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## COMMENT ON LEMPERT ON POSNER

*Richard A. Posner\**

**R**ICHARD Lempert is a distinguished evidence scholar, one on whose work I relied in my article in the *Stanford Law Review*,<sup>1</sup> which forms the text for his conference paper.<sup>2</sup> His paper, critical but courteous, does me the honor of taking my article seriously and makes a number of nice points—for example, on the cost profile of discovery,<sup>3</sup> on the Weitzman search model,<sup>4</sup> on harmless error,<sup>5</sup> and on the hearsay exception for records.<sup>6</sup> He also improves on my economic analysis of the bus case.<sup>7</sup>

I shall turn presently to the areas of our disagreement, which are many. But let me begin by remarking the defensive note that his paper sounds, the note of legal specialists defending their domain against invasion by economists or, worse, by lawyers who think like economists or, most irritatingly, by lawyers whose professional experience makes it difficult to dismiss what they have to say in the vein of economics as the ravings of a completely ignorant outsider to whichever field of law they want to put under the economic mi-

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\* Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. This is the slightly revised text of the comment that I gave on Richard Lempert's paper, "The Economic Analysis of Evidence Law: Common Sense on Stilts," at the February 23, 2001 conference at the University of Virginia School of Law on "New Perspectives on Evidence."

<sup>1</sup> Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 *Stan. L. Rev.* 1477 (1999) [hereinafter Posner, *Law of Evidence*]. I have republished the article in slightly different form as chapters eleven and twelve of my book *Frontiers of Legal Theory*. Richard A. Posner, *Frontiers of Legal Theory* (2001).

<sup>2</sup> Richard Lempert, *The Economic Analysis of Evidence Law: Common Sense on Stilts*, 87 *Va. L. Rev.* 1619 (2001).

<sup>3</sup> Lempert, *supra* note 2, at 1641–42.

<sup>4</sup> *Id.* at 1642–43; Posner, *Law of Evidence*, *supra* note 1, at 1482.

<sup>5</sup> Lempert, *supra* note 2, at 1675–77, esp. n.162.

<sup>6</sup> *Id.* at 1686–88.

<sup>7</sup> *Id.* at 1671–72. He is mistaken, however, to argue that Company *A* will have no greater incentive to be careful (if it is liable for all the accidents on the bus route) because its taking care will not affect the number of *B*'s accidents, for which, by hypothesis, *A* is liable. But precautions will affect the total number of accidents, and therefore *A*'s aggregate liability. Nor is it correct that *A*'s best response is to reduce the number of buses it runs on the route to the number run by *B*. A better response would be to reduce the number of buses it runs to one less than *B*'s; but of course *B* will respond in kind, and eventually neither company will run any buses.

crosscope. I am not an expert on evidence, as Lempert is, but I have taught evidence, and in addition to reviewing evidentiary rulings in my normal capacity as an appellate judge, I have even presided at jury trials and made such rulings.<sup>8</sup> Lempert wishes to extrapolate from the flaws he finds in my article to the utter hopelessness of trying to apply economics to the law of evidence. Such predictions about the doomed future of economic analysis of law have a long and amusing history.<sup>9</sup>

Lempert's defensiveness takes an extreme form when he argues that economists cannot do anything distinctive unless dealing with monetizable variables and that economic analysis of evidence has no future because conservative foundations are not interested in financing it.<sup>10</sup> These points are unsound quite apart from the fact that the very conference for which Lempert's paper and my comment were prepared was sponsored by the Olin Foundation! The idea that economic analysis of law owes its success to foundation support, implying that other interdisciplinary fields of law owe their lack of success to lack of foundation support, is particularly unconvincing. Foundation or government grants are indeed vital in many areas of natural science and some areas of social science, but they are not vital to research conducted in law schools or to purely theoretical investigations by economists. The considerable empirical work on evidence to which I refer in my article suggests that there

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<sup>8</sup> My experience as an occasional trial judge leads me to disagree with Lempert's statement that "[e]vidence rules are intended to be applied, not bargained around." *Id.* at 1634. Most lawyers and judges have quite a relaxed sense of the rules of evidence, often ignoring them by tacit agreement and not only in bench trials.

<sup>9</sup> See, e.g., Owen M. Fiss, *The Law Regained*, 74 *Cornell L. Rev.* 245, 245 (1989) ("[L]aw and economics . . . seems to have peaked."); Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 *Hofstra L. Rev.* 905, 905 (1980) ("I have the strong feeling that the economic analysis of law has 'peaked out' as the latest fad in legal scholarship."). But see Bryant G. Garth, *Strategic Research in Law and Society*, 18 *Fla. St. U. L. Rev.* 57, 59 (1990) ("[L]aw and economics represents the one example of a social science that has successfully found a place at the core of the legal arguments made in courts, administrative agencies, and other legal settings."); Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground"*, 91 *Mich. L. Rev.* 2075, 2083-85 (1993) (stating at one point that "the methods of law-and-economics scholars, especially those of the Chicago school, . . . marched upon and occupied huge areas of legal decision making, especially in the federal executive, and . . . infiltrated many areas of judicial doctrine as well").

<sup>10</sup> Lempert, *supra* note 2, at 1628, 1636-38. The first of these points, however, is considerably toned down in the current version of his paper.

is no shortage of funding for empirical legal research in the area of Lempert's interests. I add that a number of law schools, including I believe Lempert's own, have well-funded law and economics programs, the funding for which is not earmarked to (or away from) particular areas of law.

When Lempert says that "evidence scholars have shown themselves to be quite skilled at imagining and manipulating plausible world states,"<sup>11</sup> I sense a premature air of self-congratulation. He says that "evidence scholarship . . . aims at practical application,"<sup>12</sup> which is surely the right aim, but he gives no examples of any recent successes of that scholarship ("recent" because I do not want to be thought to doubt the impact of Wigmore) in changing the law of evidence. When he says that few evidence teachers can understand math, I am moved to observe that teachers who can understand Bayes' Theorem can understand the math used in the economic analysis of evidence law; that his argument is akin to saying that since most economic analysis of law is written in English, foreigners cannot be expected to pay attention to it; that it is shocking that any modern evidence professor does not know at least the rudiments of statistical analysis, given the growing importance of statistical evidence in litigation; and that it is time that law professors began to be embarrassed about suffering from math block.

Lempert chides me, albeit gently, for discussing "areas that evidence scholars regard as neighboring kingdoms"<sup>13</sup> (such as the parol evidence rule)—as if that mattered. His use of the word "kingdoms" is revealing. One senses an effort to police the boundaries of his field against invasion by economic imperialists who he fears seek to conquer his own kingdom.

He is right to point out that many of the insights of economics are commonsensical. But he rides this horse too hard.<sup>14</sup> Common sense and economics are not interchangeable. What is called "common sense" is a mass of insights that is very loose, imprecise, and unstructured, and is often just another name for prejudice and complacency. I smell complacency when Lempert says that it "is not surprising" that "jurors perform well in the absence of financial

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<sup>11</sup> Id. at 1633.

<sup>12</sup> Id. at 1635.

<sup>13</sup> Id. at 1640.

<sup>14</sup> E.g., id. at 1653, 1655. The title of his paper says it all.

incentives or career stakes”<sup>15</sup> and lets it go at that. The question of jurors’ and judges’ incentives is one of the most challenging that confronts the legal system, and it is central to the evidentiary process. Doubt stimulates inquiry; confidence in one’s intuitions leads to premature closure.

Whenever economists train their sights on a new field of law, they encounter the objection that what they have to say is either obvious (“common sense”)—nothing new (“since Bentham!”<sup>16</sup>)—or obviously wrong. But if Professor Lempert is correct in conceding “the influence of simple economic intuitions on judicial analysis”<sup>17</sup> and in stating that “the rational actor perspective that is associated with economics is already well represented in evidence law” without the benefit of economics,<sup>18</sup> it would be surprising if economics had little to contribute to understanding and improving those laws.<sup>19</sup> Economics can aid the understanding of economics! Consider Lempert’s remark that “[t]aking guilty defendants off the streets is likely to stop them from committing future crimes.”<sup>20</sup> This is a truism, and yet it is misleading. If the elasticity of supply of some category of offenders is high, the main effect of imprisoning some or even many of them is to make room for their replacements rather than to reduce the rate of the offense. This is especially likely in the case of lucrative offenses such as drug dealing, about which Lempert makes the curious remark that “a conviction of a crime like drug dealing may bring little in the way of deterrence because so many people are convicted of dealing that an additional conviction has little marginal value.”<sup>21</sup> Many are convicted because many are engaged in this criminal activity, and so an additional conviction may have as much deterrent effect as an additional conviction for a crime in which convictions are infrequent because the crime rate is low. (And of course it is not just the conviction, but the punishment, that is important, and punishments for drug crimes have become very severe.) On the same page Lempert notes, as a datum

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<sup>15</sup> Id. at 1660.

<sup>16</sup> Id. at 1639.

<sup>17</sup> Id. at 1676.

<sup>18</sup> Id. at 1623.

<sup>19</sup> See, as a modest example of what it can contribute, *supra* note 7.

<sup>20</sup> Lempert, *supra* note 2, at 1663. I take it he means while they are in prison, not necessarily after they are released.

<sup>21</sup> Id. at 1664 n.124.

contradicting the economic analysis, that the criminal burden of proof does not vary with the severity of the sanctions. It need not for efficiency to be maintained. The greater severity evokes greater investments in evidence gathering by both sides, producing (by sampling theory) greater accuracy, and thus fewer erroneous acquittals and erroneous convictions in the cases that carry the heavier penalties.

One salutary antipathy of economists is verbal mush, and so I tried in my *Stanford Law Review* article to banish talk about justice in evidence law. Lempert insists that “[t]here are many conceptions of justice and what it requires.”<sup>22</sup> This is correct but not helpful—indeed it is the problem, not the solution. And it may not even be terribly relevant if economics already dominates evidence law. Lempert intones “justice” throughout his paper, yet without ever attempting to define it (or, perhaps I should say, them). His scattered references to “Kantian-type grounds,”<sup>23</sup> fairness, Rawls, legitimacy, torture, corrective justice (“justice between the parties”<sup>24</sup>), folk conceptions of justice (“justice . . . as an ideal to be realized in each case”<sup>25</sup>), and inequality, with culture and history thrown in for good measure, do not add up to a nourishing stew. The value of parsimony in scientific inquiry seems lost on Lempert. “Justice” in his hands is a putty used to fill in the chinks in his arguments, making the arguments nonfalsifiable. That way scientific progress does *not* lie.

The protracted but inconclusive discussion of Federal Rule of Evidence 609<sup>26</sup> at the outset of Lempert’s paper<sup>27</sup> illustrates the danger of missing the forest for the trees if one insists on multiple dimensions of normativity. The basic question raised by Federal Rule 609, as it seems to me at any rate (but then I am a simplifier, not a complicater), is single and straightforward, though empirically unresolved: Is a previously convicted criminal more likely to lie on the stand than a person standing trial for crime the first time? Maybe so, because he faces a heavier punishment if con-

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<sup>22</sup> Id. at 1651 n.85.

<sup>23</sup> Id. at 1665.

<sup>24</sup> Id. at 1669.

<sup>25</sup> Id.

<sup>26</sup> Fed. R. Evid. 609 (impeachment by prior convictions).

<sup>27</sup> Lempert, *supra* note 2, at 1624–30.

victed than a first offender faces. But maybe not—maybe virtually *any* accused criminal will lie on the stand without compunction now that oaths are no longer taken seriously by many people (least of all perhaps by criminals)—and, if this is right, then the rule makes recidivists easier to convict even when they are innocent. That may perversely reduce the deterrence of recidivists, since if punishment is truly random, the threat of it creates no incentive to avoid criminal activity.<sup>28</sup>

These questions about Federal Rule 609 are difficult enough to answer without letting ourselves get sidetracked into inconclusive debates about “justice.”

Speaking of random punishment, Lempert argues in what he thinks is disagreement with me that it can be a rational method of deterrence after all, which I denied in my article. But what he is discussing under the heading of random punishment, and pointing to in economic analysis, is not random punishment at all; it is collective punishment and hostage taking, which are neither random nor irrational. When the actual wrongdoer is difficult to identify, punishing the group to which he belongs gives the other members of the group an incentive to control his behavior, expel him, or report him to the authorities. (This is the economic rationale of *Ybarra v. Spangard*,<sup>29</sup> the “conspiracy of silence” case that ought to be considered an important evidence precedent rather than a subject only of the “neighboring kingdom” of tort law.) Killing hostages is cruel, but it is not random.

What is true about randomness in punishment is that the relation between procedural accuracy and deterrence is complex. I said in my article that the threat of *purely* random punishment would not deter punishable activity, and I stick to that claim, but I acknowledged that an *element* of randomness may increase deterrence.<sup>30</sup> A person who knows there is a risk that he will be punished for a crime he did not commit will have an added incentive to steer clear of whatever activity might give rise to an accusation. He will avoid association with known criminals; he will avoid shady practices on the borderline of criminality. This avoidance behavior (the ration-

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<sup>28</sup> See Posner, *Law of Evidence*, supra note 1, at 1526–27.

<sup>29</sup> 154 P.2d 687 (Cal. 1944).

<sup>30</sup> See Posner, *Law of Evidence*, supra note 1, at 1483–84.

ale for refusing to recognize a defense of reasonable mistake in statutory rape cases) will reduce the likelihood of his committing criminal acts as the result either of the pressure of associates or of a failure to calculate the borderline accurately or stay on the right side of it.

All this makes perfectly good economic sense.

Lempert criticizes me for ignoring what he terms organizational variables. My article does discuss them, but in terms of incentives, which is more precise; incentives are of course affected by institutional structure, though by much else besides. It is unclear to me how Lempert would go about conducting an analysis of organizations. With respect to that important and mysterious forensic institution, the jury, he is content to invoke civic duty and intrinsic satisfaction as juror motivations, thus indicating, as I suggested earlier, a lack of curiosity about human psychology. Commitment to the rational model of human behavior drives the economist to ask questions about the motivations of persons, notably judges and jurors, who are placed in an institutional framework that is designed to eliminate the usual motivations. How do people decide questions when there is nothing tangible at stake for them in the answers? Conventional evidence scholarship has little to say about this.<sup>31</sup>

Lempert questions my claim to have given an economic explanation for why there is a higher standard of proof in criminal than in civil cases. In this instance, at least, we should be able to use our common sense to figure out that the cost to an innocent person of being imprisoned (or executed) for crime is greater than the deterrent or incapacitative or other benefit of one more conviction, which, as Lempert himself emphasizes elsewhere in his paper,<sup>32</sup> just slightly raises the probability of detection and conviction in the future. The stakes in the typical civil case for money damages are more symmetrical. The cost of the judgment to the defendant is offset by the benefit of that same judgment—a transfer payment—

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<sup>31</sup> I took a whack at the issue in chapter three of my book *Overcoming Law*, “What Do Judges Maximize?”. Richard A. Posner, *Overcoming Law* 109–44 (1995).

<sup>32</sup> Lempert, *supra* note 2, at 1646–47. He attributes to me the view “that verdict accuracy is a value that must be maximized to maximize efficiency.” *Id.* at 1649. That is not my view (and, as a detail, I point out that efficiency is achieved, not maximized—it is not an aggregate). Accuracy must be optimized, not maximized; what must be maximized is the excess of benefits over costs of the evidentiary process.

to the plaintiff. To my suggestion that the procedural dice are loaded in the prosecution's favor in a criminal case, in part because most criminals are indigent and therefore represented—often appallingly poorly—by appointed counsel, Lempert responds that appointed counsel is an advantage that indigent criminal defendants have and indigent civil defendants lack. But “indigent civil defendant” is an oxymoron. No one sues people who lack the money to pay a judgment.<sup>33</sup> I would much rather be an impecunious tort plaintiff represented by a contingent-fee lawyer than an indigent criminal defendant represented by court-appointed counsel.

Turning to statistical evidence, Lempert says that “[f]or most legal purposes, the strength of apparent relationships is more important than significance levels.”<sup>34</sup> I don't understand what he means by “strength of apparent relationships.” What he should mean is that the *magnitude* of a correlation, and not merely whether it is statistically significant at conventional levels, is vital to determining what legal weight to attach to the correlation.<sup>35</sup> He attributes to me the view, which I do not hold, that only statistical significance matters, so that if a correlation is highly significant there is no need to consider whether its significance may not be an artifact of the study's design. And he advances the view, with which I disagree, that the precise significance level is irrelevant. Other things being equal, the higher the significance level, the more weight that should be given the correlation, as it is less likely to be spurious.

Lempert claims that what he calls “narrative relevance,” the relevance of evidence that makes it easier for the judge or jury to understand the case without necessarily affecting the outcome, is inconsistent with an economic analysis of Federal Rule 403 modeled on the familiar economic analysis of the Hand formula for

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<sup>33</sup> If the defendant, while lacking the money to pay a judgment, is insured (and hence attractive to sue), the insurance company will hire a lawyer to defend him.

<sup>34</sup> Lempert, *supra* note 2, at 1673. As a detail, it is not accurate to say that the concern addressed by significance levels is “whether it is plausible to suppose that an identified relationship results from chance rather than from the specific reasons the study's proponent proposes.” *Id.* at 1672–73. Significance levels test the probability that the relationship would be observed even if it did not exist.

<sup>35</sup> I have emphasized this in my recent study of the 2000 election fiasco. Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* ch. 2 (2001).

determining negligence.<sup>36</sup> I do not understand him. Federal Rule 403 does not define relevance; it sets forth the considerations pro and con of the exclusion of relevant evidence and a formula for weighing the pros and cons against each other.<sup>37</sup> Relevance is defined in Federal Rule 401,<sup>38</sup> and, as I noted in my article, the definition includes what Lempert calls narrative relevance.<sup>39</sup>

Finally, Lempert's effort to show that economic analysis of evidence has no future because the previous economic literature on evidence has not been heavily cited is premature. The literature is both sparse and recent; at a minimum, a responsible statistical analysis of citations to it would compare the number of citations to it to the number of citations to a random sample of articles on economic analysis of law of the same vintages as the evidence articles.

My article on evidence is surely not the last word on the application of economics to law; it is barely the first. No single article could do justice to so large and complex and difficult a field as evidence. It is too soon to write off the application of economics to the law of evidence. Lempert says that while rational choice models can "be expanded to explain various aspects of trials, . . . when they are, they lose the power they have to make sense of some kinds of actions and decisions."<sup>40</sup> How does he know?

Professor Lempert wishes to strangle the infant in its crib.

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<sup>36</sup> Lempert, *supra* note 2, at 1678.

<sup>37</sup> Fed. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

<sup>38</sup> Fed. R. Evid. 401 ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

<sup>39</sup> See Posner, *Law of Evidence*, *supra* note 1, at 1522 (discussing the Advisory Committee Note on Federal Rule 401). I remark there on the value of redundancy, contrary to the implication of Lempert, *supra* note 2, at 1680 n.175.

<sup>40</sup> *Id.* at 1661.

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