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AFTERWORD: KNOWLEDGE AND ANSWERS

*Frank H. Easterbrook**

All very well, but can you prove it? If you do not have conclusive proof, we shall go on as before.

Edmund Burke would have approved the sentiment. Many lawyers and legal academics share it. They point out that economists often disagree, that economic methods rarely produce eternal verities or even demonstrably “right” answers.¹ As Mark Kelman observes in this Symposium, economic inquiry presupposes some set of entitlements, institutional arrangements, and rules for trading. There is very little in Kelman’s critique—except its conclusion—to which Adam Smith would have taken exception. The author of *The Theory of Moral Sentiments* did not think that economics was, should, or could be determinate or value-free.²

Yet there is a curious inversion of argument at work. Burke questioned the invocation of abstractions and ideals to upset the collective wisdom of political society. Economic analysis of law by and large seeks not to upset but to understand the legal system and the activities that the system regulates. Economists, like anthropologists, suspect that any arrangement that persists for many years among many people must be doing something good. Why else does it survive? Regularities of all sorts—the basic rules of negligence, the doctrine of consideration, the practice of tie-in sales—rest on something more significant than passing fancy or mistake.

What do these doctrines and business practices do? These are the questions with which economic analysis starts. The observation that economic analysis cannot answer these questions with certainty does not lead to the conclusion that lawyers and judges are free to upset the practices based on intuition and political philosophy. The invocation of philosophic ideals as grounds of change was the target of Burke’s original criticism. Economic analysis has supplied a new name—the Nirvana Fallacy, the belief that if a given practice is costly or imperfect then some alternative must be better—for a very old idea. It is always well to improve the state of economic knowledge; it is always necessary

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1. Compare Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. Cal. L. Rev. 617 (1973), and Kennedy, *Cost-Benefit Analysis of Entitlement Programs: A Critique*, 33 Stan. L. Rev. 387 (1981), with Markovits, *Duncan’s Do Nots: Cost-Benefit Analysis and the Determination of Legal Entitlements*, 36 Stan. L. Rev. 1169 (1984).

2. See G. Stigler, *The Economist as Preacher, and Other Essays* 3–13 (1982); accord R. Coase, *How Should Economists Choose?* (1982).

to remember that the difficulties in obtaining knowledge do not justify actions based on unexamined intuitions and utopian theories.

Much of this Symposium is about the process of testing the limits of knowledge. What can we say with certainty? With confidence? The exchange between Daniel Rubinfeld and Richard Lempert shows both the methods and hazards of drawing conclusions through the application of econometric techniques in litigation. The exchange between Elizabeth Hoffman and Matthew Spitzer, and Mark Kelman, shows both the methods and hazards of drawing conclusions about how bargaining proceeds. The papers by Alvin Klevorick, George Fletcher, Susan Rose-Ackerman, and Richard Epstein test our ability to draw conclusions about legal rules through the arguments and data now available.

It is no surprise that questions dominate answers even in empirical work. Professional economics, like other sciences, proceeds very slowly. Someone formulates a new hypothesis. If the hypothesis appears to offer a congenial way to organize observations about some slice of the world, economists may embrace it. Among those who do, some will design tests. This empirical work will be presented at seminars and other professional gatherings, subjected to the scrutiny of referees selected from the best in the profession, and perhaps will be published. Other economists will endeavor to tear it apart. After several iterations of this cycle, the profession may accept the answer or it may consign the problem to the list of anomalies to be dealt with by some future development in theory.

The cycle of posing questions, offering and altering answers, moves far too slowly to answer questions as they arise in litigation. We still do not know the answers to such fundamental questions as "does capital punishment deter murder more effectively than life imprisonment without possibility of parole?"³ and "do seat belts save lives?"⁴ Although Professors Rubinfeld and Lempert observe that empirical methods may offer much knowledge about particular litigable issues, it is important to distinguish knowledge from answers.

The gap between questions and knowledge, on one hand, and answers, on the other, is not peculiar to economics. Biochemists cannot yet answer the question "does saccharin cause cancer in people?" Engineering and physics cannot tell us with certainty whether the hazards of using nuclear reactors to make electricity exceed those of burning coal to make electricity. Anytime a science must deal with a very com-

3. Compare Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 *Am. Econ. Rev.* 397 (1975), with Blumstein, Cohen & Nagin, *Summary of Report of the Panel on Research on Deterrent and Incapacitative Effects*, in 6 *J. Crim. Just.* 1 (1978).

4. Compare Crandall & Graham, *Automobile Safety Regulation and Offsetting Behavior: Some New Empirical Estimates*, 74 *Am. Econ. Rev. (Papers & Proc.)* 328 (1984), with Peltzman, *The Effects of Automobile Safety Regulation*, 83 *J. Pol. Econ.* 677 (1975).

plex system—whether the body or the economy—a large gap will exist between knowledge and answers. The political and judicial arms of government nonetheless must give answers. Lawyers must settle on answers to questions that have no right answers.

Economic analysis helps people shape questions to take maximum advantage of scarce knowledge. If lawyers and judges start from scratch in wrestling with a problem, they will be driven to consult their intuitions for answers. Do rules restraining alienation help or hurt the poor? Does a ban on resale price maintenance help or hurt customers? Unless there is some way to break the questions down into manageable parts, on each of which there is some knowledge, the lawyer might as well consult Tarot cards.

The discipline of economics instructs people that to understand the effects of a rule they must evaluate the rule's influence on marginal incentives rather than the rule's average consequences. It shows why we should ask questions *ex ante* rather than *ex post*. It teaches people to respect the ability of markets to capture the information of all traders and thus to create wisdom more profound than any actor possesses individually.⁵ Economic approaches suggest sources of knowledge that may otherwise be overlooked. Though knowledge is scarce, it does exist, and a new approach to old questions may enable us to use and generalize from the knowledge we possess. The contributions to this Symposium continue the effort to break down unanswerable questions into manageable parts and to bring more knowledge to bear in the search for plausible responses to intractable problems.

5. See T. Sowell, *Knowledge and Decisions* (1980); Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 *Harv. L. Rev.* 4, 8–18 (1984).