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On Theory and Practice: Reply to 'Richard Posner's Praxis'

Richard A. Posner

Articles

On Theory and Practice: Reply to "Richard Posner's *Praxis*"

RICHARD A. POSNER*

The editors have invited me to reply to Professor Ian Shapiro, who in a recent article[1] concludes from an examination of my views on wealth maximization,[2] my book on the federal courts,[3] and my judicial votes and opinions in labor and antitrust cases that the economic ideas in these writings are "nothing more than thinly veiled ideology to legitimate the inequalities wrought by market systems" (p. 1046). "The amazing thing is that these arguments can have so much influence among lawyers when they were thoroughly discredited by welfare economists over thirty years ago. That, one supposes, is eloquent testimony to the staying power of an intellectually bankrupt but dominant ideology" (p. 1046).

These quotations convey the flavor of Shapiro's piece; and it is with flavor that I begin. Despite its academic jargon and hefty footnotes, the piece is not a work of detached scholarship, but of angry polemic. One of the rhetorical tricks on which Shapiro relies to persuade the reader, illustrated by the second sentence I quoted (the last in his article), is to shift the plane of discussion from whether my ideas are sound or unsound to how anyone could believe such rubbish. This is a ploy calculated to induce a feeling of sheepishness in any reader inclined to think those ideas might have some merit. A related device, which surfaces in the second sentence of Shapiro's article, is to equate disagreement with proof: "I *reveal* the internal logic of Richard Posner's microeconomic conception of judicial efficiency to be fallacious . . . . I *establish* . . . that he fails to adhere consistently to either his microeconomic or his macroeconomic conceptions of efficiency as a judge" (p. 999; emphasis added).

The article insinuates that I am not merely someone who holds views sharply different from those of Ian Shapiro but someone who is at once obtuse and sly, someone who "does not see" (p. 1003), who "seems unable to distinguish neoclassical models from reality" (p. 1045), who "sidesteps" embarrassing facts with a "quip" (p. 1004), who plays "conceptual games" (p. 1003), who is "quite wrong" (p. 1024) yet displays "quite staggering offhand confidence" (p. 1006), who offers replies that are "entirely unsatisfactory" (p. 1021), whose ideas are "ad hoc," "asserted without argument," "naive," "pernicious," and "much ado about nothing" (pp. 1041, 1046), who makes assertions that are "indefensible" (p. 1044), "sheer fancy, and empirically implausible to boot" (p. 1007). I am also disingenuous, for I can only be "forced to admit" my exaggerations ("Even Posner is here

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1. Shapiro, *Richard Posner's Praxis*, 48 OHIO ST. L.J. 999 (1987). Unless otherwise indicated, my page references are to this article.

2. Primarily as presented in my book THE ECONOMICS OF JUSTICE (1981). Shapiro does not cite any of my more recent writings on wealth maximization—an omission to which I shall return.

3. R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985).

forced to admit," p. 1045),[4] and—my craftiest move—I disclaim originality in "an attempt to undermine the force of" a criticism first made years after the disclaimer was entered (indeed, first made in Shapiro's article) (p. 1022).

The hyperbole, the abuse, the censoriousness, the speculation about my motives—what purpose can all this serve? Only readers strongly predisposed to Shapiro's message will be swayed, and they do not need swaying. Neutral readers will be distracted from the substance of Shapiro's article—to which I now turn.

Shapiro first presents, and criticizes, what he understands to be my views about wealth maximization. Wealth maximization is the policy of trying to maximize the totality of goods and services, tangible and intangible (leisure is included, for example), weighted by willingness to pay. It is the state of affairs achieved in well-functioning competitive markets. The goal of a wealth maximizing society would be to promote and protect free markets, and to simulate the operation of those markets in settings where natural monopoly, scarcity of information, or externalities prevent markets from operating effectively. "Wealth" in the sense in which I use the term is the concept of welfare employed by most economists in addressing problems of market failure, is the basis of the Marshallian demand curve, and is the heart of the classical economic tradition that runs from Adam Smith to Milton Friedman.[5]

Like many critics of free markets before him, Shapiro points out that maximizing wealth does not ensure its equitable distribution (p. 1008). Actually, there is no basis for his assertion that "wealth concentrates in market systems over time" (p. 1007); families grow faster than the real rate of interest, making it hard to maintain family wealth across several generations. But if people differ in their abilities, and are not highly altruistic outside of their immediate family circle, wealth maximization is consistent with substantial inequalities in wealth. Whether the inequalities can be eliminated without an unacceptable reduction in the standard of living is a question Shapiro does not discuss. Instead he denies that a free-market system is wealth maximizing. That it is, is the proposition he claims I assert with "quite staggering offhand confidence" (p. 1006), but he offers no evidence against it. In the six years between my assertion and his article, the evidence that capitalism, whatever its other deficiencies, delivers the goods has mounted to the point where there are few doubters outside the academy. The socialist government of France, led by Mitterand, has swung around to this view, as has the entire Communist world, China being an especially dramatic example. England has turned its back on socialism, and after having been the sick man of Europe under the socialistic Wilson—and seemingly destined to be poorer than Greece or Spain—has the highest growth rate in Europe under the capitalistic Thatcher despite declining revenues from North Sea oil. The contrasts between West and East Germany, between South and North Korea, between Taiwan and mainland China, between Singapore and Vietnam, and between the capitalistic Ivory Coast and its socialistic neighbors are too persistent to reflect

4. The force was applied, according to Shapiro, by a dissenting colleague; Shapiro does not explain how a dissenting judge can "force" an admission from the author of the majority opinion.

5. *See* Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 85 (1985); Posner, *The Ethics of Wealth Maximization: Reply to Malloy*, 36 U. KAN. L. REV. 261 (1988).

random factors. The record of the Reagan Administration in promoting free markets is a mixed one, to be sure, but the Democratic Party is friendlier to capitalism today than it was eight years ago, and undoubtedly one of the factors in the enormous economic success of the Japanese has been their relatively unfettered capitalism—their small public sector and low taxes. Capitalism may or may not be less just than socialism, but it clearly is more productive.

I nevertheless agree with Shapiro "that wealth-maximization cannot be the exclusive value guiding adjudication" (p. 1008). It has, I think, great merit as a guide to common law adjudication, but not all adjudication is common law adjudication. Federal judges spend a lot of their time interpreting statutes and constitutional provisions that are not based on the principles of wealth-maximization, and they have no mandate for misinterpretation. As the federal labor laws are notable examples of such statutes, I cannot understand Shapiro criticizing me for the fact that my labor opinions are "inconsistent" with my economic theories; I would not be doing my job as a judge if I interpreted federal labor law as if it were designed to maximize society's wealth.

Having knocked me about the ring for advocating wealth maximization, Shapiro then accuses me of having abandoned wealth maximization when I came to write my book *The Federal Courts: Crisis and Reform*[6] (p. 1009). The accusatorial tone here is odd, for if wealth maximization is as pernicious a philosophy as Shapiro claims, he should applaud me for abandoning it. He makes two arguments to show that I abandoned wealth maximization. The first is that *The Federal Courts* expresses great concern about the expansion of the federal courts' caseload in the last quarter century, yet, from the standpoint of economic analysis, "there is, of course [there are a lot of 'of courses' in the article], no particular reason for the system not to expand over time" (p. 1011); it is as if I were critical of the economy for having expanded over the last quarter century. But Shapiro ignores my argument for why we should be concerned about the growth of the federal courts, though not about the growth of the economy as a whole. Beyond a point that the federal judicial system may already have reached, and if not probably will reach soon, a judicial system is difficult to expand without a serious reduction in quality. Society cannot add courts, the way the economic system can add factories, to meet increased demand, because it is difficult to coordinate the decisions of a large number of courts unless each has a specialized jurisdiction—and there are problems with a specialized judiciary, as my book discusses at length. The federal judicial system is already so sprawling that the Supreme Court has only a tenuous control over it, and the problem will get worse. To all this Shapiro replies that "if people demand services at a greater rate than they are prepared to tolerate increases in taxation, the result must necessarily be a decline in quality. But so what?" (p. 1012). So what? So plenty. The federal courts play an important role in society, and they had better be able to play it well. Nor is it a matter of the people choosing lower quality over higher taxes. It is not apparent how higher appropriations for the federal courts would alleviate the problem of quality, and it is

6. *See* THE FEDERAL COURTS, *supra* note 3.

not clear either that the only choice is lower quality or higher taxes (a third possibility is the demand-limiting measures discussed in my book) or that "the people" play a big role in decisions about the federal court system.

Shapiro's second criticism of the book is that in criticizing the canons of statutory construction and advocating in their place that courts attempt the "imaginative reconstruction" of framers' intent, the book surreptitiously jettisons my theory that the common law is efficient—for the canons are a part of the common law (p. 1022). But they are not a part of the common law; they are rules for interpreting statutes and the Constitution, and thus would not exist in a pure common law system. Actually the canons are no more a part of statutory law than of common law. Rather, they are a part of the rhetoric used by judges who have to interpret statutes and the Constitution. As I have never defended judicial rhetoric—although I have frequently defended the economic approach as a way of digging beneath the rhetoric[7]—I am at a loss to understand why my criticisms of the rhetoric of statutory interpretation should be thought inconsistent with a belief that common law judges "do" economics with surprising success.

Shapiro makes a third criticism of my book, and though it has nothing to do with the abandonment thesis it is worth attending to for the light it sheds on a recurrent feature of his article: its omission of any mention of certain highly pertinent aspects of my scholarly corpus. The criticism is that when economic analysis is applied to constitutional issues such as due process and free speech, it quickly degenerates into an empty labeling game, with "costs" and "benefits" being substituted for the more familiar "competing interests" of traditional legal "balancing" (pp. 1023–24). The danger is a real one, but to evaluate it Shapiro would have had to go beyond the brief illustrative discussions in *The Federal Courts*, a book that as Shapiro himself emphasizes (it is the core of the abandonment thesis) is not centrally about wealth maximization. Shapiro says that his research on my judicial opinions continued through October 30, 1987 (p. 1027 n.154), so he should have been able to retrieve the academic writings (and one judicial opinion) in which I try to put flesh on the skeletal economic analyses of due process and free speech presented in *The Federal Courts*.[8] He should have acquainted himself with the literature on the economics of the regulation of campaign financing, a literature that would help him to evaluate the disagreements among the Supreme Court Justices over the constitutionality of such regulation.[9] He would have learned that such regulation, by entrenching incumbents, endangers democratic processes, rather than, as he suggests, promotes them. "For every economic theory there is a competing one" (p. 1026) true, but they are not equally cogent or well (or poorly) supported, and he should not have decided that

7. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW 21 (3d ed. 1986).

8. *See* Sutton v. City of Milwaukee, 672 F.2d 644 (7th Cir. 1982); Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U.L. REV. 1 (1986); ECONOMIC ANALYSIS OF LAW, *supra* note 7, § 21.1 & ch. 28; Posner, *The Law and Economics Movement*, 77 AM. ECON. REV. PAPERS & PROC. 1 (May 1987). *See generally* Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4 (1987).

9. *See, e.g.*, J. KAU & P. RUBIN, CONGRESSMEN, CONSTITUENTS, AND CONTRIBUTORS: DETERMINANTS OF ROLL CALL VOTING IN THE HOUSE OF REPRESENTATIVES ch. 8 (1982); Kazman, *The Economics of the 1974 Federal Election Campaign Act Amendments*, 25 BUFFALO L. REV. 519 (1976).

economics has nothing to say about constitutional law before canvassing the efforts of economists and economically minded lawyers to say something about the subject.

I turn now to Shapiro's discussion of my judicial performance. He examines not only all of my opinions, but all of my votes, in the fields of labor and antitrust law. The object is to determine whether I am being consistent with my academic writings on wealth maximization and on the federal courts. I am not, in his eyes, since he believes that the two bodies of academic writings are inconsistent with each other.

I have no quarrel with his choice of fields, but point out that the labor field is misspecified. Shapiro includes three categories of cases. The first is composed of suits involving arbitration under the Taft-Hartley[10] or Railway Labor Acts,[11] the second of proceedings to review decisions of the National Labor Relations Board, and the third of suits by workers against employers under various benefits statutes such as the Black-Lung Act.[12] The three categories constitute an arbitrary subset of litigation between worker and employer interests. If a collective bargaining agreement contains an arbitration clause, disputes under the agreement are resolved by arbitration; if it does not, the dispute is resolved by a court, applying federal common law. Shapiro offers no explanation for excluding the latter group of cases, but it is a small group. More important, if suits by workers seeking benefits are to be included in the labor category, why not include other suits by workers against their employers, such as suits under the Federal Employers' Liability Act,[13] the Equal Pay Act,[14] the Age Discrimination in Employment Act,[15] and Title VII of the Civil Rights Act of 1964?[16] Shapiro offers no explanation for excluding these cases. He treats his set of labor cases as a natural category, which it is not.

Shapiro's peculiarly designed sample contains 52 cases, in 28 of which I voted for the employee or union and in 24 for the employer (p. 1033). In the absence of any benchmark—the votes of other judges, of the average judge, of judges in other circuits, or whatever—one might think that this distribution of votes (54 percent "pro-labor") would be about what one would expect of the average judge, the judge with no bias in favor of "labor" or prejudice against it. And in fact, Shapiro, who offers no benchmarks of any kind that would enable my performance to be compared with that of any other judge, remarks (he would say, is "forced to admit") that "Posner's voting record seems even-handed, even comparatively generous to labor, *in his affirmances*" (p. 1033; emphasis added). For if one looks just at the 35 cases in which I voted to affirm the arbitrator or the Labor Board (or some other agency), in 26 of these cases I voted for the labor side of the dispute. But Shapiro focuses on

10. Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C. (1982 & Supp. IV 1986)).

11. Railway Labor Act, ch. 347, 41 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151–188 (1982)).

12. Black Lung Benefits Act, Pub. L. No. 91-173, 83 Stat. 792 (1969) (codified as amended at 30 U.S.C. §§ 901–62 (1982 & Supp. IV 1986)).

13. Employers' Liability Acts, ch. 3073, 34 Stat. 232 (1906) (codified as amended at 45 U.S.C. §§ 51–60 (1962)).

14. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. § 206 (1982)).

15. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–34 (1982 & Supp. IV 1986)).

16. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C. (1982 & Supp. IV 1986)).

the 17 cases in which I voted to reverse the arbitrator or agency. In only two of these cases was the reversal in favor of the labor side, so he finds a "strong tendency" on my part "to vote for reversals to the disfavor of labor" (p. 1033). However, a sample of 17 is much less reliable than one of 52. While this might not matter if there were a reason for distinguishing between reversals and affirmances, there is no reason. Why would one expect a judge's pro- or anti-labor sentiments to surface only in cases where he was voting to reverse? Why would one not expect the judge to affirm where the arbitrator or agency had decided in favor of the employer, and otherwise reverse?

Shapiro draws two conclusions about my votes and opinions in labor cases. The first is that they show that I have "not adhered consistently to the 'nonintervention-ist's view'" that I advocated in *The Federal Courts* (p. 1034). Shapiro correctly infers from the book that my concern about the mounting federal judicial caseload inclines me to favor judicial deference to arbitrators, administrative agencies, and other nonjudicial adjudicators. But a judge who *never* voted to reverse an arbitrator or an agency would be pushing deference too far; he would be abdicating his judicial function. Out of the 52 cases in Shapiro's sample, I voted to reverse the arbitrator or agency 17 times (p. 1033). Is this too high a fraction for a restrained judge—a judge who takes seriously all that I said in *The Federal Courts*? Without a benchmark, the question cannot be answered. Shapiro provides no benchmark. Nor does he address the problem of selection bias that a study of reversal rates involves. It is not true that a court that was exceedingly restrained and known to be so would affirm all, or even the vast majority, of the decisions appealed to it. The known attitude of the court would discourage most losing parties from appealing, and the rate of appeal would therefore fall; but among those cases that were appealed the rate of reversal might well be unchanged, for it is the rare litigant who will appeal an adverse judgment in a civil case if he does not think he has a shot at reversal.[17]

The second conclusion that Shapiro draws from his sample of my labor cases is that "at least some [of Posner's opinions] involve *post hoc* de novo re-evaluation of the factual record from a court, arbitrator, or administrative agency below, in violation of both traditional principles of judicial review and Posner's conception of 'macrojudicial' efficiency" (p. 1034). He gives three examples. The selection is an odd one, for in two of the three cases I voted to affirm the decision of the Labor Board.[18] Any reader with the patience to read these three opinions can form his or her own judgment on whether Shapiro's criticisms have merit. I want to consider the question: supposing they do, what does that prove? It proves that in three out of the 29 cases in the sample in which I wrote an opinion—10 percent—I failed to give sufficient deference to the arbitrator or agency. Given the difficulty and uncertainty of American law and the fact that the easiest appeals are disposed of in unpublished opinions (excluded from Shapiro's sample), it should be easy to make a plausible case that an appellate judge failed in ten percent of his cases to give adequate deference

17. *See* Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

18. NLRB v. Acme Die Casting Corp., 728 F.2d 959 (7th Cir. 1984); NLRB v. Village IX, Inc., 723 F.2d 1360 (7th Cir. 1983) (upholding four out of the Board's seven unfair-labor-practice findings). Shapiro counts *Village IX* as a reversal; he counts all partial reversals as reversals rather than as affirmances—without explaining why.

to the tribunal being reviewed. Before concluding that such failure demonstrates bias, the observer ought to consider the other tail of the distribution—the cases in which the judge may have given too much deference to the tribunal. Shapiro does not do this. Thus, he does not consider the merit of the accusation by the dissenting judge in *East Chicago Rehabilitation Center, Inc. v. NLRB*[19] that the majority opinion—a "pro-union" affirmance written by me—displays "excessive deference" to the findings of the Labor Board, and, by "concentrating solely on the interests of employees to the exclusion of the interests of the employer as well as the public, makes a mockery of Congress' intent to strike a fair balance between the conflicting interests of employers and employees."[20] Nor does Shapiro consider that in *NLRB v. Browning-Ferris Industries*,[21] classified by him as one of my anti-labor reversals, the key holding[22] was that refusing to cross a picket line at the premises of an employer's customer is an activity protected by the National Labor Relations Act.

Turning to Shapiro's sample of my antitrust cases, little need be said, since what mainly divides us is disagreement over questions of substantive antitrust law. As he reveals by relying heavily on the position of *dissenting* Justices (pp. 1043–44), my views on antitrust are close to those of a majority of the current Supreme Court, which has never reversed—has never even granted certiorari in—a substantive antitrust decision written or joined by me. (It also has not reversed, or granted certiorari in, any of the cases in Shapiro's labor sample.) So while it is true that "[f]or Posner to claim that a version of his theory is now embraced by a majority of the Supreme Court does not in itself establish that it is economically rational" (p. 1044), the bearing of this observation is unclear. As a lower-court judge I am supposed to try to decide cases in conformity with the views of the Supreme Court.

Three other features of the antitrust sample should be noted briefly. First, Shapiro drops his earlier suggestion that reversals are more significant than affirmances, for in the antitrust sample I voted for the plaintiff almost twice as often when I was voting to reverse the trial court than when I was voting to affirm it, yet I am given no credit for this. Second, Shapiro treats the existence of a dissenting opinion as conclusive evidence that the majority opinion (provided it was written by me) was erroneous. My opinions are thus subjected to close scrutiny, while opinions of judges disagreeing with me are taken at face value. Third, in citing a decision[23] that he regards as an exception to my alleged tendency to give insufficient deference to findings of a lower court or an administrative agency that favor the antitrust plaintiff, Shapiro describes the decision as "arguably the exception that proves the rule" (p. 1039 n.202). Shapiro should know better than to suppose that a rule is somehow proved by finding an exception to it. The word "proves," in the expression "the exception that proves the

19. 710 F.2d 397 (7th Cir. 1983), *cert. denied*, 465 U.S. 1065 (1984).

20. *Id.* at 406–07 (Coffey, J., dissenting).

21. 700 F.2d 385 (7th Cir. 1983).

22. One member of the panel rejected this holding on the ground that it was excessively pro-union. *See id.* at 390–91 (Coffey, J., concurring).

23. Hospital Corp. of America v. FTC, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1975 (1987), upholding, in an opinion written by me, an order by the Federal Trade Commission finding a violation of § 7 of the Clayton Act, as amended 15 U.S.C. § 11 (the anti-merger law).

rule," means "tests," not "demonstrates;" a rule cannot be regarded as confirmed until its alleged exceptions have been examined and evaluated.

Since Shapiro is a political scientist rather than a lawyer, one might have expected greater methodological rigor than his article displays. One has only to compare the recent student Note in the *Columbia Law Review* on Reagan's appointments to the federal courts of appeals to see the difference between careful and tendentious statistical analyses of judicial performance.[24] One of the results of the Note's analysis is pertinent to Shapiro's theme: "four of the five 'academic' Reagan judges [studied in another article] . . . were more conservative than other Republican appointees . . . . As a group, Judges Scalia, Bork, Easterbrook, and Winter voted on the liberal side of the case only 12% of the time—far less than the 34% rate for the rest of the Reagan judges and the 35% rate for other GOP appointees. Judge Posner, however, took the liberal side over 30% of the time, much like his other Republican colleagues."[25]

Finally, suppose that I were as prejudiced against labor unions and antitrust plaintiffs as Shapiro believes; Shapiro's conclusion that the goal of my judicial philosophy is to perpetuate an unequal distribution of income and wealth would still be questionable. He assumes rather than argues that federal labor legislation, and the sort of private antitrust litigation which pitches a dealer against a supplier—the dominant type of case in his antitrust sample—are egalitarian in their effects. This is a highly contestable assumption. Unionization cannot transfer wealth from shareholders to workers in competitive industries. It can, however, in all types of industry, transfer wealth from consumers to workers (the higher wages of union workers are passed on, in part, to consumers in the form of higher prices). And it can transfer wealth from worse-off workers to better-off ones; for, by raising the price of labor, it reduces the demand for it (by spurring employers to substitute capital for labor), and the burden of reduced demand falls mainly on the marginal workers. The net effects are uncertain, and this is not the place to try to evaluate them; my point is only that Shapiro is being uncritical in assuming that the tendency of unionization is to equalize wealth.

As for the type of antitrust thinking embraced by Shapiro that sees the antitrust laws as a charter of protection for dealers and other small businesspeople, it is hard to see how the protection of small business can be conducive to the equalization of wealth. Small businesspeople are not poor people, and if the antitrust laws protect them against competition from more efficient big businesses, consumers will be the losers, along with the workers employed by those businesses. And much stock in large corporations is owned by workers' pension funds.

Could it be that all Shapiro has succeeded in showing—even if one accepts his defective statistical analysis, as one should not—is that I am a champion of the consumer?

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24. Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766 (1987).

25. *Id.* at 779 n.66.