“Only Grey Matter”?
Richard Posner’s Cost-Benefit Analysis of Sex
Martha Nussbaum†

I. A SIGH OF LONGING AND SEVERAL SPLASHES OF BLOOD

When one writes about this subject, however apparently dry and impartial one’s manner, one cannot avoid putting one’s own sensibilities and responses on the page. Stendhal expressed this point vividly, when, in De l’amour, his narrator observes: “I am making every possible effort to be dry. I want to impose silence on my heart, which thinks it has a lot to say. I am continually fearful that I have written only a sigh of longing, when I think that I have set down a truth.” Usually these personal reactions lie concealed from view; and yet they provide the assessor of a theory of sexuality with a set of privileged explananda, to which the theory—whatever its merits in explaining the data it adduces explicitly itself—will inevitably be held accountable.

It is my idea, therefore, to set out what I take to be some privileged explananda, accounts of sexual behavior and of reasoning about it that I believe to be of sufficient interest and depth that a theory that cannot do well by them has a lot of explaining to do. I

† University Professor and Professor of Philosophy, Classics, and Comparative Literature, Brown University. I have already reviewed Posner’s book in The New Republic. Venus in Robes, New Republic 36 (Apr 20, 1992). There I focused on Posner’s libertarian normative theory of sexuality (see Section II below), and gave only a brief account of the bioeconomic explanatory theory. I shall focus on that theory here. Since this is also the portion of the book of which I am the most critical, this review may well seem less positive in tone than the other one. But it would be an error to conclude that my overall (favorable) judgment has altered.

I am grateful to Joshua Cohen, John Roemer, and Cass Sunstein for their comments on an earlier draft, and especially to Richard Posner for his valuable suggestions.

1 Stendhal, De l’amour 40 (Gallimard, 1969) (“Je fais tous les efforts possibles pour être sec. Je veux imposer silence à mon cœur qui croit avoir beaucoup à dire. Je tremble toujours de n’avoir écrit qu’un soupir, quand je crois avoir noté une vérité.”) (emphasis in original).
shall do this by turning to literature, choosing passages that seem to me both profound and in certain ways representative, and whose claims to representativeness—unlike that of one's own experiences—can at least be discussed publicly. My selection is obviously not neutral. It focuses on recent Anglo-American works, and works that seem to me to raise various interesting problems for Richard Posner's analysis (though in other ways they support it). They are also works that I love. (For I did try to concoct a sample less dictated by my own sensibilities, including, for example, a passage from John Updike, but found my distaste for it too strong to set it on the page.) I am hardly alone in finding something of importance in these works; their very fame (in four of the five cases, at least) seems evidence that they speak for many.

1. James Joyce, *Ulysses*.

... he says your soul you have no soul inside only grey matter because he doesn't know what it is to have one ... no that's no way for him has he no manners nor no refinement nor no nothing in his nature slapping us behind like that on my bottom because I didn't call him Hugh the ignoramus that doesn't know poetry from a cabbage that's what you get for not keeping them in their proper place pulling off his shoes and trousers there on the chair before me so barefaced without even asking permission and standing out that vulgar way in the half of a shirt they wear to be admired like a priest or a butcher or those old hypocrites in the time of Julius Caesar of course he's right enough in his way to pass the time as a joke sure you might as well be in bed with what with a lion God I'm sure he has something better to say for himself an old Lion would O well I suppose it's because they were so plump and tempting in my short petticoat he couldn't resist they excite myself sometimes its well for men all the amount of pleasure they get off a woman's body were so round and white for them always I wished I was one myself for a change just to try with that thing they have swelling upon you so hard and at the same time so soft when you touch it ... .


The clientele of Messrs Hill and Hall was drawn from the middle-middle classes, whose highest desire seemed shelter—continuous shelter—not a lair in the darkness to be reached against fear, but shelter everywhere and always, until the existence of earth and sky is forgotten, shelter from poverty and disease and violence and impoliteness; and consequently from joy; God slipped this retribution in. He saw from their faces, as from the faces of his clerks and his partners, that they had never known real joy. Society had catered for them too completely. They had never struggled, and only a

---

Only Grey Matter

struggle twists sentimentality and lust together into love. Maurice would have been a good lover. He could have given and taken serious pleasure. But in these men the strands were untwisted; they were either fatuous or obscene, and in his present mood he despised the latter least. They would come to him and ask for a safe six per cent security. He would reply, “You can’t combine high interest with safety—it isn’t to be done,” and in the end they would say, “How would it be if I invested most of my money at four per cent, and play about with an odd hundred?” Even so did they speculate in a little vice—not in too much, lest it disorganized domesticity, but in enough to show that their virtue was sham. And until yesterday he had cringed to them.

3. Emily Brontë, Wuthering Heights.

“May she wake in torment!” he cried, with frightful vehemence, stamping his foot, and groaning in a sudden paroxysm of ungovernable passion. “Why, she’s a liar to the end! Where is she! Not there!—not in heaven—not perished—where? Oh! you said you cared nothing for my sufferings! And I pray one prayer—I repeat it till my tongue stiffens—Catherine Earnshaw, may you not rest, as long as I am living! You said I killed you—haunt me, then! The murdered do haunt their murderers. I believe—I know that ghosts have wandered on earth. Be with me always—take any form—drive me mad! only do not leave me in this abyss, where I cannot find you! Oh, God! it is unutterable! I cannot live without my life! I cannot live without my soul!”

He dashed his head against the knotted trunk; and, lifting up his eyes, howled, not like a man, but like a savage beast getting goaded to death with knives and spears.

I observed several splashes of blood about the bark of the tree, and his hand and forehead were both stained; probably the scene I witnessed was a repetition of others acted during the night. It hardly moved my compassion—it appalled me; still I felt reluctant to quit him so.

4. Joyce Carol Oates, You Must Remember This.

Enid’s mind was extinguished, she wept, she did hate it; for a very long time she couldn’t move, it was like waking in the hospital but knowing you were paralyzed, your muscles locked still in sleep, in stupor, while the world kept its distance. She couldn’t draw a breath wholly her own, not Felix’s, half asleep she imagined he was breathing her breath for her, lying heavily against her, oblivious of her, as if they had fallen together from a great height. By degrees her frantic heartbeat always calmed but this too was Felix’s heartbeat. He gripped her tight, one arm awkwardly beneath her the other cradling her neck; if he slept he drew her down into sleep, the undersides of her eyes burned as she made her way through a grassy field or slope, the grass vibrantly green! so wonderfully green! and there she stood shielding her eyes against the glare of the sun on the lake, in the lake was

---

3 E. M. Forster, Maurice 202-03 (Edward Arnold, 1971).
the sky which always consoled her, Heaven and Earth in one plane. She saw in the water a shadowy reflection not her own, she stared, she stared, she began to weep with desire, a need so desperate it could scarcely be borne, like the pleasure that rose so violently between her legs that was Felix's to give or to withhold.⁸


"Last night, when we were talking up here round the fire, I began to think that the very soul of the world is economic, and that the lowest abyss is not the absence of love, but the absence of coin."

"I call that rather cynical."

"So do I. But Helen and I, we ought to remember, when we are tempted to criticize others, that . . . [t]he poor cannot always reach those whom they want to love, and they can hardly ever escape from those whom they love no longer. We rich can . . . ."

"That's more like Socialism," said Mrs. Munt suspiciously.

"Call it what you like. I call it going through life with one's hand spread open on the table."⁶

These (in the spirit of reviewing with one's hand spread open on the table) are the passages to which I shall later be returning to assess Posner's bio-economic theory of sexuality. They are culturally narrow, clearly; but for this reason they are especially closely related to the internal texts of many of our experiential scenarios—their causes and effects, I think, as well as their representations.⁷ And although they plainly do not encompass the entirety of sexual experience, even in the modern Anglo-American world—their combination of romanticism and welfarism is no doubt a reviewer's equivalent of Stendhal's "sigh of longing"—nonetheless, I hope it will be granted that they are at least a part of what a good explanatory theory of sexuality ought to be

---

⁸ Joyce Carol Oates, *You Must Remember This* 186 (Dutton, 1987).
⁷ In *Love's Knowledge* (Oxford, 1990), I argue that to focus on literary works as representations of life is not neutral: for literary genres themselves embody certain conceptions of what is salient in life and what is not—conceptions that may be at odds with certain philosophical and economic conceptions. In *The Literary Imagination in Public Life*, 22 New Lit Hist 877 (1991), I develop this argument further, claiming that the sense of life embodied in the realist novel is profoundly at odds with the sense of life embodied in the theoretical premises of welfare economics. So it may seem unfair to Posner that I should approach an economic theory of sex *via* novels. I do not think it is unfair. For Posner's theory makes claims about explanatory adequacy that seem to require it to cover and to be able to predict the data of life. And the data of life can hardly be fully captured in reports given from the outside; they include people's perceptions of what is salient in their lives as they live them from the inside. These perceptions make a predictive difference. And it was this, I argued, that gave the novels their superior claim to truth and to explanatory adequacy.
able to explain. When I return to them later, I shall discuss each of them in detail.

I shall argue that the first four passages show (to put it very roughly) that Posner's bio-economic theory is too economic: that its account of sexual choice in terms of costs and benefits cannot at all explain the Brontë and Oates passages (intimately related texts that I shall treat together), that it cannot explain the whole of the excerpt from Maurice (cannot explain how Maurice is different from his clients), that it has difficulty even with the material from Ulysses, which might in some ways appear to support it. For none of these cases can be exhaustively analyzed in terms of cost-benefit analysis—unless that analysis is made so multi-valued and so complex that it ceases to be, properly speaking, an economic analysis at all.

In the Brontë and Oates passages the problem lies still deeper: an erotic obsession appears to defeat all rational calculation about well-being. Sexuality is seen to lie beyond the world of reasons altogether, in a realm of blood and death, of mysterious spiritual union. The rational narrator, imagining the scenes "acted during the night" of which Heathcliff's bloody frenzy is a reenactment, finds herself both appalled and fascinated by that which stands beyond compassion, beyond the giving and receiving of reasons.

On the other hand, what the passage from Howards End shows, I think (together with the tragic story of Leonard Bast to which it refers), is that in certain ways Posner's economic theory is not complete enough as an economic analysis of sexuality: for it fails to investigate fully enough the countless ways in which one's social class affects one's material well-being and in turn, one's capability for sexual expression and even for certain sorts of erotic thoughts, sentiments, and motives.  

II. History and Judicial Prejudice

Posner's book has three distinct aims. The first, which he describes as his "initial motivation" (p 442), is to provide the American public, and especially the legal profession, with information about sex that is usually lacking in public discussions of the topic, by describing the "principal findings" of the "vast multidisciplinary literature" that now exists on human sexuality "in a form ac-

---

8 See Forster, Howards End at 72, just after the passage cited above, where Margaret, reflecting on her independent income, concludes that "all our thoughts are the thoughts of six-hundred pounders, and all our speeches . . . ."
cessible to the legal profession” (p 2). Since, as Posner points out, most recent judicial opinions in the area of sexuality have been insufficiently grounded in historical and scientific study, and that, in particular, recent Supreme Court decisions on sexual privacy are “not only poorly reasoned but poorly informed” (p 7), his aim in studying this material is also, he announces, “to inform myself in my role as a judge and to dispel some of the clouds of ignorance, prejudice, shame, and hypocrisy that befog the public discussion of sex in America generally and in the American legal system in particular” (p 442). By making this rich material available to others for study, he aims “to shame my colleagues in the [legal] profession for ignoring it” (p 4).

This aim, as I have already argued, Posner performs with exemplary thoroughness and clarity, sorting through and making available a vast and varied multidisciplinary literature. Especially impressive is his account of the many ways in which sexual norms, and even basic sexual categories, are “socially constructed”—that is, not “given” or “natural,” but generated out of a culture’s specific history and its normative judgments or prejudices. For ancient Greece, for example, he shows that the distinction between “homosexuality” and “heterosexuality” did not exist in anything like its modern form. That is, the Greeks did not categorize people in accordance with a supposedly deep and immutable “orientation” toward partners of either the same or the opposite gender. Instead, the primary distinction, for males, was the distinction between the active and the passive. What was important was that one be the active party (the penetrator) in a sexual act; the gender of the passive partner was regarded as a matter of relatively little importance. No special moral suspicion or stigma attached to a

---

10 Here Posner is especially indebted to the pioneering work of Michel Foucault. Michel Foucault, 2 History of Sexuality: The Use of Pleasure (Pantheon, Hurley trans, 1985); 3 History of Sexuality: The Care of the Self (Pantheon, Hurley trans, 1986).
11 In this regard, Posner evinces striking mastery of the best recent specialized scholarship, in particular, of Kenneth J. Dover, Greek Homosexuality (Harvard, 1978), and David Halperin, One Hundred Years of Homosexuality and Other Essays on Greek Love (Routledge, 1990). On the development of this field of study, and recent attacks on it, see Martha Nussbaum, The Softness of Reason: A Classical Case For Gay Studies, New Republic 26 (Jul 13/20, 1992).
12 One might add to Posner’s account the fact that, since sexual acts were understood to be above all acts in which one person penetrates another, the concept of female homosexuality seems to have struck many Greeks as too peculiar to articulate at all. See John J. Winkler, The Constraints of Desire: The Anthropology of Sex and Gender in Ancient Greece 39-40 (Routledge, 1980). Certainly it cannot be classified as a species of a genus of which the penetration of a male by a male is another species. Instead, the genus “Penetrat-
male’s interest in males, nor was it assumed that an interest in males excludes an interest in females. The moral norm was appropriate manly control over one’s pleasures; so long as one is in control—neither given to excess nor interested in sexual passivity—one might indulge one’s sexual interest with a receptive partner of either gender.

Indeed, one can go further. The Greeks do not appear to have regarded the sexual appetite with any special shame or embarrassment, or as the source of any unusually deep moral perplexity. Lacking the notion of “original sin” through which the Christian tradition has so frequently educated its members to view sexual desire as a central moral problem, if not also as filthy and contaminating to the aspiring soul, the Greeks seem to have viewed the management of sexual appetite as one part of the larger issue of exerting active control over one’s pleasures, and thus as not different in kind from the management of the appetites for food and drink. They do not appear to have had the thought that sex is by its very existence something dirty and shameful; thus, though they constructed many ethical theories that gave normative instructions about the management of the passions, they did not moralize about sex in the manner of someone who sees sex as by its very nature sinful. And this, like the difference with regard to sexual orientation, is a difference that shows up not only in philosophical theories, but also in the ways in which ordinary people articulated and described their experiences. The evidence suggests that such profound conceptual differences are not simply differences of labeling; they enter so deeply into people’s experience of sexual desire and activity that we may conclude that even this desire itself is not a “natural” extra-historical constant, but, to some extent at least, an artifact of social arrangements.

Material of this sort—and there is much more of it in Posner’s concise, highly readable historical discussion (pp 37-82)—does not have direct ethical or legal implications, as he would be the first to admit. For of course describing what has been done under varied historical conditions does not yet even raise, much less answer, the question what we ought to do. Yet realizing how varied sexual judgments and categories have been throughout history does

ing” has two primary species, a male penetrating a male and a male penetrating a female; the genus “Being Penetrated” has the species that correlate with these. Lesbian sex is off the usual map altogether: the dream interpreter Artemidoros classifies it among weird counter-factual occurrences, such as intercourse with a god.

13 Foucault, 2 The History of Sexuality: The Use of Pleasure, passim (cited in note 10).
loosen the grip of one's own pre-reflective and local ways of seeing things—freeing the mind, as Foucault put it, so that it can think itself differently.\textsuperscript{14} No longer is it possible to think of our distinctions and judgments with regard to sexual orientation as simply "natural," representing some pre-social and pre-religious state of human nature. Nor is it possible to regard the history of Western civilization, on this topic, as unequivocal in its condemnation of "homosexuality"—as the majority and concurring opinions in \textit{Bowers v Hardwick}\textsuperscript{15} assert without argument. Indeed, history suggests that the category in its present form is of relatively recent origin, and that culture, religion, and a culturally narrow form of psychiatry conspired in its formation.\textsuperscript{16} And where the moral condemnation of same-sex activity is concerned, cultural and religious prejudices are even more clearly at work.\textsuperscript{17}

Furthermore, to turn from homosexuality to the more general issue of sexual desire and activity, the case of the Greeks shows us to what extent our own ways of problematizing sex and evincing embarrassment and shame about it are not at all "natural" or "given," but constructed by a particular Christian religious heritage. This does not directly show that the Greeks were not barbarous and stupid, and the Christians on the right track. But the fact that this different attitude was held by a civilization that we generally hold in high esteem should make us pause and reflect before we assert this conclusion.\textsuperscript{18} More important, the fact that our own

\textsuperscript{14} Id at 2.
\textsuperscript{16} See Halperin, \textit{One Hundred Years of Homosexuality} at 15 (cited in note 11). Posner does not go as far down this path as Halperin and other "social-constructionist" theorists do. For he believes that it is likely that we will discover some biological explanation for same-sex preferences. He holds that a group of homosexuals whom he calls "true homosexuals" are so on account of biology, subsuming under this rubric both ancient Greeks who (contrary to social norms) preferred the passive role and more or less all modern homosexuals. Other acts of same-sex intercourse, he argues, can usually be explained as "opportunistic," i.e. chosen because access to females was difficult. In my prior review, I criticized this analysis where ancient Greece is concerned. Nussbaum, New Republic at 38 (Apr 20, 1992) (cited in note 1). The evidence shows that female prostitutes were very generally available, and also that male prostitutes were very much in favor. See Halperin, \textit{One Hundred Years of Homosexuality} at 88-112. Where contemporary homosexuality is concerned, Posner's argument runs up against the difficulty that, of course, not all homosexual males prefer the passive role—thus there is no easy mapping of Athenian categories onto modern categories.

\textsuperscript{17} Even where the Judeo-Christian tradition is concerned, there was much variation in judgment. See generally John Boswell, \textit{Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century} (Chicago, 1980).

\textsuperscript{18} The hypocrisy in Anglo-American culture's treatment of the Greeks is beautifully depicted in Forster's \textit{Maurice}, in a scene from Maurice's university education. A venerated
categories begin to appear as parochial and partial, rather than as ubiquitous and universal, gives us notice that we need to have reasons for them if we wish to maintain them, and, all the more, if we wish to use them to deprive some people of their freedom of expression in sexual matters. In the law, we need reasons of a particular kind, reasons that do not promote one religious tradition over others.19

In short, Posner's sweeping historical inquiry, in these and other areas, puts judges on notice that they may not invoke our current prejudices as if they were timeless, neutral, and natural; and many arguments will thus need to be reexamined. We are, as Posner has written in his now-famous opinion in the Indiana nude-dancing case, "a culture in which puritanism, philistinism, and promiscuity are complexly and often incongruously interwoven."20

History and cross-cultural comparisons are urgently important for judges in such a culture, so that they will have a clearer view of their own intuitions and their origins, and will render judgments that are truly based on reason rather than prejudice. Posner has shown an admirable openness to the facts of the case and to arguments about them, and has shown the legal implications of these facts and arguments very clearly. This is a major achievement in the history of American law.

III. EXPLAINING SEXUALITY: POSNER IN THE GARDEN OF EDEN

But Posner's book has a larger aim. Its historical chapters are followed by two ambitious theoretical projects: the articulation and defense of a "bio-economic theory" of sexual behavior, and of a "libertarian" normative theory of the role of the law in sexual matters. The libertarian project, in which Posner defends the rights of individuals to regulate their sexual conduct by their own choice except where it can be shown to cause harm to or to infringe the rights of others, is connected in complex ways to both the historical account and the bio-economic theory. I must therefore discuss it after examining the bio-economic theory, although a full un-

---

19 See Bowers, 478 US at 211-12 (Blackmun dissenting).
20 Miller v Civil City of South Bend, 904 F2d 1081, 1100 (7th Cir 1990), rev'd sub nom Barnes v Glen Theatre, Inc., 111 S Ct 2456 (1991).
standing of the theory will require saying something about its intended consequences for practical and legal issues.

What, then, is Posner’s bio-economic theory? It is, in extremely general terms, a theory that understands all of human sexual activity in relation to evolutionary fitness on the one hand, and to a “rationality” understood in terms of cost-benefit analysis on the other. But we must pause to ask what is meant by “understands . . . sexual activity . . . in relation to”: that is, which among the several tasks that an account of sexual behavior might take on is Posner’s account attempting?

Accounts of sexual activity take, it seems, at least four different forms. First, descriptive accounts: these gather and record information about the sexual activities people actually perform. Such accounts may attempt to confine themselves to the reporting of bodily movements, without investigating the self-understandings of the actors (as seems to have been, on the whole, the intention of the Kinsey Report). On the other hand, they may attempt to describe not only the movements people make but also the intentions, plans, labels, categories, taboos, etc., that they use as they make them.

Second, explanatory accounts of sexual behavior: these usually attempt to find behind the multiplicity of the data some simpler laws (frequently unknown to the agents) that actually explain all or most of the variety of behavior in which they engage. They must, then, be based on an adequate descriptive account, and they must adequately cope with the data that description brings forward. Such accounts do not pass normative judgments on behavior; they simply seek to understand what causes or motivates it. The theory would seek to understand the variety of causes that engender the actual variety of human sexual behavior, invoking any causes that appear to have explanatory value, whether they come from biology, culture, religion, morality, or psychology—but always in their role as causes, rather than as justifiers, of behavior. Most psychoanalytic accounts of human sexuality are, on the whole, of the explanatory sort—although they sometimes verge over into the next type of account insofar as they announce a distinctive norm of health and classify certain activities as deviations from that norm.

Third, we have normative accounts of sexual activity. These, in turn, may take several forms—medical, aesthetic, ethical, religious—and one might coherently combine more than one of them. The mark of such an account will be an attempt to sort out, among the actual forms of behavior, those that are in some sense good or desirable from those that are bad or undesirable. We may ask what
forms of sexual expression are healthy for us (whether physically or psychologically); we may ask about the aesthetic or artistic aspects of sexual pleasure; we may ask about the benefits and harms to others caused by various forms of sexual activity; and, to some extent independently of all of these, we may ask ourselves whether we wish to follow the guidance of a particular religion, where sex is concerned.

Finally, we find legal accounts of sexual behavior. By this I mean not descriptive accounts of what the law already is in some area, but normative accounts of what the law ought to be. These will not be altogether independent of the previous sort of general normative account, since we need to have some reasons for making an existing practice illegal. But nobody believes that everything that is immoral—not even everything that can be generally agreed to be immoral—should be illegal, and a central task for a legal theory will be to say how to draw that line. In constructing a legal account where sex is concerned, the legal theorist must take into account our interest in personal freedom, our interest in not harming ourselves or others, and many other highly complex factors. Many of these will be moral factors, involving the weighing of harms, rights and liberties, and so forth. Even a strongly libertarian legal theory, such as Posner’s, cannot be altogether independent of ethical judgments, as he sometimes seems to suggest. For although in its hands-off way it refuses to pass judgment on practices that many people deem immoral, it does so because of the high worth it ascribes to personal liberty of choice, a central moral value.²¹

If Posner’s libertarian normative theory is clearly a legal theory of sexual behavior, what task is undertaken by the bio-economic theory? It seems evident to me that it is intended to be an explanatory theory. The theory begins from a descriptive account—here is its link with the book’s historical and cross-cultural and scientific reportage; but it seeks, within the data, a number of simpler laws and principles that will suffice to explain what people do. Posner often describes the theory in these terms, speaking of

---

²¹ It may help to consider a parallel to the simpler and less fraught case of food behavior. Here too, we find descriptive accounts, (telling us what foods people actually eat), explanatory accounts (seeking the biological and/or cultural factors behind this behavior), normative accounts (telling us what foods are good to eat), and legal accounts (making recommendations about what the law should be where food is concerned). Normative accounts regarding food may take several forms: they may tell us what foods are healthy; they may describe good taste in food; they may make ethical judgments concerning matters such as the killing of animals for food; and they may recommend legislation concerning food.
its "explanatory power" (p 5); he insists that its adequacy should be assessed by looking at the accuracy (and the non-obvious, non-trivial character) of the predictions about social data that it enables us to make (pp 5-6). A theory assessed in this way cannot be a normative theory (although Posner does at times use the word "rational" normatively, as if behavior that falls outside his explanatory structure is somehow deficient). It is all too obvious that a normative theory of human behavior will deliver rather poor predictions concerning the way people actually act; that would hardly be a fair way to assess it. Nor, equally obviously, would it be illuminating or fair to test a theory of what the law should be by seeing whether human behavior already conforms to its norms. So Posner's bio-economic theory, as he himself seems eager to say, is an explanatory theory rather than a normative theory.

It is equally obvious, however, that Posner regards the bio-economic theory as the rival and, indeed, the vanquisher of normative moral theories. He announces near the opening of the book that his theory is continuous with (and, he believes, an advance upon) other explanatory theories such as the Freudian and the sociobiological (pp 3, 220-21). But "[t]he uncompromising, the truly unassimilable rival of the economic theory . . . is a heterogeneous cluster of moral theories" (p 3).22 He tells the reader that his bio-economic theory can be arrived at only by one who has put aside moral theorizing, considering sex as a "morally indifferent" topic (pp 85, 181). Again, as he begins his rather brief examination of the moral theories, he announces: "To find a real, no-holds-barred rival to the economic approach, we must look outside functionalism to what I call the moral theories of sex" (p 221).

This claim seems at first highly peculiar. For it is not at all clear in what way an explanatory theory that tells us why we do what we do provides any sort of replacement for a normative theory. One thing we appear to discover as we try to understand ourselves is that we are creatures who engage in ethical discourse and prefer certain forms of life to others on ethical grounds. And so to discover our actual behavior and the principles behind it would seem to be just a first step on the way to asking what we ought to do—hardly a replacement for the posing, and answering, of that question. And this Posner sometimes acknowledges—as in a pas-
sage following the biological portion of the bio-economic theory, where he admits that biology can show us at most certain powerful tendencies in our behavior; these do not fully determine what we are and do, and in this sense they do not replace our own normative inquiries (p 108). So, one might ask, isn’t Posner’s claim that his theory displaces moral theorizing just a mistake—and a mistake of a sort he elsewhere shows himself prepared to repudiate?

Things, however, are not so simple. (Things rarely are simple when one is dealing with Posner.) First of all, there is considerable ambiguity about what Posner is including under the rubric “moral theories”—and, therefore, about what he views as the “unassimilable rival” of his own theory. At times, as in the list at the opening of the book, which includes Kant, Joel Feinberg, and Ronald Dworkin, “moral” is used very broadly, as more or less equivalent to “normative,” so as to raise our question about whether an explanatory theory could ever be a true “rival” to such a broad range of normative inquiries (pp 3-4). At other times, “moral” is used in a far narrower sense, a sense connected with a specifically Christian tradition of the problematization of sex as sinful or evil. For example, at one point Posner says that the position that sex is “morally indifferent” was held by “the ancient Greeks and Romans,” as well as by Bertrand Russell and by modern Swedish society (pp 181-82). But of course all the people named did have ethical views about sex, and were (or are) perfectly prepared to judge that some forms of sexual activity are good (conducive to the flourishing of either the agent or other members of the community) and that others are bad. It was one of the main points of Russell’s writing on the topic to insist that human flourishing was impeded by Christian condemnations of sex—and in that sense his theory was on its face a normative ethical theory, albeit an anti-religious one.23

In correspondence with me, Posner sorts this issue out by opting for the narrower construal: “I certainly agree that my theory of sex is ethical in the Greek sense, but to me the word ‘moral’ in conjunction with ‘sexual’ connotes (not denotes) that human sexuality is ‘low,’ shameful, ‘private’ in the sense of not to be discussed publicly without discomfort, or, at the least, deeply problematic.”24

---

23 On Greek ethical views about sexuality, see generally Dover, Greek Homosexuality (cited in note 11); Halperin, One Hundred Years of Homosexuality (cited in note 11); Winkler, The Constraints of Desire (cited in note 12). See also Anthony Price, Love and Friendship in Plato and Aristotle (Clarendon, 1989). For Russell’s views, see especially The Conquest of Happiness (Horace Liveright, 1930).

Of course it is his libertarian normative theory to which Posner alludes in making this judgment. And that theory is clearly an ethical theory in the sense he has in mind. But there is a sense in which even his bio-economic explanatory theory is a direct rival to the Christian “moral” position on human sexuality that Posner, with Bertrand Russell, rejects. For the Christian position comes equipped with its own explanatory theory, which gives no small support to its normative theory. Sexual desire, this explanatory theory holds, is not necessary for any of the good and reasonable ends that sexual activity achieves. It is, indeed, the product of our sinful nature. As developed in an especially clear form in Augustine’s *City of God*, Book XIV, the theory holds that in the Garden of Eden before the fall, human sexual behavior existed (for God would not have left procreation unprovided for), but in a form very different from its form in our current fallen state. For in Eden it was governed by reasoning (and instinct) about the good of procreation. Human beings felt no desire, but were able to use their genital organs as we now use gardening tools.

Certain human beings . . . have natural endowments that are quite different from those of others and remarkable for their very rarity. They can at will do with their bodies some things that others find utterly impossible to imitate and scarcely credible to hear. For some people can actually move their ears, either one at a time or both together. Other people, without moving their head, can bring all the scalp that is covered with hair to the forefront and then draw it back again at will. Others can swallow an astonishing number of different objects and then, with a very slight contraction of their diaphragm, bring forth, as though from a bag, whatever item they please in perfect condition. Certain people mimic and render so expertly the utterances of birds and beasts, as well as of any

---

25 Throughout his discussion, Augustine focuses on male sexuality. He does not draw a conclusion that his argument might seem to imply, namely that females, able to reproduce without desire, are closer to the state of grace than are males.

26 Saint Augustine, *The City of God* XIV.23 (Harvard, Loeb Classical Library, Levine trans, 1966) See especially XIV.10, entitled “An primos homines in paradiso constitutos ullis perturbationibus priusquam delinquarent affectos fuisset credendum” (“Whether we are to believe that the first human beings who were placed in paradise were subject to agitations of any kind before they sinned”) and XIV.24, “Quod insontes homines et merito obo.Tiae in paradiso permanentes ita genitalibus membris usui sensent ad generationem proles sicut ceteris, ad arbitrium voluntatis” (“That if human beings had remained innocent and had earned the right to stay in paradise by their obedience, they would have used their genital organs for the procreation of offspring in the same way as they used the rest, that is, at the discretion of the will”).
other human beings, that it is impossible to tell the difference unless they are seen. Some people produce at will without any stench such rhythmical sounds from their fundament that they appear to be making music even from that quarter. From my own experience I know of a man who used to perspire at will. . . . That being so, what is there to keep us from believing that human members may have served the human will without sexual desire (libidine), for the procreation of offspring before the sin of disobedience and the consequent punishment of deterioration?27

In other words, sexuality was once a reason-governed, “morally indifferent” matter. With the advent of sin, and its transmission by the sin of conception and birth to all of Adam’s offspring, it is so no longer. Formerly, it was explained by a certain sort of reasoning about costs and benefits. Now it is so no longer: for it is explained, now, by sin. Formerly (Augustine perceptively adds), it was a topic that could be dispassionately discussed and made the topic of a scientific inquiry that would not need to apologize for itself:

Discussion, free and unencumbered by any fear of obscenity, would range over every aspect that might occur to the thought of anyone who reflected on bodily parts of this sort. There would not even be words that could be called obscene, but all our talk on this subject would be as decent as what we say in speaking about the other members of the body.28

Now, even Augustine must apologize to “the chaste and devout reader or listener” for the desires that might be aroused by “the words of [his] necessity.”29 Human sexual activity is to be judged problematic and shameful by Christian normative theory because Christian explanatory theory has inserted sin and corruption into the very foundations of its explanation.

It is in this sense that Posner is absolutely right to portray his bio-economic theory as a deadly rival to certain sorts of moral theories. For his theory asserts that we are, in effect, still dwelling in the Garden of Eden. Right now, our sexual behavior is governed by reasons and instinct concerning the good of procreation, just as for Augustine it was then. Right now, it is proper to make sex the object of a dispassionate shame-free scientific inquiry, just as for Au-

27 Id at XIV.24 (with a few small changes of my own in the translation).
28 Id at XIV.23.
29 Id.
gustine it was only then. Posner does not of course introduce into his account the more extravagant claims of Augustine regarding the tool-like reason-governed behavior of the genital organs. At times, however, one does feel that this would be the natural next step for his hyper-rationalistic theory to take. And when one considers the remarkable closeness between Posner’s account of our current condition and Augustine’s account of Eden, one might begin to notice that a most striking feature of Posner’s book, behind its more evident hard-headedness, is its innocence.

Unlike Augustine’s theory, however, Posner’s explanatory theory has no room in it for the idea of an original sinfulness that lies behind all of our sexual acts. It holds that our actions are well-suited to serve our ends—both the biological ends of reproduction and species-survival and a set of more complex ends (to be examined shortly) in terms of which we are alleged to compute costs and benefits. The explanatory adequacy of such a naturalistic theory of human sexuality would indeed be a rival to moral theories that rely on explanations that sever us abruptly from the rest of nature and introduce mysterious non-empirical types of corruption as causes for our every sexual act. In fact, a good explanatory theory can rival a moral or ethical theory in more than one way. It can, as Posner stresses, show that the moral theory relies on false factual premises (pp 222-23). Posner correctly observes that contemporary ethical/legal theories of sexuality—he mentions especially those of Dworkin and Feinberg—are often unfortunately neglectful of factual information that might have enabled them to build a more powerful theoretical case. A good explanatory theory might also show a moral theory to be unworkable—for example, because it imposes demands on human beings that their natural equipment will not let them fulfill without excessive strain or torment. This line of attack, too, shows up in Posner’s assault on

---

30 I do not mean here to sympathize with Augustine’s explanation of humanity’s lack of simplicity in sexual matters. But he was in many ways a profound psychologist of desire, and one might sympathize with his account of the gap that exists between the Edenic state and our actual complexity, without believing in original sin as its cause.

31 His examples here, convincingly developed, are the normative political theory of National Socialism in Germany, and Anita Bryant’s crusade against a homosexual rights ordinance in Dade County, Florida.

32 He mentions that Feinberg and Dworkin attack moralistic opponents of homosexual rights by pointing out logical errors in their positions, when, had they done more empirical work, they might have pointed to numerous false factual claims as well. Posner is very effective at bringing such false factual premises to the surface (pp 222 et seq, 291 et seq).
religious moralism about sex. But also, as in my Augustine example, a good naturalistic explanatory theory, without directly refuting such moral theories, can undermine such theories by calling into question metaphysical assumptions on which they rest, and their explanatory role. This is really the primary strategy used by Posner in his assault on moral theorizing. Since Posner here situates himself in a distinguished tradition of ethical argument, in which leading roles have been played by such complex thinkers as Epicurus, Lucretius, Hume, and Nietzsche, it is worth pausing to say something about the characteristics of argument in this tradition.

The strategy of this philosophical tradition involves: (1) setting out our best explanations of animal behavior in the area in question, (2) reminding the interlocutor that he or she is committed to the explanatory principle that similar explananda should be explained in similar ways, (3) giving an account of the human behavior in question that shows the interlocutor its surprising closeness to animal behavior in the area in question, and (4) pointing out that right now the interlocutor is used to explaining the two sorts of behavior in very different ways—the animal behavior along simple naturalistic lines, the human behavior by positing a variety of non-experiential metaphysical principles, usually of a religious origin. At this point, of course, the choice could go either way: the interlocutor might opt to grant animals membership in the metaphysical realm, or she might naturalize her explanations of the human. The latter choice is made to seem preferable on grounds of evidential support, simplicity, and hard-headed realism.

An especially clear example of this way of proceeding can be seen in the fascinating sections in Hume's *Treatise of Human Nature* entitled “Of the reason of animals,” “Of the pride and humility of animals,” and “Of the love and hatred of animals.” The titles alone are, of course, shockers to the audience that Hume wishes to shock. For this audience is accustomed to make a sharp

---

33 For example, in a context dealing with AIDS and other pressing social problems: “The restoration of Puritan sex ethics is not realistic, and those who preach it are merely evading the difficult questions of policy” (p 442).


35 For Epicurus' and Lucretius' use of such appeals to "the perspective of nature," and a comparison to Hume, see generally Martha Nussbaum, *Beyond Obsession and Disgust: Lucretius' Genealogy of Love*, 22 Apeiron 1 (1989).

distinction between the human and the animal, and to consider reason a special divine faculty implanted in us by a special non-natural agency. Thus to speak of the reason of animals is close to blasphemy; and to speak of their humility and their love no better. Hume objects. In animals, he argues, we find a great deal of evidence of goal-directed means-end reasoning that leads to actions "which tend to self-preservation, to the obtaining pleasure, and avoiding pain." But when we reflect that these creatures behave very much as we do in these respects, "all our principles of reason and probability carry us with an invincible force to believe the existence of a like cause" in our own case. Whenever, therefore, we advance an explanatory hypothesis for activities in which we resemble the beasts, "we must apply the same hypothesis to both; and as every true hypothesis will abide this trial, so I may venture to affirm, that no false one will ever be able to endure it." In the case of animals, he continues, we have no difficulty explaining even actions of the most impressive complexity and "sagacity" as caused by some combination of innate biological equipment with experiential learning. Let us now turn to our own case, Hume continues, and turn to it free from "the influence of custom on the imagination." If we do so, we discover that we can understand our own behavior in a completely naturalistic way, without invoking any extra-experiential spiritual or metaphysical principles. And if we can do so, we are bound to do so, by the principles of explanation already accepted. We conclude, then, that "reason is nothing but a wonderful and unintelligible instinct in our souls." This famous and shockingly anti-religious conclusion is arrived at, note, not by discovering any new facts about ourselves, but by discovering that the old facts have a simpler and more economical explanation than religion had led us to believe.

Such, in brief, is the strategy of Posner’s bio-economic theorizing. In the manner of Hume, he aims "to strip away the moral and emotional overtones, the preconceptions, the myths, the customary attitudes that make it difficult for people in our society ... to treat sex, and its regulation by law or social custom, as subjects of dispassionate scientific study" (p 85). And, like Hume, he does

---

37 Id at 176.
38 Id.
39 Id at 177.
40 Id at 177-78.
41 Id at 178.
42 Id at 179.
Only Grey Matter

1992

this by commending to his reader a naturalistic explanatory theory that allegedly explains the phenomena, and does better by the similarities between human and animal behavior than do the explanatory theories associated with religious moralism.

But two cautionary notes about Humean strategies are in order before we proceed to a more detailed examination of this one. First, a theory may perform the central part of the Humean anti-metaphysical function without being itself an adequate theory. A shockingly simple and even reductive account of human behavior in animal terms may so arrest us by its explanatory strength vis-à-vis metaphysical theories that the grip of the metaphysical may be loosened for all time, even though in the end we might feel the simple theory too simple to explain all that needs explaining. Hume's demonstration that a naturalistic explanation of belief is available, and on a stronger footing than metaphysical explanations, is thus a lasting contribution, even if we should come to reject his particular naturalistic theory in favor of another more complicated theory. And sometimes the very simplicity that may in the end make such a theory prove inadequate is an asset, when the task at hand is the upsetting of superstition and the unseating of prejudice. Posner knows this, and one often gets the sense that his strategic aim of shocking the pious and opening a space for real thought is more important to him than having a subtle and complete theory. At one point, he describes his theory as an "acid bath" that will peel away "layers of ignorance, ideology, superstition, and prejudice," and "clear the ground for a normative analysis" of a more complete and adequate sort (p 437). Thus, if we find fault with his theory, as I shall, we are not necessarily finding fault with his project, which may have accomplished some of its ends precisely by being cruder than the truth.

Second, however, one must also note that the replacement for a religious or metaphysical explanatory theory need not be a crude theory that simply equates humans with other animals. When one deprives oneself of the heavens one is not simply left with the abyss. It is all too easy to suppose that this may be the case, if one is living in a culture in which religion has arrogated to itself all the mystery, complexity, and subtlety of human relations, all the wonder of an experience of desire that is not simply that of a bodily drive or instinct, but involves a distinctive response to a perception of some value in the object.

The Augustinian part of the Christian tradition has schooled generations of its followers to believe that all selective perception and all intentionality in sex are rooted in the soul, an otherworldly
entity. Thus one might too readily believe that if one gives up on Christian otherworldly metaphysics one is left simply with "grey matter." Such is the conclusion of Blazes Boylan, in Molly Bloom's recollection of him—a conclusion that is hardly independent of his membership in a deeply Christian culture, in which the only way to talk about one's insides is to use the metaphysical word "soul." (Leopold Bloom never makes this mistake, and is able to see spirit and emotion and uniqueness in a woman's body itself, the reason why Molly prefers him to Boylan—"because I saw he understood or felt what a woman is.") This is not unconnected, in the novel, with his being a cultural outsider who never believed in the specific Catholic polarities of body and soul, animal instinct and sinful humanity, tool use in Eden and sin outside of Eden.) As Nietzsche saw, two thousand years of Christian asceticism have saddled us with an understanding of our own complexity that might lead us to think that in order to admit the death of god, we have to turn ourselves into the beasts that, according to the Church, we are without god to sustain us.

The largest problem in Posner's book, I believe, is that, Nietzschean though in some sense he is, he makes the mistake that Nietzsche eloquently exposed and warned against. He supposes, in effect, that if god is dead, the ethical and psychological complexities of sex, and all of its mystery, must go out the door too; that all we have left, if we deny ourselves appeal to transcendent sources of authority in these matters, is a situation in which the world is a great market and individuals are simply competing to maximize the satisfaction of their subjective preferences, any one of which is as good as any other. If not the Christian explanatory theory, then no normative distinction-making at all. If not Augustine's world of sin, then Augustine's garden of Eden, a world without delight, mystery, ethics, or love. Or, to put the same point differently, the world as seen by Blazes Boylan. Who would make such an error, one can imagine Nietzsche asking. Someone, perhaps, all too fascinated by religion and by human dependence on it; someone who

---

43 Joyce, *Ulysses* at 782 (cited in note 2).
45 One may understand in this connection the odd fact that Posner classifies the secular moral theories of Feinberg and Dworkin along with religious views (p 3); for he makes the mistake of thinking that humans cannot invent and commit themselves to complex moral evaluations on their own hook, without the other world to tell them so.
doesn’t altogether trust human beings to use their very own wits to say what has value and how much. Posner, secular humanist that he is, should not make this error—and he doesn’t always, as the “acid bath” passage attests.

IV. THE BIO-ECONOMIC THEORY: SEARCH COSTS AND WORMY APPLES

I turn, then, to the bio-economic theory. For even though Posner sometimes gives signs of incomplete allegiance to the theory, and even though he can accomplish many of the central aims of his book without it, he does advance the theory very seriously and makes its defense a centerpiece of the book. The theory is easily characterized in general terms. Human sexual activity, the theory holds, is caused at times by tendencies that are rooted in our innate biological makeup (as handed on to us through the process of evolutionary selection). These tendencies, of which we are most often unconscious, conduce to the preservation of the species. On the other hand, since one thing evolution has brought about is that we are also reasoning animals who choose our own ends and adapt behavior to the ends we have chosen, a good part of our behavior is also the product of our rational choices, where “rational” is understood in some manner derived from economic understandings. Many of these ends, and many of the motives to pursue them, are conscious. In general, our behavior should be understood as the outcome of either one or the other of these types of forces, and of their interactions.

In what follows I shall be focusing on the “economic” side of the bio-economic theory, except where Posner explicitly brings the two together. For he stresses that the conclusions of sociobiology are controversial and insufficiently proven, and that, even if taken as true, they show only tendencies to behavior, not determining forces. The rational human agent “feels the tug of the genes but does not always yield to the tug” (p 108). For this combination of reasons, Posner tells us, he has tried to make the economic analysis of the book relatively independent of the biology: “the reader need not accept sociobiology to find the main arguments of this book persuasive” (p 110).

To say that the behavior of human beings in sexual matters is explicable with reference to the idea of economic rationality is not yet to say much with concrete predictive value. For the notion of “economic rationality” can be understood in more than one way, and Posner’s theory with it. I shall first attempt to understand the theory interpreting “economic rationality” in a narrow and strict
sense deriving from Posner's earlier work; we shall see that this narrow interpretation cannot be made to fit the text. Next I shall advance a very broad construal of "economic rationality," which also turns out to be inadequate to explain the variety of Posner's explanations. This will put us in a good position, finally, to see what Posner's theory owes to economics and what it does not. Ultimately, to assess its adequacy, we shall return to our five literary passages.

In much of his earlier work in law and economics, Posner has held that an agent's behavior is rational in the economic sense if and only if it is designed to maximize the amount of that agent's satisfactions.46 His account of judicial rationality holds that judges aim to maximize society's wealth, but he holds that in so operating the judges themselves are seeking to maximize their own individual satisfactions. The argument connecting these two ends is by no means clear, but it does show that satisfaction, and not wealth, is ultimately at the bottom of things in his theory.47 We need to get more precise about what this conception, in turn, entails. So let me hypothesize that Posner, in these earlier works, was committing himself, in such statements, to three characteristic tenets of Utilitarianism:48 (1) Metricity: When an agent chooses rationally, there is in each and every choice one end, varying only in quantity, that is seen as common to all the alternatives and that is the criterion of choice. The agent weighs and measures using this single standard. (2) Singleness: In all situations of rational choice there is one and the same metric. (3) Consequentialism: A choice is valuable not for its own sake but for the consequences it produces. If we combine these three, filling in Posner's account of the end, we have

46 For an especially clear summary of the approach, see Richard A. Posner, The Economics of Justice (Harvard, 1981); Richard A. Posner, Economic Analysis of Law 1-17 (Harvard, 3d ed., 1986); and Richard A. Posner, The Problems of Jurisprudence 353-92 (Harvard, 1990). He states: "The basic assumption of economics that guides the version of economic analysis of law that I shall be presenting is that people are rational maximizers of their satisfactions—all people (with the exception of small children and the profoundly retarded) in all of their activities (except when under the influence of psychosis or similarly deranged through drug or alcohol abuse) that involve choice." The Problems of Jurisprudence at 353-54.

47 See Posner, The Problems of Jurisprudence at 354-60 (cited in note 46), for some relevant considerations, including the fact that wealth-maximizing is uncontroversial "and most judges try to steer clear of controversy"—a proposition that is not altogether easy to square with Posner's career.

48 I define and discuss these in Love's Knowledge at 56 (cited in note 7). For an excellent succinct account of the logic of Utilitarianism, and a striking critique, see Amartya Sen and Bernard Williams, eds, Utilitarianism and Beyond 1-21 (Cambridge, 1982) (Introduction).
the idea of maximization to which he so frequently alludes: whenever an agent chooses rationally, he or she is weighing up quantities of satisfaction, a single thing varying only in quantity, and seeking to maximize the quantity of satisfaction that he will, as a consequence, receive. If we combine this with Posner's striking claim that all agents choose rationally, with few and rare exceptions, we have the bold explanatory theory that this is what we are always doing, in sexual matters as in everything else.

This is a theory that can indeed be readily compared to other explanatory theories of sexuality such as Freud's, and tested against experience. But it is clear that it is not this simple theory that Posner actually has in mind in this book—possibly because he sees clearly that it could not explain all the behavior that he wishes a theory to explain. First, there is the complication of economics by evolutionary biology, which adds to satisfaction a very different sort of goal that is not even comprehensible in terms of the goal-set of the individual taken singly. It is of course perfectly possible that what conduces to the survival of the species does not conduce to the satisfaction of its individual members, and Posner is very clear about this, especially in his lengthy accounts of the ways in which the alleged constraints of evolution have worked to deny women autonomy, mobility, and even sexual satisfaction itself. Second, and even more striking, is the fact that Posner explicitly adopts an account of the ends of "economic" activity in sex that violates singleness:

Let us begin by considering the ends that sex serves and then the means of serving those ends, that is, the practices themselves. The ends fall into three groups, which I shall call procreative, hedonistic, and sociable. The first is obvious. The second has two cells. One is relief from the urgency of sexual desire; the analogy is to scratching an itch, or to drinking water when one is thirsty. The other is ars erotica, the deliberate cultivation of the faculty of sexual pleasure; the analogy is to cultivating a taste for fine music or fine wine.

The third group of sexual ends, the sociable, is the least obvious. It refers to the use of sex to construct or reinforce relationships with other people, such as spouses or friends. . . . The relationships can be explicitly commercial; thus the ends pursued by the prostitute fall into my category of sociability. Many sexual relationships that are not classified as prostitution nevertheless contain a strong commercial element: for example, marriage for money. But an exchange need not be commercial to be economic. Marriage is a relationship of ex-
change that can be modeled in economic terms even if neither spouse's motives are crassly pecuniary, or indeed pecuniary at all. The idea of male friendship spilling over into a (homo)sexual relationship that in turn cements the friendship is an element of the ancient Greek theory of homosexuality... (pp 111-12).

So it seems clear that satisfaction, as Posner understands it, is not a single thing varying in quantity alone; there can be a plurality of types of satisfaction. Some of these, it appears, may not even be feelings of the agent, but ways of acting to another person, or even of interacting with another person. And this, of course, threatens metricity as well: for one can imagine countless cases in which a sexual choice will present itself as a choice between one of these ends and another, between sociability and erotic artistry, between the relief of desire and the end of procreation. In such cases, or so it appears from this brief passage, Posner does not endorse the idea that a cost-benefit analysis will be able to identify, in the diverse alternatives, one single thing that it is the business of rational choice to maximize. And this, though it clearly makes the theory more intuitively flexible and powerful, also makes it look less economic.

One might therefore, after reading the more subtle and multi-valued passages of this work, be tempted to move to the opposite extreme and construe the appeal to economics extremely broadly, as more or less lacking in any distinctive content. On this construal, Posner's economic theory would just be the claim that people's sexual decisions are not whimsical or arbitrary, but patterned in ways that are functional in relation to their goals, needs, and interests, and/or those of the species. There is some sort of reason for every sexual choice, and this reason will mention a goal of the agent or the agent's species; but the goals may be plural and qualitatively distinct; they may include actions and relations as well as feelings; and they may include whatever it is that the agent pursues and values, whether or not his or her scheme of ends accords with that of rational-choice theory in economics.

So interpreted, the theory would not be so much an alternative to other explanatory theories as a genus of which many other theories, such as the Freudian and the narrowly economic theories, might be seen as species. It would be at odds only with explanatory theories that posit inexplicable gaps and arbitrary turnings in human sexual behavior. It might not even be incompatible with the romantic explanatory theory that animates Wuthering Heights: for one can certainly see what Heathcliff's tormented be-
behavior is all about, and give a description of why he dashes his head against the trunk that mentions his goals and ends.

But this extremely capacious view of sexual explanation also rings false as an account of what Posner intends here. For he continually uses narrowly economic language—search costs, transaction costs, etc.—to explain what he has in mind; and he clearly thinks of his view as generating predictions that are definite, testable, and frequently counterintuitive. The truth, then, clearly lies somewhere between the narrow interpretation and the broad interpretation. Let us now, starting from the broad construal, begin to narrow it down, by pointing to features of the text that support such narrowing.

(1) Posner's explanatory view is committed to secularism and naturalism. Thus, among the entities that are admitted into the account of reason's (and biology's) ends will be only this-worldly entities (except insofar as agents who are religious might seek satisfaction in the fulfillment of what they believe to be religious needs and imperatives). The view is incompatible with Augustine's explanatory theory, as the broad construal may not be.

(2) Posner's account of reason's goals tends to hold reason very close to biology. Thus, despite the apparent capaciousness of the paragraph I have quoted, it turns out that when we get down to concrete cases, he will give procreation pride of place over both ars erotica and sociability, allowing that both of the latter are rationally pursued only in procreative contexts. One sees this most clearly in the book's striking account of "normal" and "deviant" sex (pp 98-108). For Posner, as it turns out, "normal" sex is "vaginal intercourse designed either to produce offspring or to reward the male for protecting offspring already produced," (p 98) together with a variety of other "procreative-protective" sexual activities that have evolved in human society to cement relationships whose central goal is procreative, including "anal and oral sex, when heterosexual" (p 98 n 27). Classified as "deviant," on the other hand, are a group of sexual practices that do not seem even indirectly procreative: Posner lists "masturbation, homosexuality, voyeurism, exhibitionism, seduction of young children, and fetish-"

* The theory might, however, be incompatible with the phenomenon of akrasia, as usually understood: an agent knows the better, but does the less good. Posner may be bound to accept the rewriting of such events proposed by Plato's Protagoras: the agent is acting for the greatest good after all, but makes a mistake as to where the greatest good is to be found. On the role played by quasi-economic analysis in Plato's argument, see Nussbaum, Love's Knowledge at 106-24 (cited in note 7).
ism” (p 98). He might also, it seems, have listed extramarital heterosexual relations, where there is usually a determined intent to avoid conception, or, indeed, marital or other heterosexual relations between partners known to be infertile or committed to not having children. Concerning such “deviant activities,” he makes two observations: first, that they are “much more common among men than among women” (pp 98-99). Second, that “they involve little or no interaction with adult consenting members of the other sex” (p 99).

These claims are problematic. The first is not clearly true of homosexuality and is certainly false of adultery. The second is not really a single claim at all. For Posner runs together the idea of adult consent and the idea of an opposite-gender partner, in a way that hangs a false mantle of substandardness, and of “deviance” in an ethical sense, around homosexuality. Homosexuality thus enters the “deviant category” on account of the gender of the partner, not on account of the absence of adult consent. If one expands Posner’s list as I have suggested, the claim that “deviant” activities do not involve consent between adult members of the opposite sex is patently false.

What concerns me here, however, is not the adequacy of the theory, but its content. This passage appears to make plain the fact that to aim at *ars erotica*, at sexual release, or at one of the various forms of sociability, without also, at least indirectly, aiming at procreation is not sufficient to make sexual behavior “normal” according to Posner’s theory, whatever he says elsewhere. He does suggest that behavior may in some cases be rational without being normal—if, for example, a male chooses a homosexual act because a female partner is unavailable; even an entire homosexual lifestyle may have an indirect evolutionary payoff (p 107). But it does appear that such “deviant” behavior is less central, more in need of special pleading and special explanation, than the “normal” cases. To that extent, “reason” is not independent of biology.

(3) Posner’s account tends to treat sexual activity as a means to an end that has value, but not as valuable in its own right. Thus he seems to retain economic theory’s brand of consequentialism, even while broadening its range of ends. And, furthermore, the end is usually seen in individualistic, and not relational terms. “To interact in a certain way with so-and-so” would not be, it appears, a rational end, even when we take sociability into account, for in economic theory sociability is itself a means to the maximization of individual satisfactions.
(4) The theory tends to treat sexual desire hydraulically, as a drive or "push" welling up from our bodily nature relatively independent of the "pull" of an object. The intensity of sexual desire, Posner holds, comes from biology, and one may predict that a drive frustrated by failure to find a suitable object of one sort will seek to discharge itself into another object that is available, even if that object is different in looks, character, even gender. There are countless examples of this sort of reasoning in the text, in which behavior is explained as a simple function of amount of sex drive with search costs. Here is just one:

A pretty boy may leave the tepid heterosexual cold but provide an acceptable albeit not ideal outlet for the sex drive of the superheated heterosexual. It is like a passion for apples. The passionate apple eater is more likely to consider a slightly wormy or overripe apple an acceptable substitute for an orange than the person whose enthusiasm for apples is more measured. Replace apples with sex and oranges with television and the point should be clear. The superheated heterosexual may not be able to find enough women to satisfy his sexual desires and, faced with a choice between masturbation and boys may choose boys (p 124, footnote omitted).

On the basis of reasoning such as this, Posner draws many conclusions: for example, that women have a weaker sex drive than men, since they seek out prostitutes less often than men. But how good is the reasoning? There are, it seems, two sorts of passionate apple-eaters. One has a powerful drive toward apples, not much tempered by selective perception; he is willing to wolf down apples until the drive lets up, and if the only apples at hand are wormy or soft, he will put up with that. But another sort of passionate apple-eater loves apples. This person is interested in the characteristics of the object, indeed is drawn to the whole activity of apple-eating by the characteristics of the object. Such a person is less likely, not more, to put up with a wormy or soft apple—just as it is the real lover of Mozart piano concertos who would rather wait a year to hear Brendel than go to weekly performances by inferior musicians; the real lover of the Verdi Requiem who wishes she had stayed at home when she discovers that Jessye Norman has been replaced at the last moment by Deborah Voigt (I speak from bitter experience); the real lover of novels who is not likely to be found reading Judith Krantz just because she is in the airport without her Proust; the passionate lover of philosophy who would not read Alan Watts under any circumstances at all. The real lover of a type
of experience, one might well argue, is the one who looks for high quality in that experience, and is willing to put up with a lot of waiting, deprivation, even hardship, in order to get a really good experience. Indeed, she is pained and sometimes positively disgusted by an experience of a substandard sort, precisely because she has such a passionate interest in that type of activity.

Sexual desire, in short, is a complicated phenomenon. In part it is indeed a powerful instinctual drive, a “push,” like the needs for food and drink; and insofar as it is such a drive, it may well demand a lower grade satisfaction where a more desired form of satisfaction is not available. But in part it is also a “pull,” displaying a complex intentionality. It seeks some value in its object, and is aroused by the perception of value in an object. It simply is not true that the state of arousal and desire in a human being is a function only of biology: complex forms of perception and response are also involved. And the more one cares about sex, the more passionate one is about it, the more particular one might well be about the objects one chooses for satisfaction. Thus from women’s failure to frequent prostitutes nothing follows at all about the biological level of their sex drive—so many are the reasons why such an idea might repel someone accustomed to link sex with personal concern and real passion. And much the same can be said for anyone whose sexual ends are to a large extent either sociable or artistic. Posner does not even begin to separate out the drive component from the intentional component in sexual desire, or to ask in what complex ways these two are related. In that sense, his book does not take a necessary first step toward developing a really adequate theory of human sexuality.

(5) Posner’s account, though at times it appears to deny singleness and métricity, still often uses quantitative language, and appears to commit itself to some limited thesis concerning the commensurability of sexual aims and ends. One sees this in the frequent talk of weighing and measuring, the reliance on cost-benefit analysis, and the ubiquitous talk of the substitutability of one practice for another.

(6) Finally, the theory appears to downgrade, implicitly if not explicitly, the role of one’s personal psychological history, of one’s unique personal emotions, and of the unique individuating features of the object, in explaining the choices people make. This is conspicuously less true in the book’s brief account of erotic love (pp

---

50 A task undertaken by the theory of sexuality as early as Lucretius. See generally Nussbaum, 22 Apeiron (cited in note 35).
98, 118-19); and though Posner believes that love can to some extent be explained in bio-economic terms, as a form of bonding, he does grant that “the emotional character of the love bond” is not fully explained in this way (p 118). But this concession, and the role of love in sex, play a small role in his overall analysis. Nor does he grant that one might have an interest in sexual particularity outside of a relationship of love.

So there is a good deal of economics in Posner’s economic theory, despite the modifications he appears to have made in his earlier economic models. And there is, in turn, a good deal of biology lurking in Posner’s bio-economic theory, despite his attempt to claim that the economic theory is altogether independent of sociobiology. A rational sexual agent, according to Posner, seeks satisfaction of one of the major sexual ends, focusing above all on procreative and procreative/protective activities (if his or her choices are “normal”), and focusing, too, on the goal of release and satisfaction, rather than on other available goals. Such an agent computes costs and benefits, using as much quantitative comparison as he or she possibly can, and factoring in transaction costs and search costs. He or she tends to view objects as fungible, though of course not perfectly so, and seeks discharge of sexual tension with whatever vehicle is available. A rational agent is one who performs such calculations and for whose behavior reasons of this sort can be given; an irrational agent is one whose actions cannot be so explained. All of us, most of the time, are such rational agents.

V. Sex Without the Soul

Let us now return to the literary passages, asking how well the bio-economic theory explains the behavior of their characters. For recall that an explanatory account is only as good as the insight it offers into the explananda: it must tell us why people do what they do, and thus enable us to predict what they will do in the future. Here I will be criticizing, above all, Posner’s explanatory account. But since there is often a normative dimension to his use of the term “rational”—“rational” choice being good, “irrational” choice bad—I must to some extent speak of these normative matters.

---

81 One wants to ask, furthermore, why Posner thinks that it is only in the context of love that the object’s particularity becomes important. Especially in the light of his frequent comparisons of sex to connoisseurship, he should grant that sexual pleasure, seen as an art, can be highly selective with or without love to infuse it.

82 Consider, for example: “Men will incur considerable search costs for a call girl—and even higher ones, of course, for a mistress or a wife” (p 120).
We may begin by noting that the four passages that refer to a sexual relationship depict a relationship that is "deviant" by Posner's account of the term. Molly's affair with Blazes Boylan is adulterous—and though one could argue that, given Leopold Bloom's peculiar psychology, it is actually "procreative-protective," I think that this would be stretching Posner's usage of that term. It is in any case clear that Molly and Leopold have given up on procreative sex because of the tragedy of their little son's death, and that Molly is determined to seek sexual satisfaction while completely avoiding the entire issue of procreation. Her preference for mutual masturbation, coitus interruptus, and anal sex makes her anti-procreative intent clear, as do many of her explicit statements. Forster's Maurice is thinking of his intercourse with Alec Scudder, the first complete homosexual act (and indeed the first complete interpersonal sexual act) of his life. Heathcliff and Catherine have an adulterous and quasi-incestuous relationship that is never physically consummated, and whose sexual intensity derives in great part from its complete separation from marital and procreative ends. The novel as a whole is constructed around the opposition between the procreative and sociable sexuality of the Edgar/Catherine union—which produces a child whose physical robustness is constantly referred to—and the procreatively sterile, erotically passionate union of Catherine with Heathcliff, which is associated with images of disease and wasting, and which could never, we feel, have produced a healthy child. Oates's novel (clearly setting itself in the tradition of Brontë) concerns an incestuous affair between a fifteen year old girl and her uncle, a boxer. The relationship clearly stands between Enid and any interest in marriage—indeed it makes all future marriage for her impossible—and it is also completely incompatible with procreative ends. (During most of the affair, Enid remains technically a virgin; soon after they begin having vaginal intercourse she becomes pregnant, seeks an abortion, and terminates the affair.)

In spite of the fact that we have here four examples of "deviance," we don't find Posner's generalizations holding true. All the women are passionately involved, and indeed instigators, in the sexual activity; and in all cases the relationships are consenting, mutual, and, indeed (with the exception of Molly and Boylan) emotionally intense. We might be prompted by this apparent coincidence of literature's interest in deviance to ask ourselves where...
in literature Posner’s sort of “normal” sex is depicted for our interest. The answer is, very rarely. And this tells us something about ourselves and the sources of sexual interest and intensity in us that appear to point in a direction opposed to, or at best obliquely related to, Posner’s argument. What is “normal” and what is not, where the complex sexual goals of human beings are concerned? We are urged to keep an open mind.

Now I turn to the individual passages. I begin with Molly Bloom, whose reflections seem the closest, in our passages, to the terms of Posner’s theory. For she clearly is choosing, in Blazes Boylan, a substitute object for the husband who is more or less unavailable to her sexually (and for the Stephen Dedalus whom she has not yet managed to meet). With her “of course hes right enough in his way to pass the time as a joke,” she does appear to be thinking of costs and benefits in a way. And we might even say that, like Posner’s apple-lover, she has preferred the inferior substitute to no object at all on account of the strength of her sex drive. All this seems true enough. And yet, if we were to translate Molly’s monologue into the terms of economic analysis, we would feel that no mere incidentals, but the essence of her humorous and humane way of seeing the world—and, with this, much that is crucial to understanding her current choices and predicting future ones—would have been eclipsed. (The fact that there is no economics of humor is not a trivial fact.) For first of all, it is of the essence of Molly that she is a generous and not a calculating person; it is important to our estimation of her that her mind slides around very uneconomically between this and that. Then too, it is exceedingly important that she bases most of her reasoning about men (and also her less articulate dreaming and musing) on distinctions of quality, not quantity, and distinctions that appear to pertain not just to the nature of the satisfactions she herself receives, but to the whole quality of the interpersonal relationship. So far as mere quantity is concerned, Boylan, along certain dimensions, wins hands down. But it is in his way of touching her, in his way of

---

54 One might consider the wonderful, long description of the intercourse of Enid’s parents, on which the Oates novel ends. Oates, You Must Remember This at 428-36 (cited in note 5). Its sad and yet tender description of waning desire and the acceptance of mediocrity in sex offers a very pointed contrast to the intense eroticism of the “deviant” pair, reminding us of how rarely we read, or wish to read, about “procreative-protective” activity.

55 Joyce, Ulysses at 776 (cited in note 2).

56 “yes because he must have come 3 or 4 times with that tremendous big red brute of a thing he has I thought the vein or whatever the dickens they call it was going to burst though his nose is not so big after I took off all my things with the blinds down after my
addressing her, that she senses his impoverished inner world; and
this to her makes lovemaking with him a mere joke and pastime,
not much different indeed from being with an "old lion".

From her wonderfully humorous descriptions we see an aspect
of sexuality that Posner's analysis does not recognize: namely, the
way that the particular qualities of a lover and one's relationship
with the lover color the physical experience of sexual exchange,
even where nothing like love is in question; the way the touch of a
hand is of a piece with the sound of a voice, the way a penis is not
a detachable tool of satisfaction but a part of a person, the way
one's response to it is not independent of one's view of the whole
person. Molly is hardly determined to find pleasure only in connec-
tion with safety and marriage; she loves sex for its own sake and
feels very strongly the drive to sexual expression. But she is aware,
too, that in sexual satisfaction qualitative distinctions are of enor-
mous significance, indeed are everything that goes beyond a joke,
indeed, also everything that goes to make a good joke. Her speech
is all about the comedy, and the tragedy, of the lack of fit between
drive and intentionality, between biology and the perception of
particularity, between, so to speak, quantity and quality. Under-
standing this lack of fit as she sees it is crucial to predicting her
choices. And this comedy, and tragedy, Posner cannot account for,
since he acknowledges only one side of the issue.

Forster's *Maurice* poses as direct a challenge as one can find
to the view that cost-benefit analysis will yield us an adequate ac-
count of sexual expression. Indeed, the entire novel is constructed
around the opposition between prudent cost-benefit analysis and
another way of viewing one's sexual life. Clive Durham has made
the choice that Posner's theory predicts: to maximize his satisfac-
tions (his place in society, his respectability, his political career),
he has substituted one object for another: a wife for the man he
really desires. What the novel argues is that such a choice
manifests a cowardly and self-protective nature—and that it ulti-

hours dressing and perfuming and combing it like iron or some kind of a thick crowbar
standing all the time he must have eaten oysters I think a few dozen he was in great singing
voice no I never in all my life felt anyone had one the size of that to make you feel full up he
must have eaten a whole sheep . . ." Joyce, *Ulysses* at 742 (cited in note 2). Even here we
see how impossible it is for Molly to think without qualitative distinctions—for the very
mythic language with which she describes Boylan is in part comical, and renders him crude
and animal-like, in contrast to her ensuing tender thought of her husband.
mately destroys the self. Deprived of deep sexual joy, deprived of honesty, he is a shell of a human being. By any account of economic rationality that has any content, Clive Durham—and the clients of Messrs Hill and Hall who “speculate in a little vice”—are behaving rationally; and Maurice, who throws up job, respectability, and country, all for an uncertain future outside respectable society with a barely literate gamekeeper—is behaving irrationally. And he has been irrational from the beginning—for unlike Clive he has proven unable to make the desired substitution of an available for an unavailable object. It is the novel’s point that this intransigence in desire, and this recklessness in its expression, are manifestations of integrity, that by pursuing an end that is not even one of Posner’s economic ends, but is a kind of self-affirmation and deep self-expression that cannot be reduced to either satisfaction or art or sociability—Maurice is living well, and the others are living badly. Posner’s explanatory account could not have predicted his choice, which must on that account be seen as irrational and incomprehensible.

And there is something more: it is clearly Forster’s intention to show that having to face adversity and endure pain in the way he does has made Maurice a better lover, and a better person. The endurance of risk makes him expose his deepest vulnerabilities in lovemaking with Alec in a way that men who happen not to encounter that struggle might not ever do. And it is this vulnerability, born of his marginality and his weakness, that exposes him to real joy.

The novel does admittedly stack the deck unfairly. By depicting Clive as a character who lives superficially and weakly in every area of life—the familial, the marital, the friendly, the political—it suggests that one’s preferred form of sexual expression is at the root of all other activities in life, and that no life with any sort of...

---

67 The novel ends, after the final painful confrontation between the two men, with Clive returning to his house “to correct his proofs and to devise some method of concealing the truth from Anne.” Forster, Maurice at 231 (cited in note 3).
68 He is also, Forster suggests, a collaborator with the oppressors of other homosexuals. As he memorably writes in the 1960 Terminal Note, forty-seven years after the writing of the novel, without the decriminalization of homosexuality, “Clive on the bench will continue to sentence Alec in the dock.” Id at 241.
69 Id at 203.
70 In the Terminal note, Forster writes: “In Maurice I tried to create a character who was completely unlike myself or what I supposed myself to be: someone handsome, healthy, bodily attractive, mentally torpid, not a bad business man and rather a snob. Into this mixture I dropped an ingredient that puzzles him, wakes him up, torments him and finally saves him.” Id at 236.
integrity is possible without it. One might feel, however, that by any realistic assessment the costs incurred by the choice to be openly homosexual in turn-of-the-century England (or even, for that matter, in contemporary America) are so great that a person who wants a fulfilling career and family life might be not in the least contemptible for making Clive’s choice. It is like so many choices faced by women who wanted a career in the days before contraception was reliably available. Frequently enough, deep sexual expression—and, in that case, children as well—were given up; but that did not imply that the choice was a stupid or cowardly one, all things considered, or that the person became thereby a mere shell of a person. Sex need not be seen as the only source of integrity or personal expression in life, or as the necessary root of all the others. Thus, Forster might have depicted a very different Clive, a success rather than a failure. But the important point would still be that he was being forced to give up on a distinct, and centrally important, human good, not commensurable with the goods he would on this hypothesis preserve—as Maurice, too, is made to give up the distinctive goods of family life and a fruitful career. This more complex way of looking at things would not only have explained the behavior of both men more adequately, it would also have set the blame more squarely where it belongs: on the society that made and makes it impossible to live openly as a homosexual without painful disadvantages. To this issue I shall shortly return.

But if we now go back to Forster’s own account of Maurice’s choice, considering it in the light of Posner’s economic analysis, we see that one can still to a great extent separate the costs in Maurice’s analysis from the benefits. It was one of Forster’s lifelong projects to support the decriminalization of homosexual relations, and it is abundantly clear that, despite his romantic remarks about the role of adversity in giving birth to joy, he does not regard the story of Maurice’s salvation as an argument for continued

---

61 The two cases are importantly asymmetrical, Forster’s narrative makes clear, with respect to the role played by denial and secrecy in Clive’s life. Women who gave up sex and children for a career did not have to pretend that these things were of no interest to them. Clive does have to repudiate Maurice and, later on, to enforce the laws that condemn him. He apparently convinces even himself that he no longer desires and even loathes this type of sexual expression. And here we discover the novel’s deepest indictment of English society: it does not just rob Clive of pleasure, it makes it impossible for him to tell the truth, to others and to himself.

62 For one typical example of such disadvantages, see my account of the false accusations against David Halperin, a leading gay activist and scholar, in New Republic at 34 (Jul 13/20, 1992) (cited in note 11).
criminalization. So it seems only a contingent feature of Maurice's story that the sexual activity that brings him personal fulfillment and a sense of identity is one for which he incurs great risk and cost. Moreover, we could present the case so that Maurice does appear to be an economically rational actor: we would have to say that he ascribes much more importance to self-affirmation and sexual joy than to safety, job, country, etc., and thus is after all pursuing the maximization of satisfaction, if only in an unusual way. I think that such a story would explain at the price of robbing the economic theory of whatever content it has. It would amount to saying that whatever a sane person does has some explanation—and that's hardly an economic theory. But what the attempt to describe it in these terms does bring out is a possible difference between Maurice's case and our Brontë and Oates passages, in which the relationship between erotic desire and even a generous conception of practical rationality remain adversarial. Let me therefore now turn to those passages.

In *Wuthering Heights* we have a vision of the erotic that has been central to the Western tradition for some time; a vision in which an obsessive unswerving attachment to a particular object persists despite all obstacles, including death, and in which the attachment is founded not on any publicly articulable reasons, but on an intuition of deep and mysterious spiritual kinship. It is the contention of the romantic tradition that only those capable of such a deep, intense, and risky attachment are truly alive; everyone who makes prudential reasoning the criterion of choice is already in a sense dead. Cathy dies because she betrays her erotic depths for a safe marriage dedicated to mutual tenderness and procreation. Yet, in her moments of intensity she proves to be alive in a way that no other character, except her lover, is. Heathcliff, dashing his head against the knotted trunk, is not a human being, but a beast. But it is also evident that he is fully alive as a human being, alive in the excruciating rawness of his vulnerability, alive in the very ungovernability of his passion—in a way that none of the more rational and reasonable characters is alive. Mr. Lockwood, the narrator, who “shrank icily into myself, like a snail” at the prospect of passion; Ellen Dean, the watcher, appalled by the spec-

---

63 See Terminal note and especially the scene in the novel in which Maurice, consulting a psychiatrist whom he asks to “cure” him of his homosexuality, is told that the “cure” would consist in moving to France or Italy: “England has always been disinclined to accept human nature.” Forster, *Maurice* at 211 (cited in note 3).

64 Brontë, *Wuthering Heights* at 7 (cited in note 4).
tacle of Heathcliff's torment—these more reasonable humans are awestruck and riveted by a passion they have never known. For this reason, although they have never exactly known it, they recognize it when they see it, and recognize it as a kind of human depth and integrity that is life to their death, just as Heathcliff's self-destructive fervor is death to their prudent calculative life.

Oates's novel, too, explicitly plays on this sense of the ambiguity of life and death: for both Enid and Felix, in the mysterious intensity of their erotic obsession, are wedded to death.66 But Enid and Felix are the only characters in the novel who are truly alive. The safe "procreative-protective" sex of the parents is depicted as dead inside, dead on account of its willingness to compromise with the world of reasons and cost-benefit analysis. (The novel's last chapter, called "Shelter," ends with the sad, half-alive lovemaking of Enid's parents down in their basement fallout shelter.) The only way that Enid can go on living at the novel's end, losing Felix, is to become a musician—for in art she may live a life at the limits of risk and intensity, without ceasing to exist. While her parents make love in the shelter, she plays a Mozart rondo at the conservatory. The piano lessons were Felix's present to the family.

In both Brontë and Oates, then, we are confronted with two worlds: a world of reason-giving, cost-benefit analysis, and safety—which is equated with death—and the world of pure uncompromised sexuality, that resists all scientific understanding, all attempts to calculate rationally. (In both novels, this world is akin to the world of art, to its deep spiritual energies.)66 Ellen Dean cannot feel compassion for Heathcliff, since he seems beyond the reach of socially articulable reasons for grief, like a strange animal who has ceased to inhabit the world of prudence altogether. "Enid's mind was extinguished,"67 and though any cost-benefit analysis would have cautioned her against incest, she knows that deep sexual joy is linked with the extinguishing of the reasoning power, of language, almost of consciousness—and therefore with

---

66 The novel begins with a suicide attempt by Enid, which proves to be the device that draws Felix to her. And Felix, a boxer, seeks Enid out of that world of blood and guts, needing her partly because he no longer enters the ring and thus needs a new arena in which to risk his whole life.

67 In Wuthering Heights, however, this is complicated by the fact that the two narrators are engaged in and interested in narration precisely because they are not immersed in passion. Brontë here develops a theme concerning the possible tension between narration and erotic love that is present in quite a few other novels in her tradition—in Dickens's David Copperfield and Henry James's The Ambassadors, to name just two.

67 Oates, You Must Remember This at 186 (cited in note 5).
the constant risk of death.\textsuperscript{68} Without an openness to another’s body so complete that it can only appall an onlooker, without an exposure so total that a touch—or its absence—can kill, there is, it is claimed, no life and no soul. For the other is one’s life and one’s soul, and in seeking shelter from that one ceases to be oneself. Here we see a close kinship between these works and \textit{Maurice}, where, in a similar way, only a risk so terrible that it can annihilate makes true joy possible.\textsuperscript{69}

Posner’s theory, unlike Freud’s, has no comprehension of this mysterious and awesome side to sexual experience. It cannot explain or predict such behavior. And (as it slips from its explanatory use of “rational” to its normative use) it is bound to regard it as “irrational” and therefore in some way substandard and bad. Indeed, with its claim that all sexual behavior is rational—a claim that might, though with much rewriting and much strain, be accommodated to Molly Bloom’s choices and perhaps even those of Maurice—it seems determined to deny this aspect of sexuality, a fact that the literary examples portray as at its very core. And indeed they imply that to lack access to this element in sex is to be somehow on the side of death, to be dead already. Maybe this is all crazy romanticism—although it is not only in romanticism, of course, that the conception of sex as Dionysian is to be found.\textsuperscript{70} But Posner never so much as states or confronts this part of sex, and appears preoccupied with denying it. To this extent his theory certainly does not explain what many human beings have taken to be central in sexual life, whether rightly or wrongly. So his economic theory appears to be a normative theory in disguise, one that demotes the worth of the Dionysian by its persistent refusal to acknowledge that it is there to be explained, or left unex-

\textsuperscript{68} Consider also the reference to death: “slowly slowly again again again kissing her with his tongue deep in her mouth until Enid couldn’t bear the powerful waves of sensation, orgasm overcame her quick and terrible, her eyeballs rolling in their sockets and her lips drawn back in a death’s head grimace from her teeth. She heard herself cry out helplessly, crazily—the delirious words \textit{I love you I love love love you} or no words at all, only frightened sounds like those of a small child being beaten. Their faces were hidden from each other, Felix’s weight on her was profound as the very weight of the world, she wanted it never to be lifted.” Oates, \textit{You Must Remember This} at 182 (cited in note 5) (emphasis in original). Oates’s prose in this and other passages gestures in words toward a realm of no words.

\textsuperscript{69} Many other literary works have this theme. One might recall that in Elizabethan literature, “die” is used as a term for sexual orgasm, apparently with a similar set of concerns in view.

\textsuperscript{70} See Martha Nussbaum, \textit{The Transfigurations of Intoxication: Schopenhauer, Nietzsche, and Dionysus}, 2 Arion (3d series) 75-111 (1991) (discussing the Dionysian in both Nietzsche and ancient Greece).
Nietzsche, I think, would have seen this as the error of someone still too much in the grip of a certain picture of religion and its arrogant portrayal of its own relation to value and depth. We need not accept the conclusion that without worship of a transcendent divinity we must live in a world without Dionysian passion.

With my fifth passage, from Howards End, we arrive at a new topic: the relationship between all these elements in sexual experience and the organization of society, where class, wealth, and education are concerned. Much of Posner's historical and cross-cultural analysis does concern inequalities; and he is very good at describing the many ways in which social arrangements shape the sexual experience and opportunities of groups who do not make the social rules. But he focuses in general on the status of women and of homosexuals, and says relatively little about the ways in which differences in wealth and social class shape the opportunities people have for sexual expression and even for the cultivation of certain forms of sexual desire and imagination. At the very end of the book he does raise this issue, in a most striking way, summarizing his account of teenage pregnancy, sex education, and AIDS by recommending that Americans take steps in the future toward Scandinavian social policies that make strong public commitments to the support of many aspects of sexual choice (pp 441-42).

This is exactly the issue in Forster's novel, with its tragic portrayal of Leonard Bast and his wife, both victims of poverty and class, where their sexual lives are concerned. The wife, orphaned in Cyprus with no money, is forced to become the mistress of the wealthy Henry Wilcox in order to survive—and, later, to continue depending on and also in a sense preying on a series of men, of whom her husband is not the last. Her fundamental verve and good nature are completely swamped by her circumstances; and it

---

71 Posner is, as always, complex here: and he does state that “By deeming sexual behavior rational, I do not commit myself to denying the importance of emotion and of pre-rational preference, or to exaggerating the degree of conscious calculation” (p 436). But, first of all, this is rather too little too late—he has committed himself to giving calculation, whether conscious or not, an enormously large role straight through the book. And, second, he immediately follows this disclaimer with a typically anti-romantic remark that shows that he does not really wish at all to admit the sort of sexuality represented by Heathcliff: “Sex is a means to human ends, and the efficient fitting of means to ends, whether done consciously or unconsciously, is the economist's notion of rationality” (p 436). And Heathcliff's notion of what it is to be dead.

is no wonder that her very presence causes the privileged Schlegel sisters to recoil in alarm, thinking how contingent are the barriers that separate one woman's lot from another's. Leonard Bast, who wishes to rise into the cultivated middle classes, and to live a sexual life of taste and passion, is blocked at every turn—by his depressing connection with a wife whom he no longer loves but has been decent enough to marry, by the indifference and bad advice of Henry Wilcox, and in general by the defeating barriers that tedious work, low wages, and hunger erect against the imagination and its projects. It isn't just sexual opportunities that Leonard lacks—indeed, he has some great good fortune with respect to opportunities, when Helen turns his way. It is the chance to make something of the opportunities, and the chance, even, to form the desires and the thoughts that would have made it possible for him to have made something of the opportunities.

Money and class, as Margaret says, are in that sense the soul of life, forming sentiments and thoughts and plans. And thus a public concern with sexual opportunities cannot confine itself to that part of legislation that is explicitly concerned with the regulation of sex. It must concern itself, as well, with equality of capabilities for fully human functioning across the board. The only way to make people fully free sexual agents, Margaret later concludes, is to give them more cash. And thus, in her view (a view that I share), a truly libertarian sexual policy must also be welfarist and egalitarian. For liberty is not pure spontaneity, existing in all humans who are not directly impeded by some law. It needs to be created for human beings by social conditions; prominent among these conditions are a certain sort of control over one's work, and a certain level of material well-being—in short, whatever it takes to give Leonard Bast a fully human relation to the world.

Posner takes this sort of issue very seriously. The book shows in many ways how deeply the organization of resources enters into the shaping of desire and its expression. In the concluding section, he seems to entertain the possibility of adopting the conception of libertarianism that I have supported here, with its focus on providing material support for the coming-to-be of liberty, and its effective expression. It is my hope that in future works he will develop this intuition much further. For it appears that libertarianism without a policy of material welfare support is a libertarianism that does not go all the way down. If one is as passionate about

---

73 Forster, *Howards End* at 71 (cited in note 6).
sexual liberty as Posner is, one must, in willing that end, will its material means. And this would mean a departure from some tenets of the economic libertarianism that Posner has until now endorsed.

If we now connect these reflections with my earlier analysis of Maurice, a further, more general point emerges, one that I need to introduce at this point to qualify, or at least to complicate, my allegiance to romanticism. For if we reflect on the lives of Clive Durham on the one hand, and Leonard Bast on the other, we discover that the opportunity to be romantic actors, exposing their deepest selves for erotic attachment, is not exactly an opportunity that society has given them. Leonard Bast has no chance to form romantic sentiments, projects, and relationships, burdened down by a life of material need. Clive Durham—on the assumption that he does not want to be told by society that he cannot do his work or maintain ties with his family—has equally little opportunity for romantic exposure of the kind depicted in Brontë. Of course what the romantic tradition says to its readers is that one must be willing to risk “everything” for deep erotic experience. But for many middle-class heterosexual people who live by that idea, “everything,” in practice, is very rarely everything. What such people court in love is the risk of profound personal loss and pain—but rarely, simultaneously with that, the loss of material well-being, work, and social position. (The novels depict this: Heathcliff is a wealthy leisured man through most of the novel, and Enid is supported in comfort in her effort to have a musical career.)

Romantic risks, then, are risks that can frequently be courted only when other things in life have been taken care of. They are, in that sense, artifacts of social and economic arrangements, arrangements of power. The world of cautious calculation and cost-benefit analysis (of which Posner’s explanatory theory is more or less correct) is the only world that many societies allow many of their members to inhabit. In this sense, to praise romanticism might appear to be the thoughtless self-assertion of a well-fed middle-class

---

74 This is of course all the more true of people whose labor is more exhausting and numbing. In our studies of women doing field work in India and Bangladesh (as part of the Quality of Life project at the World Institute for Development Economics Research, Helsinki), we do not hear frequent mention of romantic goals and aims; and even sexual satisfaction is a distant luxury, when what is at issue is not starving. See forthcoming papers in Martha Nussbaum and Jonathan Glover, eds, Human Capabilities: Women, Men, and Equality (Clarendon), especially Marty Chen, A Matter of Survival: Women’s Right to Work in India and Bangladesh.
straight person. I don’t think it is simply that. I think that these novels do describe a human good of great importance. But it is a good whose pursuit has background conditions of complicated kinds, conditions that are not available to many people in our society because of economic inequality, lack of education, and moral/religious prejudice. Thus it would seem that the best thing for any romantic to do, in addition to praising romanticism, would be to fight to secure those conditions for all.

VI. DEFENDING SEXUAL LIBERTY: THE DIFFERENCE BETWEEN POETRY AND A CABBAGE

The sections of Posner’s book dealing with the libertarian normative theory of sexual expression are, along with the historical sections, the book’s most important and most consistently successful sections. As I have just argued, I believe that the libertarianism needs to be deepened in connection with more economic analysis. But to have made the case for the protection of liberty in sexual expression as passionately and effectively as Posner has here, with his impressive grasp of historical and scientific fact, is a major achievement, and one that should have a lasting impact on the conduct of American law in these respects. Of the major findings of this portion of the book I have spoken at length in my other review, praising its arguments in favor of reforms in marriage law, the decriminalization of homosexual relations, the inclusion of gays in the military, the protection of artistic expression with respect to erotic art and nudity, and a more general protection of privacy with respect to intimate sexual choices. I shall therefore not deal with those findings here.

But it is also important for my general argument to try to understand the normative libertarian conception itself. For we must try to see precisely how it is connected to the bio-economic theory, and whether my criticisms of that theory undermine it. Of particular interest and importance in this regard are Posner’s brief re-

75 In Nussbaum and Glover, eds, Human Capabilities (cited in note 74), the various participants in a conference on women in developing countries, at the World Institute for Development Economics Research, debate what capacities for valuable types of human functioning development policy should consider. On the one hand, much of the discussion, focusing as it does on issues of women’s health and freedom from hunger, would seem to suggest that emotional capabilities are a luxury and an afterthought. In Emotions and Women’s Capabilities, one of my contributions to the volume, I argue that this is not the case: it is important to provide material support not just for material functioning, but for all the functions that make human lives meaningful and flourishing.

76 See Nussbaum, New Republic at 36 (Apr 20, 1992) (cited in note 1).
marks about constitutional interpretation, where sexual privacy is concerned. Although Posner finds in the Constitution no explicit basis for the recognition of a general right to sexual privacy, he argues effectively that courts should plug this gap and recognize one anyhow:

A constitution that did not invalidate so offensive, oppressive, probably undemocratic, and sectarian a law [viz., the anti-contraception law at issue in *Griswold v Connecticut*] would stand revealed as containing major gaps. Maybe that is the nature of our, as perhaps of any, written Constitution; but yet, perhaps the courts are authorized to plug at least the more glaring gaps. Does anyone really believe, in his heart of hearts, that the Constitution should be interpreted so literally as to authorize every conceivable law that would not violate a specific constitutional clause? This would mean that a state could require everyone to marry, or to have sexual intercourse at least once a month. . . . Yet we do find it reassuring to think that the courts stand between us and legislative tyranny even if a particular form of tyranny was not foreseen and expressly forbidden by the framers of the Constitution (pp 328-29).

This passage is not only of intrinsic interest in the context of current constitutional debates; it is also of major importance to the interpreter of Posner. For we find, as elsewhere in the libertarian sections of this book, a striking reformulation of the conception of good judging that has animated a good deal of his previous work. Earlier, as I have said, Posner held that a good judge would always look to just one thing in making a decision: the maximization of society’s wealth. Now his judge has more goals to consider. Revealingly, in his first reference to his own libertarian normative theory, Posner borrows the language of John Stuart Mill’s *On Liberty*: conduct should not be regulated that does not damage another’s “liberty or property” (p 3) (my emphasis). Later, in his own voice, he appears to take a narrower view, holding that “under a laissez-faire approach to sex” conduct will be regulable only on the basis of “economic or other utilitarian considerations” (p 181). But the passage about privacy shows that it is the broader Millean conception that actually animates the argument in this section of the book. The protection of rights and liberties is to figure among the goals of the judge, when he considers how to decide a case where the Constitution gives clear guidance. Here Posner seems to move away from the narrower utilitarianism of his earlier works, in which rights and liberties did not figure as ends, toward the
broad type of consequentialism espoused both by Mill and by contemporary thinkers such as Amartya Sen—who insists that the right choice is one that promotes the best consequences overall, but that the protection of fundamental human rights must be included among the consequences that get promoted. And it is this Millean intuition that Posner actually follows in his treatment of particular cases, making no attempt to reduce sexual questions and questions of expression to questions of wealth-maximization. The same is true of his judicial opinions in this area, especially the important opinion in the Indiana nude-dancing case.

One might mention that this shows Posner's view (and practice) of judging to be a good deal closer to the norm proposed by Ronald Dworkin than Posner's own explicit references to Dworkin allow. Posner cares about empirical facts in a way that Dworkin does not always seem to. And for this reason his arguments involving rights have a very different look from the abstract and general arguments favored by Dworkin. This is not a trivial, but, I think, a fundamental difference: for Posner holds that a central way in which a judge ought to proceed is by seeking out the facts of science and history, in order to ferret out false factual premises in his own arguments, or those of others. But the underlying similarity to Dworkin should also be stressed. For Posner, as for Dworkin, a good judge dealing with issues of human sexuality will take the protection of rights and liberties seriously, as among the central goals to be promoted.

Now my question is, how much does this Millean libertarian view depend on the findings of the bio-economic theory? In one way, there is a clear relation. For if one took the metaphysical claims of certain religions as facts on a par with other facts, one would have greater difficulty coming to a libertarian conclusion about matters such as homosexuality and abortion. And thus Posner does need to have shown that an explanatory theory of a secular and naturalistic kind is on stronger ground than one that posits such metaphysical facts. But for this “undermining” purpose, as I have argued, any naturalistic secular moral theory will

---

78 See note 20.
79 See generally Ronald Dworkin, Law’s Empire (Harvard, 1986). Dworkin holds that a good judge will look to certain moral principles, prominent among which will be the protection of basic human rights and liberties.
80 Posner effectively shows, however, that even the Catholic position on abortion does not attribute the limitless value to the protection of life that some proponents of the view like to claim it does (pp 272 et seq).
do—and of course do better, the better it shows that it can answer to the complexities of our intuitions and our experience. The secular complexities of modern romanticism, or Nietzschean Dionysianism, would in this sense not upset the libertarian project at all, but serve it in the same way in which the bio-economic theory serves it.

And in two ways I think that the broader non-economic theory toward which my passages gesture serves the libertarian project far better than Posner's bio-economic theory. First, the "literary theory" shows us more about why erotic expression is deep and important in human lives. It puts it deeper down inside us, so to speak, and thus gives us stronger reasons to protect it as fundamental. Forster's passionate plea for the decriminalization of homosexual sodomy in the "Terminal Note" to Maurice derives much of its force from the way in which he has portrayed the choice of sexual expression as at the core of one's very identity, and Clive Durham's life as, therefore, a form of self-murder, in which society is a very guilty accomplice. Brontë's and Oates's portrayal of the mysterious and terrible power of erotic desire give very strong reasons for preserving a free space in human life for erotic flourishing. (And by separating sexual expression altogether from procreative goals, they show the way in which it is a separate good in human affairs, deserving of separate and basic protection.) If it were all like using tools in the Garden of Eden, we would not have such compelling reasons to build walls around it—any more than we now feel we have compelling reasons to defend a right of privacy concerning the choice of useful gardening instruments.

Even Molly Bloom's less romantic view shows us the same point. For we imagine that Blazes Boylan, for whom we are all grey matter, would lack some of the compelling reasons for thinking of sex as intimate and important that Molly now has, with her use of the term "soul" to designate the human depth of sex, and with her determination to insist on the difference between poetry and a cabbage. Posner does of course know well the difference between poetry and a cabbage, as is clear from many remarks he makes en passant in this complicated book. He should not conceal the difference—for in so doing he has concealed a motive we all have for taking up his view of sexual freedom. To put it another way: Posner's libertarianism is not a minimal libertarianism that opposes interference with sexual activity only on the negative grounds that

---

81 It is clear that Molly's use, unlike Heathcliff's, is religious, and that she accepts religion as the only alternative she knows to a reductive and anti-humanistic atheism.
it does no harm to others; he clearly holds that individuals have a positive and fundamental liberty interest in the protection of sexual privacy. But it seems difficult to articulate and defend such a view without saying more about why sex is a fundamental interest in human life, and what is fundamental about it.

There is a further issue. I have noted the use of the word "soul" in Molly Bloom's monologue (and, again, in Heathcliff's speech). What this shows, I think, is that we need a complex humanistic language to describe ourselves and our experience, where sex is concerned—and if we do not find this language in our secular explanatory theories we will be likely to turn to religion for it. If we believe (as Molly does) that we are stuck with the choice between grey matter and the Christian view of soul, this will give those of us who care about the "insides" and depths of people an incentive to be religious, or to sympathize with religious views. In this sense, the simple and reductive character of Posner's bio-economic theory, even if it is seen just as an "acid bath" strategy, may be an exceedingly risky strategy. For it might make us think that we have to choose between the embrace of a Blazes Boylan who denies the "insides" and the embrace of the church—and then one might well choose what the church has to offer. But there is a vision of life, in the novel, apart from both of these. It belongs to Leopold Bloom. To bring to light that vision of life, earthy and secular, yet qualitatively subtle and profoundly passionate, would go a long way toward gaining assent for a secular view of human sexuality, in which religious premises may not be used to deny expressive freedoms. This is another version of my Nietzschean point. If god is dead, it does not follow that the soul (and the humanistic quality-base view of sexual life) dies with him. And Posner's libertarianism will be on stronger ground if he shows us clearly that it does not follow.

The view of life articulated in this review has been romantic. Concerning romantic views of sexuality, Molly Bloom observes (thinking of a love letter she once received from Poldy)—for it seems best, all things considered, to let Molly Bloom have the final word—"silly women believe love is sighing I am dying still if he

---

82 Contrast Leopold Bloom's attempt to think of Molly's intercourse with Boylan in a non-humanistic scientific language: "Envy? Of a bodily and mental male organism specially adapted for the superincumbent posture of energetic human copulation and energetic piston and cylinder movement necessary for the complete satisfaction of a constant but not acute concupiscence resident in a bodily and mental female organism, passive but not obtuse." Joyce, *Ulysses* at 732 (cited in note 2).
wrote it I suppose thered be some truth in it true or no it fills up your whole day and life always something to think about every moment and see it all around you like a new world".  

83 Id at 758. Strictly speaking, in the immediate context, Molly is wishing that Boylan would write such a letter to her, and recognizing, sadly, that he will not. But her pronouns are, as often, multiply ambiguous, and her references to Spain and to other memories of Leopold suggest that her real thought, and wish, are of him. The passage in this way points ahead to the novel's ending.