventionally "sexual" object, or even an object of pleasure. It must merely serve as a



retroactive explanation of our emotion; it is whatever seems to set the chain of desire into motion. Proust's madelaine, supposedly producing the chain of memories that became *The Memory of Times Past*, is an excellent example of a little other at work. The object does not even have to be a physical object at all. Two common little others identified by Lacan are the voice and the gaze. [FN324]

The fact that the objet petit a is a substitute for our true desire means, of course, that it is, once again, in a constant state of flux. The objet petit a only functions if it is kept at a distance. The moment a subject obtains a specific object identified as her petit a, it becomes obvious that her desire is not satisfied--she is still, by definition, a split subject. She must then immediately find another object to fill this role.

A wonderful, if extreme example, is the behavior of Don Juan, as described in Leporello's Catalogue aria from *Don Giovanni*. The Don had thousands of lovers. [FN325] He truly loved each woman as the object cause of her desire, until he possessed her, at which moment his desire immediately turned to another woman. His true desire was, of course, for Woman--the abstract concept of the Feminine as lost object of desire; wholeness understood as union with the maternal. Each actual woman was only a petit a, a temporary substitute for this impossible ideal.

The concept of the objet petit a holds out a possible explanation for a number of economic conundrums we have encountered. First, it is, once again, a fuller account of the Becker-Stigler assertion that tastes are indeed stable and universal despite the overwhelming evidence of fickle and idiosyncratic tastes evidenced in specific market decisions. To recap, Becker and Stigler posit that actual objects purchased in the market are mere commodities, or things that contingently serve as means to satisfy \*246 the more abstract taste for universal recognitions. This may explain why changes in fashion are consistent with stable tastes, but does not explain why fashions change. That is, consistency of fashion is equally consistent with their notion of stable tastes. In contrast, the Lacanian account is an explanation of change itself. The true desire of normal neurotic subjects is indeed stable and universal. Indeed, desire is so universal that it can never be satisfied. Nevertheless, the subject who seeks to satisfy her desire constantly identifies objets petit a to serve as what Becker and Stigler call "commodities" or means to achieve her true desire. But, psychoanalysis goes further and explains why every commodity--every petit a--while always serving the function of explaining desire, always also fails in its function of satisfying desire. As soon as a petit a is attained--as soon as a commodity is acquired in the market place--it becomes inadequate to its task precisely because the objet petit a is only a proxy for our true object of desire (wholeness). [FN326]

The Lacanian account also explains the apparent paradox of the economic notion of utility. If economic subjects are rational utility maximizers who seek to increase their utility with each exchange, why aren't we constantly ratcheting up and becoming happier over time?

Lacan agrees with economists that subjects do in fact frequently seek to satisfy their desires, and even has an account for why this is true. But he also explains why they do not, in fact, ever get closer to their desire through acquisitive behavior. Utility maximization is necessarily a run on a hamster wheel--a frenetic race that ends where it begins.

Further, Lacan also can explain why a subject frequently engages in behavior that seems self-destructive or utility minimizing when viewed from the outside. This is not merely because the objet petit a, as the explanation for passion, can take the form of an object of revulsion as well as attraction. This leads us to our final subject--drive.

## 6. The Drive

Desire is not the only urge that affects economic behavior. There is also a force which Lacan called drive or libido. [FN327] Drive \*247 and desire have precisely the opposite relationship to enjoyment. [FN328] If utility maximization is explained by desire, wealth maximization is explained by drive.

Before trying to explain what drive is, it is helpful to clarify what drive is not. The colloquial understanding of the Freudian term "libido" is the animal mating urge; the instinctual sexual desire located in the id. [FN329] This obviously cannot be Lacan's meaning, because, as we have seen, Lacan was trying to divorce psychoanalysis from the lingering biological component in Freud's original theory. Lacan's precise point is that the subject does not have

direct access to her animal nature, but can only interpret it through the three orders of the symbolic, the imaginary, and the real.

Curiously, to Lacan, the drive or libido is defined as being completely asexual. [FN330] It is defined as that which is left over of the animal sexual instinct after the sexual component has been symbolized as desire. [FN331] The point is that, unlike desire which has both an aim and a goal, drive only has an aim and no goal. [FN332] To the animal, this goal is to mate. To the human subject this goal is *jouissance*--the achievement of wholeness by attaining the phallus, whether understood as the object of desire (the \*248 perfect mate), or a return to the lost unity of the womb. This goal is the sexual component of instinct. Drive, in contrast, is an aim without a goal. [FN333]

Consequently, desire can be said to be characterized by the ends-means reasoning that economics calls rationality. One takes action because one desires to achieve an end--utility or *jouissance*. In contrast, drive is non-purposive action. Its slogan is the same as Nike's: "Just do it."

What do I mean? As discussed, the position of desire is one of constant frustration. The goal of our true desire is impossible--an imagined lost wholeness that never did, and never could, exist. No matter how hard we try to maximize our utility, we can never get closer to our goal. We occasionally glimpse and even momentarily feel that we sometimes obtain *jouissance*, but a continuing state of *jouissance* would be the loss of consciousness and subjectivity itself. One would become a raving psychotic--or dead.

Drive is the giving up on desire. Rather than continuing to seek ecstatic *jouissance*, the subject merely seeks pleasure by losing himself in repetitive activity. [FN334] The subject of drive is driven to do what he does not because he wants to, but because he can't help himself. [FN335] Some aspects of drive can seem harmless, or even beneficial. Examples would be the pleasure one achieves \*249 by pursuing a hobby--such as running in my case--or, occasionally, engaging in "mindless" repetitive work. But, the logic of drive is destructive, even deadly.

Freud identified libido with the pleasure principle and posited that the pleasure principle is related to its opposite, the death principle. Lacan goes a radical step further. Lacan asserts that the pleasure principle and the death principle are in fact one, and all drives are death drives. [FN336]

Desire is epitomized in the feminine neurosis of hysteria; drive is epitomized in the masculine neurosis of obsession. The masculine is the part of subjectivity that tries to deny castration. The obsessional doesn't try to reach the goal of desire (wholeness) because the masculine subject tries to pretend that he is already whole. But, without a goal, the subject of drive is trapped in a spiraling, circling, acephalous dance of death. [FN337] Frequently, the driven subject threatens to trample those around her. This is seen, for instance, in mass political movements where individuals give up on their own individual desire and submit to drive by following a leader. [FN338] Drive can also lead to the subject's own destruction. The driven subject obtains a perverse pleasure in his repetitive activity and will continue it, even if it is actually harmful to him. Because drive is the opposite of ends-means reasoning, the driven subject can act without regard to even such basic goals as survival.

A homely and unpleasant example of the destructive aspect of drive, that probably everyone has experienced, is the painful mouth sore that one cannot resist constantly provoking with one's tongue. [FN339] Another example, from my personal experience, is the hobby of running. I like to tell myself that I run out \*250 of the desire to achieve the admirable goal of health and the perhaps more dubious goals of physical pleasure and beauty. This does not explain, however, why I persist in running daily for longer periods than are required for cardiovascular health, not only in the summer during heat and ozone advisories, but also when I have painful injuries that I know are exasperated by my running. At some level, I continue to run not despite of, but because of, the pain. The experience is not pleasurable, but I do achieve pleasure from pain--one of the definitions of *jouissance* that the driven subject supposedly gave up. [FN340]

Consequently, although Lacan pronounced that the only ethical rule that psychoanalysis could prescribe was do not give way with respect to your desire, [FN341] the implied corollary to Lacan's \*251 ethic of desire is that one needs to stand ready to give way with respect to one's drive. Drive is precisely the foreswearing of desire, so that it is impossible to be true both to one's desire and one's drive. Consequently, the ethical question of drive must be: How can one break free from one's chains in order to make an ethical decision?

The psychoanalytic theory of drive may offer an explanation for much economic behavior that appears irrational. Indeed, in that economic rationality is defined as ends-means reasoning, and drive lacks an end, driven behavior is economically irrational by definition. As we have seen, the reason why Posner and others want to describe behavior in terms of rationality is that they wish to make predictions and they presume that irrational behavior is unpredictable. Psychoanalytic theory, in contrast, holds that irrationality (drive) follows structural rules and should be every bit as predictable as rationality (desire). Consequently, psychoanalytic behavior holds out the possibility of enabling us to throw out the existing economic paradigm of the rationality postulate, which is encrusted with auxiliaries that attempt to explain the anomalies of apparently irrational behavior, and replace it with a new progressive research program that has excess content in that it's core can explain and predict both rational and irrational behavior without the use of auxiliaries.

Moreover, as I explain in greater detail elsewhere, psychoanalytic theory can explain the difference between traditional utility based neo-classical welfare economic theory and Posner's alternative, based on wealth maximization. [FN342] At first blush, both utilitarianism and wealth maximization would seem to be examples of "desire." That is, aren't they both characterized by aim (thrust, movement) and goal? Isn't the only difference between them their goals; utilitarian behavior seeking utility, and wealth \*252 maximization seeking wealth? As I explain in great detail elsewhere, a close reading of Posner's hypothesized economic model reveals that it, in fact, has no goal-- wealth maximization is an economic system governed by drive, not desire. [FN343]

A social system based on the principle of wealth maximization, according to Posner, does not encourage economic actors to act in order to achieve objects as the means to the end of enjoyment--to act out of desire--as does utilitarianism. [FN344] Rather, it seeks to cause subjects to maximize the means (wealth) for the acquisition of more wealth in an unending spiral. Posner proudly proclaims that one of the beauties of his system is precisely that it incentivizes productive capacity while discouraging the cultivation of the capacity for enjoyment. In fact, if one examines Posner's writings and takes his arguments to their logical extremes, we find that in a perfect wealth maximizing economic universe, no economic subject would ever enjoy any of the property she acquires in the market--she would only temporarily possess an object until she could exchange it for a more valuable one. Ronald Dworkin and other critics of Posner have long criticized him for perverse priorities, for confusing means with ends--whereas neo-classical welfare economics encourages people to acquire wealth, this is only as a means to acquire their true ends; Posner makes wealth the ends, not the means. Psychoanalysis offers an explanation of the underlying "logic" of this reversal.

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[FN2]. Question, in Herbert A. Simon, *An Empirically Based Microeconomics* 28 (1997) [hereinafter Simon, *Microeconomics*].

[FN3]. Jeanne L. Schroeder, *Just So Stories: Posner's Methodology*, *Cardozo L. Rev.* (forthcoming 2000) [hereinafter Schroeder, *Just So Stories*].

[FN4]. Milton Friedman, *The Methodology of Positive Economics*, in *Essays in Positive Economics* 3 (1994).

[FN5]. Mark Blaug, *The Methodology of Economics or How Economists Explain* 91 (2d ed. 1992); Paul A. Samuelson, *The Collected Papers of Paul A. Samuelson 1774* (J.E. Stiglitz ed., 1996); Herbert A. Simon, *2 Models of Bounded Rationality: Behavioral Economics and Business Organization* xix n.1, 369-70 (1982) [hereinafter Simon, *Bounded Rationality*].

[FN6]. Friedman, *supra* note 3, at 14.

[FN6]. Jeanne L. Schroeder, *Fear of Freedom: Economic v. Speculative Rationality* (2000) (unpublished manuscript, on file with author) [hereinafter Schroeder, *Fear of Freedom*].

[FN7]. Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 *Stan. L. Rev.* 1551, 1555 (1998) [hereinafter Posner, *Behavioral Economics*].

[FN8]. As I shall discuss below, Becker is one of the few neo-classical economists who has tried to develop an account for preference formation. See *infra* text accompanying notes 231-83.

[FN9]. Posner repeatedly claims that law and economics is scientific. See Richard A. Posner, *Overcoming Law* 15 (1995) [hereinafter Posner, *Overcoming Law*] (in which he claims that law and economics "epitomizes the operation in law of the ethic of scientific inquiry, pragmatically understood.... [E]conomics is the instrumental science par excellence.") He claims that it is drawn to the empirical. *Id.* at 7. However, as I discuss in *Just So Stories*, not only does Posner's method depart from standard accounts of the scientific method of falsifiability in theory, it departs from his own method in practice. Schroeder, *Just So Stories*, *supra* note 2. Far from engaging in the empirical process of falsification, Posner almost exclusively adopts the much less rigorous one of verification. For a sharp critique of the scientific pretensions of law-and-economics scholarship, see Brian Leiter, *Holmes, Economics and Classical Realism, in The Path of the Law and its Influence: The Legacy of Oliver Wendell Holmes, Jr.* 285 (Steven J. Burton ed., 2000).

[FN10]. For simplicity, I often refer to the legal analysis of law as practiced by Posner and his followers as "utilitarianism" because neo-classical economic theory has its origins in the writings of Jeremy Bentham and others. Many, if not most, economists, like utilitarians, do posit that economic subjects are rational utility maximizers. Posner himself famously claims to be a wealth, rather than a utility, maximizer. Elsewhere, I have taken Posner's distinction seriously on his own terms. See, e.g., Jeanne L. Schroeder, *The Midas Touch: The Lethal Effect of Wealth Maximization*, 1999 *Wis. L. Rev.* 687 [hereinafter Schroeder, *The Midas Touch*]. Nevertheless, since little in this Article depends on this distinction, I frequently use this one term to describe those who adopt the rationality postulate regardless of in which form. When I deem distinctions between utility and wealth maximization to be material, I shall make this express.

[FN11]. I present my critique of "romanticism" most fully in Jeanne L. Schroeder, *Pandora's Amphora: The Ambiguity of Gift*, 45 *UCLA L. Rev.* 815 (1999) [hereinafter Schroeder, *Pandora's Amphora*].

[FN12]. I develop this analysis at length in Jeanne L. Schroeder, *The Four Discourses: A Lacanian Analysis of Legal Practice and Scholarship*, *Tex. L. Rev.* (forthcoming 2000) [hereinafter Schroeder, *The Four Discourses*].

[FN13]. The American Heritage Dictionary defines "rationality" as: "The quality or condition of being rational" and further gives "Having or exercising the ability to reason" and "Consistent with or based on reason; logical" as the first and third definitions of "rationality," respectively. The American Heritage Dictionary 1028 (2d. ed. 1985).

[FN14]. I am admittedly begging the question as to whether animals are capable of conscious "rational" thought as understood in both colloquial and speculative theoretical parlance. As we shall see, since Posner does not associate rationality with thought, let alone with self-consciousness, he has no problem ascribing rationality to dumb brutes.

[FN15]. Blaug, *supra* note 4, at 229.

[FN16]. Rationality and its synonyms were important in the vocabulary of philosophy and ethics before the social sciences emerged as independent disciplines. The modern usage of rationality is very close to Aristotle's concept of calculative or deliberative intellectual virtue. In this sense, the rationality of an action involves its derivation by logical processes from valid premises. Rationality sometimes refers to processes of choice that employ the intellectual faculty; sometimes to the choices themselves. The former emphasis is typical of earlier usage in psychology, logic, and ethics; the latter emphasis predominates in economics and sociology. Simon, *Bounded Rationality*, *supra* note 4, at 405-06.

[FN17]. See, e.g., *infra* text accompanying notes 289-301 and 327-33.

[FN18]. Gary Lawson, *Efficiency and Individualism*, 42 *Duke L.J.* 53, 55- 56 (1992) (footnotes omitted).

[FN19]. See *infra* text accompanying notes 289-301.

[FN20]. Blaug, *supra* note 4, at 229.

[FN21]. *Id.* at 230. Blaug contends that this assertion is "obviously" false and cites, not merely Marxism, but Keynesian theory as counter- examples. *Id.* Nevertheless, as I shall discuss, many prominent economists, such as Gary Becker, do maintain that the rationality postulate, with its emphasis on maximization, is the sine qua non of the economic approach, although they may disagree as to the identity of economic agents (is it the firm, the family, the individual, or, in Posner's case, the gene?) and what is being maximized. See *infra* text accompanying notes 101-36 and 232-35.

[FN22]. Amartya Sen, *Choice, Welfare and Measurement* 91 (1982).

[FN23]. Blaug, *supra* note 4, at 231. Blaug believes, as I do, that:

The idea that rationality is obviously true and is so sacrosanct that it must be protected from criticism by the "negative heuristic" of the ad hoc accusation is very curious in view of the fact that rationality in the strict modern sense of the term cannot be universally true of all economic actions by all economic agents.  
*Id.*

[FN24]. *Id.* at 229.

[FN25]. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *Stan. L. Rev.* 1471 (1998) [hereinafter *JST, Behavioral Approach*].

[FN26]. According to Posner, "*JST* don't actually tell us what 'behavioral economics' means. But implicitly they define it negatively: It is economics minus the assumption that people are rational maximizers of their satisfactions." Posner, *Behavioral Economics*, *supra* note 7, at 1552. One of the conclusions that Posner draws from this is that behavioral economics has lost predictive power. "But it is profoundly unclear what 'behavioral man' would do in any given situation. He is a compound of rational and nonrational capacities and impulses. He might do anything." *Id.* at 1559.

[FN27]. *Id.* at 1558-59.

[FN28]. On occasion Posner makes this connection:

A market may behave rationally, and hence the economic model of human behavior apply to it, even if most of the individual buyers (or buys) are irrational. Irrational purchase decisions are likely to be random and hence cancel each other out, leaving the average behavior of the market to be determined by the minority of rational buyers (or purchases).

Posner, *Overcoming Law*, *supra* note 9, at 16 (footnotes omitted).

[FN29]. Jacques Lacan, *The Four Fundamental Concepts of Psycho-Analysis* 149 (J. Miller ed. & A. Sheridan trans., 1981) [hereinafter Lacan, *Four Fundamentals*].

[FN30]. Posner, *Behavioral Economics*, *supra* note 7, at 1558.

[FN31]. Blaug, as a follower of Imre Lakatos, is sympathetic to the neo- classical defense of the rationality postulate (which Posner himself makes), that it takes a theory to beat a theory. One does not necessarily reject a hypothesis merely because one observed inconsistent data that seems to falsify the theory until one develops an alternative explanation for the data. Nevertheless, he expresses surprise that so many economists seem to cling to the rationality postulate despite the fact that alternative theoretical explanations have, in fact, been proposed. Blaug gives Simon's theory of satisficing as an example of one such alternative. Blaug, *supra* note 4, at 233.

[FN32]. See, e.g., Herbert Alexander Simon, *The Sciences of the Artificial* (1996).

[FN33]. I present this argument in detail in Schroeder, *Pandora's Amphora*, *supra* note 11.

[FN34]. Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 *Harv. L. Rev.* 483, 492-93 (1998) [hereinafter Schroeder, *The End of the Market*].

[FN35]. Schroeder, *Pandora's Amphora*, *supra* note 11, at 895-98.

[FN36]. Posner has famously argued that law does and should seek to maximize wealth, rather than utility. See, e.g., Posner, *Overcoming Law*, *supra* note 9, at 172-73. He believes, however, that rational individual subjects probably seek to maximize their utility. Richard A. Posner, *The Economics of Justice* 64 (1981) [hereinafter Posner, *Economics of Justice*]. He states:

Not only can wealth not be equated to happiness, but, to state the same point in the language of economics, people are not just wealth maximizers. Wealth is an important element in most people's preferences, and wealth maximization thus resembles utilitarianism in assigning substantial weight to preferences, but it is not the sum total of those preferences.

*Id.*

[FN37]. I have discussed the paradox of market analysis in other terms extensively in Schroeder, *The End of the Market*, *supra* note 34; and Schroeder, *The Midas Touch*, *supra* note 10.

[FN38]. Blaug, *supra* note 4, at 142, 229.

[FN39]. See *infra* text accompanying notes 94-95.

[FN40]. I invoke the vocabulary of Lakatos's rewriting of Karl Popper's theory of falsification in detail in Schroeder, *Just So Stories*, *supra* note 2; and Jeanne L. Schroeder, Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination, 70 *Tex. L. Rev.* 109 (1991) [hereinafter Schroeder, *Abduction from the Seraglio*]. I give a brief introduction to some of its salient points immediately below and *infra* in text accompanying notes 139-45.

[FN41]. Imre Lakatos, *Falsification and the Methodology of Scientific Research Programmes, in Criticism and the Growth of Knowledge* 91 (Imre Lakatos & Alan Musgrave eds., 1970). I compare Lakatos and Posner's methodology in Schroeder, *Just So Stories*, *supra* note 2.

[FN42]. Lakatos, *supra* note 41, at 119 (footnotes omitted).

[FN43]. *Id.* at 97-99; Schroeder, *Abduction from the Seraglio*, *supra* note 40, at 168.

[FN44]. Schroeder, *Abduction from the Seraglio*, *supra* note 40, at 170.

[FN45]. Lakatos, *supra* note 41, at 118.

[FN46]. *Id.*

[FN47]. See generally Blaug, *supra* note 4.

[FN48]. Blaug, *supra* note 4, at 233.

[FN49]. In *Just So Stories* I argue that, although Posner does not use Lakatosian terminology, Posner's recent exposition of his version of the rationality postulate can be seen as an attempt to protect the hard core of his theory through the development of auxiliary hypotheses as a response to a challenge. See Schroeder, *Just So Stories*, *supra* note 2.

[FN50]. Posner, *Behavioral Economics*, *supra* note 7, at 1552.

[FN51]. Although he oversimplifies, Posner is not totally unfair in accusing JST of advocating that, whenever the populace at large can be expected to act irrationally, a "politically insulated corps of experts that JST favor would be charged with determining the populace's authentic preferences". *Id.* at 1575. This approach "sounds totalitarian to" Posner. *Id.* Moreover, Posner wonders why the experts will not share the same sources of irrationality as the populace. *Id.* Although he does not raise this point in his article, insofar as Posner still promotes wealth maximization as a goal of law, he might object to the JST proposal because it would be aimed instead at utility maximization. It should be obvious that I would go further in my objections because I question the classical

economic approach of limiting rationality to the choice of means, rather than the choice of ends, let alone the proposition that the law should adopt policies that are utility or wealth maximizing.

[FN52]. Both Posner and JST begin their essays with elaborate apologies about how they generally agree with each other before they take off their gloves.

[FN53]. Posner, Behavioral Economics, supra note 7, at 1552.

[FN54]. That is, JST do not present their paper as an attack on law and economics, but as an attempt to bring law and economics more in line with contemporary economic theory, which has modified its rationality postulate in light of empirical research. "Our goal... is to advance an approach to the economic analysis of law that is informed by a more accurate conception of choice, one that reflects a better understanding of human behavior and its wellsprings." JST, Behavioral Approach, supra note 25, at 1473. In their reply to Posner's critique they state:

A reader of Judge Posner's commentary might be left with the impression that there are large disagreements between us. This impression would be false. Posner accepts the most important points of our article...; Much of his discussion consists of quibbling about what is really a minor matter: whether we should call a given behavior rational or not.

Christine Jolls et al., Theories and Tropes: A Reply to Posner and Kelman, 50 *Stan. L. Rev.* 1593, 1594 (1998) [hereinafter JST, Theories]. In other words, they implicitly admit that their proposal is not necessarily a rejection of Posner's model, but can be read as a modification or auxiliary to it.

[FN55]. Richard A. Posner, *Economic Analysis of Law* (4th ed. 1992) [hereinafter Posner, Economic Analysis].

[FN56]. *Id.* at 3.

[FN57]. Posner, Behavioral Economics, supra note 7, at 1551.

[FN58]. Posner, Economic Analysis, supra note 55, at 3 (footnote omitted).

[FN59]. *Id.* at 3-4.

[FN60]. Posner, Behavioral Economics, supra note 7, at 1551.

[FN61]. Posner, Economic Analysis, supra note 55, at 16.

[FN62]. Simon, Bounded Rationality, supra note 4, at 406.

[FN63]. As I discuss infra in text accompanying notes 167-98, Samuelson attempts to straddle this gap between choice as process and choice as result through his theory of revealed preferences.

[FN64]. Simon, Bounded Rationality, supra note 4, at 406 (quoting R.A. Dahl and C.E. Lindblom).



[FN65]. Id. at 426.

[FN66]. Simon, *Microeconomics*, supra note 1, at 18.

[FN67]. Id.

[FN68]. Simon, *Bounded Rationality*, supra note 4, at 426.

[FN69]. Simon, *Microeconomics*, supra note 1, at 17.

[FN70]. Id. at 18.

[FN71]. Id. at 17.

[FN72]. Id. at 18.

[FN73]. "The assumption that rationality is bounded leads in many cases to quite different conclusions about the operation of the economy than does the assumption of global rationality." Id. at 17.

[FN74]. Id. at 18.

[FN75]. Id.

[FN76]. Id. at 19.

[FN77]. See *infra* text accompanying notes 92-94.

[FN78]. See *supra* text accompanying notes 60-61.

[FN79]. See *supra* text accompanying notes 3-5.

[FN80]. See Friedman, supra note 3, at 21; Schroeder, *Just So Stories*, supra note 2.

[FN81]. Simon, *Microeconomics*, supra note 1, at 18-19.

[FN82]. Id. at 62.

[FN83]. *Id.* at 63.

[FN84]. See *supra* text accompanying note 1.

[FN85]. See *supra* text accompanying notes 26-28.

[FN86]. Simon, *Microeconomics*, *supra* note 1, at 63.

[FN87]. *Id.*

[FN88]. *Id.*

[FN89]. See *supra* note 31.

[FN90]. See, e.g., *infra* text accompanying notes 98-100.

[FN91]. Posner, *Economic Analysis of Law*, *supra* note 55, at 4.

[FN92]. Posner, *Behavioral Economics*, *supra* note 7, at 1552.

[FN93]. *Id.* at 1557.

[FN94]. *Id.* at 1554.

[FN95]. Sen, *supra* note 22, at 93.

[FN96]. See *infra* text accompanying notes 167-89.

[FN97]. See *infra* text accompanying notes 205-21.

[FN98]. "The substantive content of economic rationality is a subject of some dispute as well. At a minimum, individual rationality implies some kind of consistency. In fact, economic rationality is often defined in terms of consistency." Herbert Hovenkamp, *Rationality in Law & Economics*, 60 *Geo. Wash. L. Rev.* 293, 295 (1992). Hovenkamp is quite critical about law and economics scholarship which he thinks "indulges three inconsistent assumptions about human rationality." *Id.* at 297.

[FN99]. Posner, *Behavioral Economics*, *supra* note 7, at 1555.

[FN100]. See Posner, *Economic Analysis of Law*, supra note 55.

[FN101]. *Id.* at 20-21.

[FN102]. See Richard A. Posner, *Aging and Old Age* 148-52 (1995).

[FN103]. Posner, *Behavioral Economics*, supra note 7, at 1555.

[FN104]. *Id.* at 1555-56.

[FN105]. See infra text accompanying notes 284-344.

[FN106]. Richard Dawkins, *The Selfish Gene* (1989). The following comprises a very simplified version of the argument that Dawkins makes in the first two chapters of this book. Dawkins is careful to note that he is using the term "gene" for convenience in writing a book aimed at the general public.

To be strict, this book should be called not *The Selfish Cistron* nor *The Selfish Chromosome*, but *The Slightly Selfish Big Bit of Chromosome and the Even More Selfish Little Bit of Chromosome*. To say the least this is not a catchy title so, defining a gene as a little bit of chromosome which potentially lasts for many generations, I call the book *The Selfish Gene*.

*Id.* at 33.

[FN107]. *Id.* at 19.

[FN108]. *Id.* at 20.

[FN109]. *Id.* at 7.

[FN110]. *Id.*

[FN111]. *Id.* at 47.

[FN112]. As Dawkins suggests:

[T]he program may take the form of the following instructions to the survival machine: 'Here is a list of things defined as rewarding: sweet taste in the mouth....' [T]he genes are predicting that sweet taste in the mouth,... [is] going to be 'good' in the sense that eating sugar... [is] likely to be beneficial to gene survival. The possibilit[y] of saccharine... [is] not anticipated according to this example; nor are the dangers of over-eating sugar in our environment where it exists in unnatural plenty.

*Id.* at 57.

[FN113]. "Therefore we must expect that when we go and look at the behaviour of baboons, humans, and all other living creatures, we shall find it to be selfish." *Id.* at 4.

[FN114]. For example, Posner states that

Evolutionary biology sees altruism as a trait that promotes inclusive fitness, defined as maximizing the number of copies of one's genes by maximizing the number of creatures carrying them, weighted by the closeness of the relation. The inclusive fitness of a social animal like man is greatly enhanced by his having a proclivity to help his relatives, and so it is plausible to suppose that this proclivity evolved as an adaptive mechanism. Posner, Behavioral Economics, supra note 7, at 1561 (footnotes omitted).

[FN115]. Id. at 1570.

[FN116]. Or, even worse, cute little puppies?

[FN117]. Posner, Behavioral Economics, supra note 7, at 1561.

[FN118]. "Most members of one's community would have been either one's relatives, or nonrelatives having very close affective ties to one (such as one's mate and his or her family)...." Id.

[FN119]. "In these circumstances it would not have been essential to have an innate capacity to discriminate between relatives and other intimates, on the one hand, and, on the other hand, those people--call them 'strangers'--with whom one did not have repeated face-to-face interactions." Id. (footnotes omitted).

Posner's ad hoc explanation of altruism is crude, even by the standards of socio-biology. More sophisticated accounts posit that cooperative behavior is beneficial to individuals who live in social groups, like humans, not merely because we might be closely related to the people we help. Rather, by forming coalitions with others, one is more likely to obtain the goods and mates necessary to thrive and reproduce.

[FN120]. "[O]ur instincts are easily fooled when confronted with conditions to which human beings never had a chance to adapt biologically." Id.

I am not sure how to account for my sentimentality toward dogs despite the fact that I find them disgusting. Stephen Jay Gould has suggested that Walt Disney's artists unconsciously caused their depictions of Mickey Mouse to "evolve" from his original, more realistic, mouse-like form to one having the characteristics of a human infant (large eyes in a head disproportionately large for his body) precisely because we are hard-wired to be attracted to such images. That is, we consumers are instinctively more likely to want to visit a Disneyworld inhabited by a cute humanly infantile Mickey than a creature who looks like a giant adult rodent. Stephen Jay Gould, *The Panda's Thumb* 95 (1980). Perhaps dogs evolved deep liquid eyes reminiscent of trusting children precisely as a strategy so that they can freeloader off of our confused instincts.

[FN121]. Posner, Behavioral Economics, supra note 7, at 1570.

[FN122]. JST, for example, claim that they are not rejecting the rationality postulate, but merely setting its boundary: "We will describe the differences by stressing three important "bounds" on human behavior, bounds that draw into question the central ideas of utility maximization, stable preferences, rational expectations, and optimal processing of information. People can be said to display bounded rationality, bounded willpower, and bounded self-interest." JST, Behavioral Approach, supra note 25, at 1476 (emphasis added).

[FN123]. Posner, Behavioral Economics, supra note 7, at 1563. Although the economist might agree that it might be

rational for an economic actor to threaten harm to another actor as a means of achieving her ends, it is irrational to expend any resources to follow up on the threat if the other actor fails to behave as agreed. To do so would be, so to speak, to close the barn door after the horse was gone. In a primitive society with no legal system, however, it may very well be rational to follow through with such threats, not because one thereby obtains any utility with respect to the foregone transaction, but in order to make future threats credible.

[FN124]. *Id.* at 1565-67. I discuss the endowment effect briefly in the text, *infra* accompanying notes 252-57 and 298-304.

[FN125]. Posner, *Behavioral Economics*, *supra* note 7, 1565-66.

[FN126]. Lucy (named after the Beatles' song *Lucy in the Sky With Diamonds*) is, of course, the nickname given to the first australopithecus skeleton found in Africa. After the discovery of Lucy, footprints of two australopithecuses were found preserved in volcanic ash. The prints indicate that one of the creatures was substantially bigger than the other, suggesting either that one was male and the other female, or that one was an adult and the other a juvenile. Further, the trails were side by side but so close together to indicate that they must have been touching. The Museum of Natural History in New York displays a touching diorama hypothesizing the event that led to the fossil. It depicts an apewoman and her mate as an affectionate couple walking with their arms entwined around each other's waists while looking back warily at the smoldering volcano destined to preserve the moment. Whenever I have gone to see this exhibit I have noticed that a large percentage of the museum goers react with pleasure, "Look it's Lucy--and that must be Ricky!"

[FN127]. Posner, *Behavioral Economics*, *supra* note 7, at 1570.

[FN128]. *Id.*

[FN129]. "JST's theory seems perilously close to the abyss of nonfalsifiability; perhaps it has fallen in." *Id.* at 1560.

[FN130]. Lewis Carroll, *Through the Looking-Glass* 131 (American ed. 1977).

[FN131]. Still one of the best critiques of the law and economics movement is one of the earliest. See Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 *Va. L. Rev.* 451 (1974).

[FN132]. Sen, *supra* note 22, at 89.

[FN133]. The American Heritage Dictionary's second definition of "rational" is "[o]f sound mind; sane." The American Heritage Dictionary, *supra* note 13, at 1028.

[FN134]. Posner, *Behavioral Economics*, *supra* note 7, at 1551. Or, that people are totally unpredictable in that they are a "compound of rational and nonrational capacities and impulses." *Id.* at 1559.

[FN135]. *Id.*

[FN136]. Id.

[FN137]. Id.

[FN138]. See Schroeder, Just So Stories, supra note 2.

[FN139]. Posner, Behavioral Economics, supra note 7, at 1567.

[FN140]. JST, Theories, supra note 54, at 1595.

[FN141]. Schroeder, Just So Stories, supra note 2.

[FN142]. Schroeder, Abduction from the Seraglio, supra note 40, at 183-85.

[FN143]. Friedman, supra note 3, at 7, 8; Posner, Behavioral Economics, supra note 7, at 1560.

[FN144]. That is, abduction explains already observed behavior, it does not predict yet to be observed behavior. Schroeder, Abduction from the Seraglio, supra note 40, at 180; Schroeder, Just So Stories, supra note 2. As JST note, one needs to distinguish between "a true prediction... rather than a post hoc explanation." JST, Theories, supra note 54, at 1598.

[FN145]. Schroeder, Abduction From the Seraglio, supra note 40, at 163-64; Schroeder, Just So Stories, supra note 2.

[FN146]. Posner, Behavioral Economics, supra note 7, at 1575.

[FN147]. Id.

[FN148]. Id.

[FN149]. See supra text accompanying notes 20-24.

[FN150]. Gary S. Becker, The Economic Way of Looking at Behavior: The Nobel Lecture 2 (1996) [hereinafter, Becker, Economic Way].

[FN151]. Id.

[FN152]. Id. at 385.

[FN153]. Schroeder, *The End of the Market*, supra note 34, at 537. I introduce Stigler's definition of rationality at length in this Article. Consequently, the points made and the language used in the following paragraphs of this Article are necessarily similar to those of my earlier article.

[FN154]. Frank H. Knight, *Risk, Uncertainty and Profit* (1921) (quoted in George J. Stigler, *Essays in the History of Economics* 257 (1965)).

[FN155]. Gary S. Becker, *The Economic Approach to Human Behavior* 14 (1976) [hereinafter Becker, *Economic Approach*].

[FN156]. George J. Stigler, *The Theory of Price* 52 (4th ed. 1987).

[FN157]. *Id.*

[FN158]. *Id.* at 53.

[FN159]. The classic example cited by Stigler is the common practice of making weekly deposits in a non-interest bearing "Christmas Club," rather than buying an interest bearing investment. *Id.* Stigler understands that to try to explain this away by reference to individual "preferences" (i.e. the investor just has a "taste" for Christmas Clubs) essentially does away with the requirement by turning it into a truism. *Id.* at 55.

For example, Lawson teeters on the brink of truism (if he hasn't already plummeted over the side) when he states: "The rationality postulate of economics states (or assumes, or predicts) that each action of each individual will aim at achieving a more preferred state of affairs than the individual believes would result from other courses of action." Lawson, supra note 18, at 60. In other words, when people act (or don't act) it is probably because it must have seemed like a good idea at the time.

[FN160]. That is, given a specific budget, they will choose the market basket which lies on the highest utility curve. Lawson, supra note 18, at 55. Obviously, this same concept can easily be translated into wealth maximizing criteria--given two alternatives, he will choose the one that yields the greater wealth or profit.

[FN161]. Famously, Posner has argued that the goal of law is, or should be, the maximization of wealth, not utility. Nevertheless, Posner also sometimes claims that empirical individuals are probably utility, rather than wealth, maximizing. Consequently, Posner's analysis of law and policy recommendations are, in part, aimed at discouraging the development of the capacity for pleasure in favor of productive activity so that economic subjects in fact act more like wealth maximizers than utility maximizers. See Schroeder, *The Midas Touch*, supra note 10.

[FN162]. Sen, supra note 22, at 1. As we shall see, Becker is unusual in that he has concentrated on the question of how preferences are formed and has given a new meaning to this familiar cliché. See *infra* text accompanying notes 237-42.

[FN163]. See *supra* text accompanying note 92-93.

[FN164]. Posner, Behavioral Economics, supra note 7, at 1557.

[FN165]. Friedman, supra note 3, at 21-22; see also Schroeder, Just So Stories, supra note 2.

[FN166]. JST, Theories, supra note 54, at 1600.

[FN167]. Blaug, supra note 4, at 166.

[FN168]. Samuelson describes his model as involving "an idealized individual" who is "not necessarily... the rational homo-economicus." Paul A. Samuelson, A Note on the Pure Theory of Consumer's Behavior, 1938 *Economica* 61, 62 [hereinafter Samuelson, Pure Theory]. This is because the traditional rational person was defined as a utility maximizer. That is, since Samuelson tries to eliminate the idea of utility entirely, his ideal individual may not fall within this strict definition.

[FN169]. Blaug, supra note 4, at 113.

[FN170]. *Id.* at 99.

[FN171]. Samuelson, Pure Theory, supra note 168, at 90-91.

[FN172]. *Id.* at 61.

[FN173]. *Id.*

[FN174]. Paul A. Samuelson, *Foundations of Economic Analysis* 91 (enlarged ed. 1983) [hereinafter Samuelson, *Foundations*].

[FN175]. *Id.* at 92.

[FN176]. Samuelson, Pure Theory, supra note 168, at 62.

[FN177]. Blaug, supra note 4, at 142.

[FN178]. Sen, supra note 22, at 1.

[FN179]. *Id.*

[FN180]. Paul A. Samuelson, Consumption Theory in Terms of Revealed Preference, 1948 *Economica* 243 (emphasis added) [hereinafter Samuelson, Revealed Preference].



[FN181]. A few months after the initial publication of his theory, Samuelson decided that the first two postulates may be redundant, in that they can be explained within the third postulate. P.A. Samuelson, A Note on the Pure Theory of Consumer's Behaviour: An Addendum, 1938 *Economica* 353 [hereinafter Samuelson, Addendum].

[FN182]. Samuelson, *Pure Theory*, supra note 168, at 63. See also Samuelson, *Foundations*, supra note 174, at 111; Samuelson, *Addendum*, supra note 181, at 353.

[FN183]. Samuelson, *Pure Theory*, supra note 168, at 63. See also Samuelson, *Foundations*, supra note 174, at 111; Samuelson, *Addendum*, supra note 181, at 353.

[FN184]. Samuelson, *Addendum*, supra note 181, at 353. See also Samuelson, *Foundations*, supra note 174, at 111; Samuelson, *Pure Theory*, supra note 168, at 363. The word "prefers" appears in quotes because Samuelson is not using it in the usual sense of a subjective state of mind, but the objective state of mind revealed by actual choice.

[FN185]. For a brief description of classic behaviorism, see Ernest Nagel, *The Structure of Science: Problems in the Logic of Scientific Explanation* 476- 80 (2d ed. 1979).

[FN186]. Sen chides Samuelson for his terminology which "conveys something rather dramatic and [has a] biblical association." Sen, supra note 22, at 54.

[FN187]. *Id.* at 57.

[FN188]. *Id.* at 56.

[FN189]. *Id.* at 61-62.

[FN190]. *Id.* at 62.

[FN191]. As I discuss in *Just So Stories*, Samuelson is one of the most vociferous critics of the Friedman-Posner methodology that claims to divorce theory from explanation and maintains that the truth of assumptions is irrelevant because the only test of a theory is its predictive value. Schroeder, *Just So Stories*, supra note 2.

[FN192]. See *infra* text accompanying notes 257-68 for a discussion of this version of Posnerian rationality.

[FN193]. Quoted in Sen, supra note 22, at 56.

[FN194]. Blaug, supra note 4, at 98-99.

[FN195]. Samuelson states "a description (equational or otherwise) that works to describe well a wide range of

observable reality is all the 'explanation' we can ever get (or need desire) here on earth... An explanation, as used legitimately in science, is a better kind of description and not something that goes ultimately beyond description." Paul A. Samuelson, *Theory and Realism: A Reply*, in 3 *The Collected Scientific Papers of Paul A. Samuelson* 766 (Robert C. Merton, ed., 1972) [hereinafter *Scientific Papers*] (quoted in Blaug, *supra* note 4, at 98). Although Blaug criticizes instrumentalism as a theory, he is perhaps even more critical of Samuelson's version of descriptivism, accusing Samuelson of being "as much an F-twister as Friedman, in the sense that he too infers apparently significant real-world consequences from theoretical assumptions admitted to be patently counterfactual." Blaug, *supra* note 4, at 99.

[FN196]. Samuelson's work on welfare economics continued to rely on concepts of utility and indifference curves. See, e.g., Paul A. Samuelson, *Commentary on Welfare Economics*, in 2 *The Collected Scientific Papers of Paul A. Samuelson* 1041 (Joseph E. Stiglitz ed., 1966).

[FN197]. Sen, *supra* note 22, at 9.

[FN198]. Samuelson, *Pure Theory*, *supra* note 168, at 71.

[FN199]. Sen, *supra* note 22, at 5.

[FN200]. Proponents of so-called Weak-Axiom consistency, which only deals with the choices between two commodities, sometimes claim that they do not also require three-commodity consistency (i.e. transitivity). Sen argues that, in fact, even the Weak Axiom necessarily implies transitivity. *Id.* at 57-59.

[FN201]. That is "consistency of choice is demanded only over a class of convex polyhedra ('budget triangles' in the two-good case)." *Id.* at 2.

[FN202]. See generally Richard A. Posner, *Sex and Reason* (1992).

[FN203]. See, e.g., Gary S. Becker, *Accounting for Tastes* 233-37 (1996) [hereinafter *Becker, Accounting for Tastes*]; Becker, *Economic Approach*, *supra* note 155. As discussed in the last Part of this Article, I agree that there is an economic aspect in all choices, even that sexuality and markets share much in common, although, as a Lacanian, I do not think that all choice can be equated with economics or that eroticism can be reduced to markets. Rather, markets can be seen as a subset of erotics. See *infra* text accompanying notes 305-17.

[FN204]. Sen, *supra* note 22, at 3.

[FN205]. *Id.*

[FN206]. *Id.*

[FN207]. See *infra* text accompanying notes 231-83.

[FN208]. See *infra* text accompanying notes 244-83.

[FN209]. Sen, *supra* note 22, at 91-106.

[FN210]. Posner, Behavioral Economics, *supra* note 7, at 1557.

[FN211]. Sen, *supra* note 22, at 92.

[FN212]. *Id.*

[FN213]. Posner says that it may not be inconsistent to eat lobster when one doesn't see it alive beforehand, but not be able to eat it when one sees the live animal in a tank before it is cooked. He describes this as a choice between two different products--a cooked lobster, on one hand, and a view of a live lobster followed by a cooked lobster, on the other. Posner, Behavioral Economics, *supra* note 7, at 1553.

[FN214]. Schroeder, The End of the Market, *supra* note 34.

[FN215]. R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960) [hereinafter Coase, Social Cost].

[FN216]. R.H. Coase, The Firm, the Market, and the Law 175 (1988) [hereinafter Coase, The Firm, etc.] (emphasis added). Coase continues: "If there were actions that could be taken which cost less than the reduction in damage that they would bring, and they were the least costly means available to accomplish such a reduction, they would be undertaken." *Id.*

[FN217]. Jules L. Coleman, Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law, 68 Cal. L. Rev. 221, 225 (1980).

[FN218]. *Id.* Paul Samuelson is one of the most forceful doubters of the empirical validity of the, so-called, Coase theorem. I suggest, however, that Samuelson's disagreement with Coase might result from an implicit, but unrecognized, difference in their respective definitions of rationality. Samuelson believes that Coase has shown the conditions under which market participants could or might reach an efficient bargain, but has failed to show that they must do so. See, e.g., Paul A. Samuelson & William D. Nordhaus, Economics 353 (15th ed. 1995). "Saying that there is room for an efficient, cost-saving bargain does not mean that a deal will always be struck--as the history of war, labor-management disputes, and the theory of games amply demonstrate." *Id.* Samuelson bases his argument on empirical observations that sometimes "one or both [market participants] is unwilling to discuss the possibility of making a mutually favorable movement for fear that the discussion may imperil the existing tolerable status quo." *Id.* at 251. But this means that either the parties are acting irrationally (not acting in their own best interests) or with imperfect knowledge (not understanding that the contract will benefit them). Since these characteristics keep an efficient bargain from coming about, they are transaction costs by definition.

The disagreement between Samuelson and Coase might be explained by making express an implicit and unacknowledged difference in the concept of rationality adopted by wealth and utility maximizers. Coase seems to believe that the goal of economics is something similar to Posner's goal of wealth maximization--the increase in society's productive capacity. See Coase, The Firm, etc., *supra* note 216, at 159. Samuelson, however, is implicitly defining rationality in terms of utilitarian values (i.e. the fulfillment of preferences). In the Samuelson example, if the pleasure one party experiences in being stubborn or in destroying the other party's bargain outweighs the

pleasure he anticipates he would obtain if the wealth maximizing efficient bargain is consummated, then that party would be rational from a utility maximizing point of view if he refused to sign the deal, although he would be irrational from a wealth maximizing point of view. Correspondingly, if the other party correctly estimated that the pain she would experience by risking entering into a bargain she feared would outweigh the expected pleasure from any profit she would receive, she would once again be rational from a utility maximizing point of view, but irrational from a wealth maximizing one, if she refused to go forward.

In other words, the Coase theorem requires that one adopt a definition of rationality that matches one's definition of efficiency. The problem with Samuelson's critique, therefore, is that he is applying a utilitarian definition of rationality, whereas Coase is applying a wealth maximization definition of efficiency. Samuelson is correct, therefore, that the former will not necessarily lead to the latter, but incorrect in thinking that the Coase theorem posits that it would. See Schroeder, *The End of the Market*, supra note 34, at 540 n.201.

[FN219]. Posner, *Behavioral Economics*, supra note 7, at 1551.

[FN220]. Posner, *Economic Analysis*, supra note 55, at 3-4 (footnotes omitted).

[FN221]. Schroeder, *The End of the Market*, supra note 34, at 549-50.

[FN222]. *Id.* at 550-54.

[FN223]. Coase, *The Firm, etc.*, supra note 216, at 3.

[FN224]. *Id.* at 4.

[FN225]. *Id.* at 5.

[FN226]. R.H. Coase, *Adam Smith's View of Man*, 19 *J.L. & Econ.* 529 (1976) [hereinafter *Coase, Smith's View*]. In a lecture on the history of the concept of economic rationality, Simon points out that, although Smith did adopt an early variation of the rationality postulate, he did not have any concept of maximization. Rather, he thought that people were rational in the sense that they had reasons for their actions. Simon, *Microeconomics*, supra note 1, at 6. In Simon's terminology, Smith thought that economic subjects were procedurally rather than substantively rational. See supra text accompanying notes 64-76.

[FN227]. He asserts, for example, that "[f]or strangers to have to rely on our benevolence for what they received from us would mean, in most cases, that they would not be supplied." Coase, *Smith's View*, supra note 226, at 544.

[FN228]. *Id.* This is not to suggest that Coase is so naive as to suggest that politicians should, therefore, ignore their natural benevolence in favor of narrow self interest. He continues: "And when politicians are motivated by self-interest unalloyed by benevolence, it is easy to see that the results may be even less satisfactory." *Id.* This comment is, therefore, part of an argument for political-economic conservatism that suggests that politicians are likely to take actions that would not serve economic goals regardless of whether they act benevolently or selfishly. Coase is a remarkably self-reflective fellow, however. He is the first to suggest that society should not necessarily accept economic goals as its only, or paramount, goal. Questions of law and justice, to Coase, are properly the subjects of "ethics and aesthetics," not economics. Coase, *Social Cost*, supra note 215, at 43.

[FN229]. Coase, Smith's View, *supra* note 226, at 544.

[FN230]. Jeanne L. Schroeder, Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence, 75 *Iowa L. Rev.* 1135, at 1152-53 (1990).

[FN231]. George J. Stigler & Gary S. Becker, De Gustibus Non Est Disputandum, 67 *The Am. Econ. Rev.* 76 (1977).

[FN232]. See *supra* note 155.

[FN233]. See *supra* note 203.

[FN234]. Blaug, *supra* note 4, at 220.

[FN235]. Becker, Accounting for Tastes, *supra* note 203, at 5.

[FN236]. Blaug devotes an entire chapter of his study of economic rationality to Becker's new home economics. Blaug criticizes Becker for engaging in precisely the type of ad hoc arguments that Becker accuses others of. Blaug, *supra* note 4, at 222-23. Blaug also argues that Becker's analysis "is so generally formulated as to be compatible with almost any finding." *Id.* at 224. Moreover, despite Becker's avowed adherence to the methodology of falsification, "the whole of Becker's writings are positively infected by the easier option of verificationism." *Id.* at 226. Nevertheless, Blaug, writing in 1980, was willing to view these as the inevitable problems associated with the attempt to develop a new research program and was open to the possibility that Becker and his followers would be successful in developing his theory. Indeed, Becker did win a Noble Prize for his work. Nevertheless, by the time Blaug brought out the second edition of his book in 1992, this had not happened.

I was wrong to think that the so-called new home economics would flourish and attract ever more followers and that I would come to view it more favorably in 1985 or 1990 than I did in 1980.... The Chicago research program in what Becker now calls "economic sociology" looked so promising ten or fifteen years ago but strikes one today as virtually a one-man band.

*Id.* at 228. Whether or not Blaug is correct as to Becker's failure to build a following for his new home economics, a reading of his collected essays indicates that he has continued to do very interesting work on preference formation. Becker, Accounting for Tastes, *supra* note 203.

[FN237]. See, e.g., *supra* text accompanying note 7.

[FN238]. Stigler & Becker, *supra* note 231, at 76.

[FN239]. There are economists who challenge the entire assumption of pre-given or consistent preferences. For example:

[I]n recent years many economists, Frank Knight being a notable example, have insisted upon the degree to which individual tastes and wants are socially conditioned by advertising and custom so that they can hardly be said to belong to him in any ultimate sense. All this is recognized in the witticism of the soap box speaker who said to the recalcitrant listener, "when the revolution comes, you will eat strawberries and cream, and like it!" Samuelson, Foundations, *supra* note 174, at 223-24.

[FN240]. Becker, Accounting for Tastes, supra note 203, at 4.

[FN241]. Stigler & Becker, supra note 231, at 76.

[FN242]. Id.

[FN243]. Id.

[FN244]. Becker, Accounting for Tastes, supra note 203, at 87.

[FN245]. Stigler & Becker, supra note 231, at 77.

[FN246]. See supra text accompanying note 235.

[FN247]. Becker, Economic Approach, supra note 155, at 137.

[FN248]. Id. at 254.

[FN249]. Id. at 137.

[FN250]. Id. In context, it is fairly clear that Becker was speaking generally about Marshall's approach, rather than his specific list of commodities.

[FN251]. Becker, Accounting for Tastes, supra note 203, at 122.

[FN252]. JST, Theories, supra note 54, at 1597-98.

[FN253]. That is, why don't economists argue that the object one owns and the identical object one could acquire are two different "commodities," in the same way that Posner analyzes a cooked lobster plus the sight of a live lobster followed by a cooked lobster as two different commodities? See Posner, Behavioral Economics, supra note 7.

[FN254]. Becker, Accounting for Tastes, supra note 203, at 128.

[FN255]. Id. at 128-29.

[FN256]. He gives the example of a person who stores a bottle of wine which, by luck, becomes extremely valuable. He refuses both to sell the bottle at the market price even though he would never pay that much for a bottle of wine,

and then he refuses to open the bottle and drink the wine. Perhaps this just reflects the fact that people tend to build up affections for things they have had for a long time. Perhaps, in this specific case, the wine owner might enjoy the bragging rights that go along with owning the bottle he won't open. In either case, the wine owner's behavior is not irrational, in that the specific bottle in his possession has a subjective value to him over and above the objective market price and above an alternate bottle of wine. *Id.* at 129.

[FN257]. Posner accuses JST of abandoning the rationality postulate. Posner, *Behavioral Economics*, *supra* note 7, at 1552. A more generous reading of JST is that they are arguing that behavioral economists are merely trying to modify the postulate to reflect empirically observed behavior.

Both Posner and JST are both partially correct. On one hand, JST claim to be modifying, rather than rejecting, the rationality postulate, but they do so by suggesting that people tend to act irrationally in certain circumstances. That is, they are saying, in effect, that the rationality postulate does not apply in some empirical situations. Posner is correct that this is not theory formation as he understands it because JST are not offering an explanation for why economic subjects act irrationally in some circumstances--they are not giving a theory, or reasoned explanation as to the borders of the rationality postulate. On the other hand, Posner arguably should be faulted for merely reasserting the rationality postulate despite the empirical evidence to the contrary. I discuss the JST-Posner methodological debate and the Popperian theory of sophisticated falsification in Schroeder, *Just So Stories*, *supra* note 2.

[FN258]. Becker, *Accounting for Tastes*, *supra* note 203, at 129.

[FN259]. Jeanne L. Schroeder, *The Vestal and the Fasces: Hegel, Lacan, Property, and the Feminine* 41-45 (1998) [hereinafter Schroeder, *The Vestal and the Fasces*].

[FN260]. See Schroeder, *The Midas Touch*, *supra* note 10.

[FN261]. See, e.g., Posner, *Overcoming Law*, *supra* note 9, at 172-73.

[FN262]. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 *J. Legal Stud.* 103, 119 (1979). The significant part of this definition is that the hypothetical buyer must not merely value the property, she must be able to afford to pay the purchase price she names. Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 *J. Legal Stud.* 243 (1980) [hereinafter Posner, *The Value of Wealth*].

[FN263]. See Posner, *Economic Analysis*, *supra* note 55; Richard A. Posner, *Wealth Maximization Revisited*, 2 *Notre Dame J.L. Ethics & Pub. Pol'y* 85, 97 (1985) [hereinafter Posner, *Wealth Maximization Realized*].

[FN264]. Schroeder, *The Midas Touch*, *supra* note 10, at 711-12, 749-60.

[FN265]. *Id.* at 758-59.

[FN266]. See, e.g., Posner, *The Value of Wealth*, *supra* note 262, at 251.

[FN267]. I develop this analysis more thoroughly in Schroeder, *The Midas Touch*, *supra* note 10, at 767-68.

[FN268]. See, e.g., Posner, *Economics of Justice*, supra note 36, at 68-119.

[FN269]. In a hypothetical that forms the basis of a famous debate between Posner and Ronald Dworkin, the two parties consider whether a slave would be able to buy her freedom in the state of nature if a wealth maximization regime were in place. It is hypothesized that the slave, Agatha, can engage in two activities: the writing of murder mysteries, which is financially lucrative but odious to her, and gardening, which is not remunerative but is enjoyable. Neither Posner nor Dworkin recognize the fact that gardening might increase her enjoyment of her home, thereby increasing her consumer surplus. If so, unremunerative gardening should be considered wealth production, not consumption. See Schroeder, *The Midas Touch*, supra note 10, at 711. Becker's new home economics, in contrast, does account for this.

[FN270]. See, e.g., Gary S. Becker, *A Theory of Rational Addiction*, in Becker, *Accounting for Tastes*, supra note 203, at 50.

[FN271]. See Schroeder, *Fear of Freedom*, supra note 6.

[FN272]. In other words, I will resist speculation as to whether "style" is to be read broadly, as equivalent to Marshall's category of "distinction," whether it is a sub-category of distinction, or whether it is a different category of intersubjective relation. See supra text accompanying note 249. For example, if distinction is the same as recognition it could refer to, or at least include, horizontal relationships of equality. As we shall see, Becker and Stigler's concept of style seems to connote vertical relations of status.

[FN273]. Stigler & Becker, supra note 231, at 87.

[FN274]. *Id.* at 88.

[FN275]. A good example of this is last year's pashmina shawl fad. In the Winter of 1998-99, women who considered themselves fashionable went to extraordinary efforts and paid breathtaking expenses for these hard to find imported items. Although the shawls are very soft and vibrantly hued, their primary appeal seems to have been that they were so much harder to obtain than ordinary cashmere shawls. In the Fall of 2000, the shawls are so readily available that they can be found in suburban shopping malls and can be ordered out of any number of mail order catalogs or on-line. In New York City, they were hawked by street vendors alongside T-shirts. It turns out that the fad was a product of brilliant marketing. "Pashmina" is, in fact, just another word for ordinary cashmere mixed with a little silk. It took most cashmere manufacturers a season to catch up and turn out competing products under the pashmina name. Although one will no doubt see more pashmina shawls in restaurants this Winter, they are less likely to be worn by women who consider themselves to be avant. For an amusing account of the pashmina fad and a comparative review of catalog offerings, see Lauren Lipton, *The Catalog Critic: Pushing Pashmina*, *Wall St. J.*, Nov. 5, 1999, at 15C, available in 1999 WL-WSJ-24920763.

[FN276]. These include the women who are buying pashmina shawls out of catalogs this Winter.

[FN277]. Stigler & Becker, supra note 231, at 88.

[FN278]. Indeed, this might be the best argument in favor of Posner's proposition that the common law has, in fact, developed as though its goal was the maximization of wealth, not utility. It is fairly uncontroversial that the



economic history of the United States has been characterized by impressive growth (despite the occasional depression or recession), but it much more controversial to maintain that the aggregate happiness of Americans has also grown.

[FN279]. See supra text accompanying note 224.

[FN280]. Schroeder, *The End of the Market*, supra note 34.

[FN281]. Stigler & Becker, supra note 231, at 88.

[FN282]. *Id.*

[FN283]. Blaug, supra note 4, at 242.

[FN284]. As far as one can tell from his writings, Freud had no speculative philosophic background. He only mentions Hegel once, and then in such a way as to reveal a basic misunderstanding, suggesting a lack of first-hand knowledge. Jeanne L. Schroeder & David Gray Carlson, Kenneth Starr: Diabolically Evil?, 88 *Cal. L. Rev.* 653 (2000) [hereinafter Schroeder & Carlson, *Diabolically Evil?*].

[FN285]. For example, Friedman dismisses criticisms of the rationality postulate on the grounds that "it rests on outmoded psychology and must be reconstructed in line with each new development in psychology." Friedman, supra note 3, at 30.

[FN286]. See supra text accompanying note 30.

[FN287]. Lacan, *Four Fundamentals*, supra note 29, at 149.

[FN288]. Schroeder, *The Vestal and the Fasces*, supra note 259, at 108 n.1. "Lacan considered the concept of the objet petit a his most important contribution to psychoanalysis [and devoted the latter part of his career to explicating it]. In this [Article], I am not attempting to give a full account of this rich and complex concept, but I refer to one aspect of the little a as the retroactive cause of desire." *Id.* (citing Lacan, *Four Fundamentals*, supra note 29, at 17, 62, 76-77, 103-04; Jacques Lacan, *God and the Jouissance of the Woman*, in *Feminine Sexuality* 137, 143 (Juliet Mitchell and Jacqueline Rose eds. & Jacqueline Rose trans., 1983) [hereinafter *Feminine Sexuality*]; Jacques Lacan, *A Love Letter (Une Lettre d'Amour)*, in *Feminine Sexuality*, supra at 149, 153-54; Jacques Lacan, *Seminar of 21 January, 1975*, in *Feminine Sexuality*, supra at 162, 164, 167-68; Alan Sheridan, *Translator's Note*, in Jacques Lacan, *Ecrits: A Selection*, at vii, xi (Alan Sheridan trans., 1977) (1966)); Bice Benevenuto & Roger Kennedy, *The Works of Jacques Lacan: An Introduction* 175-76 (1986); Elizabeth Grosz, *A Feminist Introduction to Lacan* 75-78, 80-81; Jacques Lacan, *Introduction to the Names-of-the-Father Seminar*, in Jacques Lacan, *Television* 81, 82 (Jean Copjec ed. & Denis Hollier et al., trans., 1990) (1974); Slavoj Zizek, *For They Know Not What They Do: Enjoyment as a Political Factor* 148, 231, 255 (1991); Jacqueline Rose, *Introduction II*, in *Feminine Sexuality*, supra at 27, 48). For an unusually succinct account of the function of the objet petit a as the object cause of desire, see Bruce Fink, *The Lacanian Subject: Between Language and Jouissance* 83-95 (1995). See also infra text accompanying notes 321-26.

[FN289]. Schroeder, *The End of the Market*, supra note 34, at 506-09; Schroeder, *The Midas Touch*, supra note 10, at 735.

[FN290]. Schroeder, *The End of the Market*, supra note 34, at 509-11. Lacan used the term "jouissance" in many different ways over his career. Jacques-Alain Miller, Lacan's son-in-law and editor of Lacan's seminars, has identified at least six different "paradigms" of jouissance adopted by Lacan over time. See Jacques-Alain Miller, Address at University of California at Los Angeles, Symposium: Encore, the Formation of the American Lacanian Link (Mar. 6, 1999). See also Schroeder, *The Midas Touch*, supra note 10, at 740 n.185. Zizek has written extensively about the horrifying aspect of jouissance. See, e.g., Slavoj Zizek, *Looking Awry: An Introduction to Jacques Lacan Through Popular Culture* 3-48 (1991) (examining confrontation with the Real through analyses of popular culture); Slavoj Zizek, *The Plague of Fantasies* 48-54 (1997) [hereinafter Zizek, *Plague of Fantasies*] (describing the traumatic nature of jouissance).

[FN291]. Schroeder, *The Midas Touch*, supra note 10, at 730-34, 740-41.

[FN292]. *Id.* at 740.

[FN293]. My first book, Schroeder, *The Vestal and the Fasces*, supra note 259, is devoted to explicating the use of masculine and feminine phallic metaphors in property law. I develop these ideas at greater length in a variety of legal and economic contexts in Schroeder, *The End of the Market*, supra note 34; Schroeder, *Pandora's Amphora*, supra note 11; Jeanne L. Schroeder, [Three's a Crowd: A Feminist Critique of Calabresi and Melamed's One View of the Cathedral](#), 84 *Cornell L. Rev.* 394 (1999); Schroeder, *The Midas Touch*, supra note 10; and Jeanne L. Schroeder, *The Eumenides: The Foundation of Law in the Repression of the Feminine* (visited Oct. 16, 2000) <[http://papers.ssrn.com/paper.taf?ABSTRACT\\_ID=214829](http://papers.ssrn.com/paper.taf?ABSTRACT_ID=214829)> [hereinafter Schroeder, *The Eumenides*]. These articles form the basis for my second book, Jeanne L. Schroeder, *The Triumph of Venus: The Erotics of the Market* (2000) (unpublished manuscript, on file with author).

[FN294]. One cannot over-emphasize the significance of the concept of "castration" in Lacan's work. See, e.g., "The fear of castration is like a thread that perforates all the stages of development." Lacan, *Four Fundamentals*, supra note 29, at 64. See also Schroeder, *The End of the Market*, supra note 34, at 501-10; Schroeder, *The Eumenides*, supra note 293; Schroeder, *The Midas Touch*, supra note 10, at 731-35.

[FN295]. Lacan, *Four Fundamentals*, supra note 29.

[FN296]. In Lacanian literature, the word "thanatos" is sometimes used to refer to the death drive. As I discuss in the last section of this Article, desire and drive are totally different things.

[FN297]. This is the theme of my book Schroeder, *The Vestal and the Fasces*, supra note 259.

[FN298]. See supra text accompanying notes 252-57.

[FN299]. See Jean-Baptiste Moliere, *La Malade Imaginaire*, *Troiseme Intermede* (discussing *Vertus Dormativa*).

[FN300]. Lacan identifies complementarity with the imaginary, and not with the symbolic order, which includes

law, language, sexuality and other social institutions that comprise the Other. For example:

What defines the imaginary order is the appearance of a complementary relationship between thesis and antithesis, the illusion that they form a harmonious Whole, filling out each other's lack; what the thesis lacks is provided by an antithesis and vice versa (the idea that Man and Woman form a harmonious Whole, for example).

Slavoj Žižek, *Tarrying with the Negative, Kant, Hegel, and the Critique of Ideology* 123 (1993) [hereinafter Žižek, *Tarrying with the Negative*].

Specifically, in the context of sexuality, Lacan insisted that the two sexes were supplements, not complements. "You will notice that I said 'supplementary.' If I had said 'complementary' what a mess we'd be in!" 20 Jacques Lacan, *The Seminar of Jacques Lacan: Encore, On Feminine Sexuality, The Limits of Love and Knowledge* 1972-1973, at 73 (Jacques-Alain Miller ed. & Bruce Fink trans., W.W. Norton & Co. 1998) (1975) [hereinafter Lacan Seminar XX]. As so clearly explained by Renata Salecl:

Lacan thus moves as far as possible from the notion of sexual difference as the relationship of two opposite poles which complement each other, together forming the whole of "Man." ... "Man" and "Woman" together do not form a whole, since each of them is already in itself a failed whole.

Renata Salecl, *The Spoils of Freedom: Psychoanalysis and Feminism After the Fall of Socialism* 116 (1994).

[FN301]. Margaret Jane Radin, *Reinterpreting Property* 41 (1993). Radin originally formulated her theory in a series of articles, the most important of which are: Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 *Colum. L. Rev.* 1667 (1988); Margaret Jane Radin, *Market-Inalienability*, 100 *Harv. L. Rev.* 1849 (1987) [hereinafter Radin, *Market-Inalienability*]; Margaret Jane Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957 (1982). She later republished these articles with minimal changes in her book *Reinterpreting Property*. Radin has since revised and incorporated some of the material from these articles into her more recent work: Margaret Jane Radin, *Contested Commodities* (1996) [hereinafter Radin, *Contested Commodities*].

[FN302]. Radin, *Market-Inalienability*, supra note 301, at 1877-78; see also Radin, *Contested Commodities*, supra note 301, at 79-101; Margaret Jane Radin, *Justice and the Market Domain*, in *Markets and Justice: Nomos XXXI* 165, 167-68 (John W. Chapman & J. Roland Pennock eds., 1989).

[FN303]. See supra text accompanying notes 252-55.

[FN304]. Although, I have analyzed Radin's theories in terms of Lacan's sexuated positions, Radin herself generally avoids such controversial gendered terminology. See Schroeder, *The Vestal and the Fasces*, supra note 259, at 229-82; Jeanne L. Schroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolable Feminine Body*, 79 *Minn. L. Rev.* 55 (1994).

[FN305]. Lacan, *Four Fundamentals*, supra note 29, at 235.

[FN306]. The typically "masculine" neurotic is the obsessional. Once again, by saying that the feminine position of desire is its epitome, psychoanalysis is not saying that the feminine position is more "emotional" than the masculine. Obsessives are every bit as emotional as hysterics. Rather, it implies that hysteria is a more adequate form. According to Lacan, "men" are in a way incomplete or failed "women." For example, while men can not bear to face castration and try to deny it, women bravely stare it right in the face, so to speak, and accept its consequences. See Jeanne L. Schroeder, *The Hysterical Attorney: Legal Representation Within Lacanian Discourse Theory*, *Int'l J.L. & Semiotics* (forthcoming 2000) [hereinafter Schroeder, *The Hysterical Attorney*].

[FN307]. I set forth my theory of Hegel's influence on Lacan in Schroeder, *The Vestal and the Fasces*, supra note 259, at 1-106. See also Schroeder, *Pandora's Amphora*, supra note 11, at 860-76.

[FN308]. 3 Jacques Lacan, *Le Seminaire de Jacques Lacan: L'envers de la Psychanalyse 1969-1970*, at 38 (Jacques-Alain Miller ed., 1991) (discussing Hegel, le plus sublime des hystériques).

[FN309]. G.W.F. Hegel, *Elements of the Philosophy of Right* (Allen W. Wood ed. & H.B. Nisbet trans., 1991).

[FN310]. Jeanne L. Schroeder, *Never Jam To-Day: On the Impossibility of Takings Jurisprudence*, 84 *Geo. L.J.* 1531, 1533-43; Schroeder, *Pandora's Amphora*, supra note 11, at 861-62.

[FN311]. See generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Legal Reasoning* (W. Cook ed., 1919).

[FN312]. An explanation of this important aspect of dialectical reasoning is beyond the scope of this Article. I discuss it in Schroeder, *The Vestal and the Fasces*, supra note 259, at 12-15, 31-32, 311-12. Leave it to say, Hegel's proposition that what is potential is actual and vice versa is not intended as a defense of the status quo.

[FN313]. I explain the Lacanian concept of love, and how it relates to economic relations in Schroeder, *Pandora's Amphora*, supra note 11, at 870-73. The following is an abbreviated version of the argument presented there in full.

[FN314]. Jacques Lacan, *Ecrits: A Selection* 312 (Alan Sheridan trans., 1977). In Wilden's words:

To put it in a nutshell, nowhere does it appear more clearly that man's desire finds its meaning in the desire of the other, not so much because the other holds the key to the object desired, as because the first object of desire is to be recognized by the other.

Anthony Wilden, *Translator's Notes*, in Jacques Lacan, *Speech and Language in Psychoanalysis* 91 (Anthony Wilden trans., 1981).

As Žižek explains:

In other words, when Lacan claims that there is no desire without an object-cause, this does not amount to the banality according to which every desire is attached to its objective correlative: the 'lost object' which sets the subject's desire in motion is ultimately the subject herself, and the lack in question concerns her uncertainty as to her status for the Other's desire. In this precise sense, desire is always desire of the Other: the subject's desire is the desire to ascertain her status as object of the Other's desire.

Slavoj Žižek, *The Indivisible Remainder: An Essay on Schelling and Related Matters* 164 (1996).

[FN315]. An account of why hysteria is "feminine" is beyond the scope of this Article. For a brief explanation, see Schroeder, *The Four Discourses*, supra note 12.

[FN316]. See infra text accompanying notes 321-26.

[FN317]. Bruce Fink, *The Lacanian Subject: Between Language and Jouissance* xi (1995); Schroeder, *The Hysterical Attorney*, supra note 306.

[FN318]. Jacques-Alain Miller, *Extimite* (Elisabeth Doisneau ed. & Françoise Massardier-Kenney trans.) [hereinafter Miller, *Extimite*], in *Lacanian Theory of Discourse: Subject, Structure and Society* 74, 79 (March Bracher et al., trans., 1994). This prefigured his even more infamous pronouncement that Woman does not exist.

Lacan, Seminar XX, supra note 300, at 72-74.

[FN319]. See Schroeder, *The Eumenides*, supra note 293.

[FN320]. "Ex-timate" is a Lacanian neologism, representing that which is foreign but within us. Slavoj Žižek, *The Ticklish Subject: The Absent Centre of Political Ontology* 45 (1999) [hereinafter Žižek, *The Ticklish Subject*]. The "ex-timate" is what we are; "more than ourselves." Id. at 375. It reflects the proposition that what we feel is most ourselves--our subjectivity, our sexuality, our desire, our moral conscience, etc., are all created through intersubjective relationships, language and law (i.e. the symbolic order) and is, therefore, in some way outside of ourselves as well. Schroeder, *End of the Market*, supra note 34, at 502-03. See generally Miller, *Extimate*, supra note 318.

[FN321]. "The great insight of late Lacanian thought is that even though personality is created through the intersubjective relationships of the symbolic (language, law, and sexuality), the self is experienced in terms of a hypothesized lost object of desire.... In other words, object relations take the place of intersubjective relations." Schroeder, *The Midas Touch*, supra note 10, at 744-45. As accurately described by Žižek, this is an understanding that Lacan only developed over time. In his early seminars, Lacan tended to concentrate on the role of intersubjective relationships in the formation of personality. As the years went on, he shifted his emphasis more and more to the object relations we form in response to the failure of intersubjectivity. Žižek, *Plague of Fantasies*, supra note 290, at 8.

[FN322]. As we shall see, an objet petit a is a specific thing--a lower case other--which for some purposes substitutes in our psyche for the Big Other. In French, the word for object (objet) begins with an "o," while the word for other (autre) begins with an "a." The term objet petit a, therefore, is shorthand for "the object that functions as lower case other." I will explain what this means presently. Objet petit a cannot be directly expressed in English because both "object" and "other" start with an "o." I will sometimes adopt the unhappy compromise of calling the objet petit a the "little other."

[FN323]. Fink, supra note 317, at 83; Schroeder, *The Four Discourses*, supra note 12.

[FN324]. "Lacan added to Freud's list of partial objects... two other objects, voice and gaze. It is therefore by no means accidental that gaze and voice are love objects par excellence.... [T]rue love aims at... what is in the object more than the object itself, in short, at what Lacan called l'objet petit a." Renata Salecl & Slavoj Žižek, in *Introduction, SIC 1: Gaze and Voice as Love Objects* 1, 3 (Renata Salecl & Slavoj Žižek eds., 1996).

[FN325]. Žižek uses this example in Žižek, supra note 288, at 112-16.

[FN326]. Schroeder, *Pandora's Amphora*, supra note 11, at 894.

[FN327]. Lacan sometimes also called the drive "libido" or the mythical lamella. Renata Salecl, *(Per)versions of Love and Hate* 48 (1998).

[FN328]. Consequently, as discussed infra note 340, desire and drive have precisely opposite relation to the superego.

[FN329]. For example, The American Heritage Dictionary gives "The psychic and emotional energy associated with instinctual biological drives" and "sexual desire" as the first and second definitions of the word "libido," respectively. The American Heritage Dictionary, *supra* note 13, at 727.

[FN330]. "Libido is not sexual instinct." Jacques Lacan, On Freud's "Trieb" and the Psychoanalyst's Desire (Bruce Fink trans.), in Reading Seminars I and II: Lacan's Return to Freud 417, 417 (Richard Feldstein et al. eds., 1996) [hereinafter Reading Seminars I and II].

[FN331]. Distancing himself from Freud, Lacan did not equate drive either with the animal mating instinct, nor with human sexuality, which is characterized by desire. Rather, drive is a uniquely human, non-sexual impulse--it may be thought of as what is left of the primordial "real" animal instinct after its sexual aspect has been symbolized as desire. Salecl, *supra* note 327, at 48. In Lacan's words "My lamella [Lacan's mythic personification of the drive] represents here the part of a living being that is lost when that being is produced through the straits of sex." Jacques Lacan, Position of the Unconscious [hereinafter Lacan, Position], in Reading Seminar XI: Lacan's Four Fundamental Concepts of Psychoanalysis 259, 274 (Richard Feldstein et al. eds. & Bruce Fink trans., 1995) [hereinafter Reading Seminar XI].

[FN332]. Marie-Helene Brousse, The Drive (II), in Reading Seminar XI, *supra* note 331, at 109, 112; Antonio Quinet, The Gaze as an Object, in Reading Seminar XI, *supra* note 331, at 139, 140-41; Schroeder, The Midas Touch, *supra* note 10, at 775-76.

[FN333]. Brousse, *supra* note 332, at 112; Quinet, *supra* note 332, at 140-41; Schroeder, The Midas Touch, *supra* note 10, at 775-76.

[FN334]. Salecl explains the difference between desire and drive as follows:

Drive paradoxically always finds satisfaction, while desire has to remain unsatisfied, endlessly going from one object to another, positing new limits and prohibitions. Drive is thus a constant pressure, a circulation around the object a, which produces *jouissance*--a painful satisfaction. The object a, the object around which drive circulates, thus needs to be understood as a special kind of satisfaction: "The object that corresponds to drive is satisfaction as object." In this search for satisfaction, drive resembles perversion.

Salecl, *supra* note 327, at 50 (quoting Jacques-Alain Miller, On Perversion, in Reading Seminars I and II, *supra* note 330, at 313). See also Lacan, The Four Fundamentals, *supra* note 29, at 166-67. "[A]n idiotic-happy circuit of the apparatus which produces *jouissance*, is this not the very definition of drive?" Brousse, *supra* note 332, at 112; see also, Quinet, *supra* note 332, at 140-41.

[FN335]. One desires something because one cannot have it. One does something out of drive merely because it feels good. The logic of desire is: "'It is prohibited to do this, but I will nonetheless do it.' Drive, in contrast, does not care about prohibition: it is not concerned about overcoming the law [i.e. the symbolic order]. Drive's logic is: 'I do not want this, but I am nonetheless doing it.'" Salecl, *supra* note 300, at 49-50.

[FN336]. "[E]very drive is virtually a death drive." Lacan, Position, *supra* note 331, at 259, 275.

[FN337]. I discuss the wild, destructive aspect of drive in Schroeder & Carlson, Diabolically Evil?, *supra* note 284.

[FN338]. As my co-author and I say elsewhere:

In these instances when society organizes itself around prosecution, the government in effect makes an obscene unspoken pact with its people: So long as you pledge your allegiance to me, you may indulge your jouissance in any way you want, no matter how horrible. The totalitarian master says, "you are allowed to kill, rape and plunder the Enemy, let yourself go and excessively enjoy, violate ordinary moral prohibitions... in so far as you follow Me." *Id.* at 674-75 (quoting Žižek, *The Ticklish Subject*, *supra* note 320, at 391).

[FN339]. Žižek pointed out this example to me in a conversation.

[FN340]. A brief note on the relationship of the superego and jouissance may be required here. The Lacanian superego is not the Freudian concept of the internalization of external moral law (the conscience). Indeed, the superego is a sadistic part of the psyche that is antithetical to ethics.

The function of the superego is to maintain the divisions between the three orders of the real, the imaginary and the symbolic that enable the subject to function. Other names for the process of this division (that I have heretofore called "castration") is the incest taboo, or the law-of-the-father. That is, because the symbolic order is the order of laws (including law itself, as well as language, sexuality, and markets that are governed by law like structures), the creation of the symbolic and subjectivity are the writing of, and the submission to, law.

In order for an injunction to be a law in the social sense--a rule of conduct--and not merely a description of instinctual behavior, it must be possible for the law to be broken. That is, it is meaningless to say that there is a law that demands that I jump when something startles me or that I get gooseflesh when I am cold, precisely because I have no choice--these are purely animal reactions.

Consequently, the Lacanian superego creates and maintains the law of the symbolic order by creating the conditions of its violation. The superego sadistically causes the subject to feel that she is always breaking the law, no matter what she does, so that, in her guilt, she will try harder and harder to maintain the law.

Traditionally, we think of the superego as telling us to maintain self-control and not give in to our desires. The superego tells the desiring subject "Don't Enjoy!" Consequently, even though the object of desire (permanent enjoyment) is impossible, the superego makes the subject feel that it is possible (or otherwise it wouldn't be forbidden). This (false) sense of possibility makes the subject only desire jouissance more and feel guilty.

When the subject gives in to the superego, forswearing enjoyment and switching from desire to drive, however, the superego immediately changes grounds and commands "Enjoy!" The driven subject, however, can only achieve the perverse and deadly pleasure in pain and feels equally guilty. As Žižek says, "Perhaps the briefest way to render the superego paradox is the injunction 'Like it or not, enjoy yourself!'" Žižek, *Plague of Fantasies*, *supra* note 290, at 114.

Lacan, following Kant, insisted that the superego is the opposite of ethical action because the subject is merely following an externally imposed maxim out of guilt.

[FN341]. And it is because we know better than those who went before how to recognize the nature of desire, which is at the heart of this experience, that a reconsideration of ethics is possible, that a form of ethical judgment is possible, of a kind that gives this question the force of a Last Judgment: Have you acted in conformity with the desire that is in you?

Jacques Lacan, *The Paradoxes of Ethics or Have You Acted in Conformity with Your Desire?* (June 6, 1960), in Jacques Lacan, *The Seminar of Jacques Lacan, Book VII: The Ethics of Psychoanalysis 1959-1960* 311, 314 (Jacques-Alain Miller ed. & Dennis Porter trans., 1986) [hereinafter *Lacan, Seminar VII*]. "I propose then that, from an analytical point of view, the only thing of which one can be guilty is having given ground relative to one's desire." *Id.* at 319. See also Žižek, *Ticklish Subject*, *supra* note 320, at 299-390.

[FN342]. The following is an abbreviated version of an analysis I present at length in Schroeder, *The Midas Touch*, *supra* note 10, at 775-78.

[FN343]. *Id.* at 749-61, 768-78.

[FN344]. Posner, *Wealth Maximization Revisited*, supra note 263, at 97. Elsewhere he says:

Utilitarianism can be purged of its absurdities by the substitution of wealth for happiness as the social maximand.

This substitution excludes the claims of the unproductive and thus gets rid of the thief, the "utility monster," and other unappealing claimants to whom the strict utilitarian must, however reluctantly, give ear.

Posner, *The Value of Wealth*, supra note 262, at 248. Indeed, one of the problems with utilitarianism, according to Posner, is that if we assigned entitlements on the basis of pleasure "[p]eople would cultivate the faculty of enjoyment rather than of hard work." Posner, *Wealth Maximization Revisited*, supra note 263, at 93. Indeed, he finds it "odd to give consumption moral precedence over production, to sacrifice the frugal for the pleasure-loving." *Id.* at 97.

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