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Honorable Richard A. Posner

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THE STRANGEST ATTACK YET ON LAW AND ECONOMICS

*Honorable Richard A. Posner**

Judge Posner responds in this Article to Professor Jaffee. He first addresses Professor Jaffee's attempt to refute Law and Economics within its own terms by reference to the concept of efficient breach of contract. Judge Posner argues that even if some of Professor Jaffee's criticisms are true—which he doubts—the “efficient breach” concept and the damages remedies that it implies still provide the preferred approach to breach of contract problems. He points out that specific performance—Professor Jaffee's preferred remedy for breach—raises problems of its own, including bilateral monopoly and a need for continued judicial supervision of contracts.

Regarding the alternative vision offered in Professor Jaffee's Article—which Judge Posner describes as “vegeto-anarchism”—Judge Posner argues that Professor Jaffee's vision is fatally flawed, a “politics of nostalgia” that fails to account for the many negative aspects of the simple cultures that Professor Jaffee offers as exemplar.

The potency of the Law and Economics movement is shown by its capacity to infuriate—to madden, perhaps literally—its opponents. Certainly it has inspired some strange critiques.¹ But none stranger than Professor Jaffee's. Upon first looking into it, I doubted whether it was addressed to the rational intellect at all. I thought it was either a spoof or the product of a deranged mind. But a closer reading has caused me to revise my estimate and to say of Jaffee's ravings what Claudius said of Hamlet's: “what he spake, though it lack'd form a

* Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. This is a comment on Leonard R. Jaffee's article, *The Troubles with Law & Economics*, 20 HOFSTRA L. REV. 777 (1992).

1. See, e.g., Anthony D'Amato, *As Gregor Samsa Awoke One Morning from Uneasy Dreams He Found Himself Transformed into an Economic Analyst of Law*, 83 NW. U. L. REV. 1012 (1989).

little, / Was not like madness."²

Jaffee's paper is in two parts, each as long as a normal article. The first is an attack on economic analysis of contract law. The style, syncopated and idiosyncratic, reminded me of Karl Llewellyn (founder of the Dr. Seuss school of legal stylistics). Here is a typical sentence: "We need not learned theory, discipline in law, but sense and feeling, feeling's sense."³ The footnotes, in which Jaffee attacks Alan Schwartz and other economic analysts of contract law, are hypertrophic even by law review standards; are so long, in fact, as to make the paper seem parodic. Still, the first part of the paper recognizably belongs to the genre of Law and Economics scholarship. The second part (parts two through four in Jaffee's notation, but I shall treat it as a single part) is ostensibly a dialogue between two ostensibly fictional characters, "Anachronis" and "Moderno"; actually it is a monologue by Anachronis, whom Jaffee describes as his "near alter ego." Anachronis is an anarcho-vegetarian. His rhapsodic, incantatory defense or, better, celebration, of this unusual ethico-political stance is mingled with recollections of a checkered career that includes brutal parents, an unhappy childhood, running away from home, foster parents, dropping out of college, four wives, an abandoned career in music, and a variety of curious jobs, including farming in Switzerland and training horses in Pennsylvania, before law school in his late thirties. How far Anachronis's career resembles that of Professor Jaffee I have no idea.

As I have already indicated, on first looking into this farrago of elephantine footnotes, diatribes against allopathic medicine, fictional or maybe not so fictional reminiscences, and grandiose posturings, I was at a loss to find the rational thread. However, a second look revealed a pattern. Part one is an attempt to demolish Law and Economics within its own terms—that is, to show that on its own assumptions it's nonsense. The deck having thus been cleared, part two presents an alternative vision, that of anarcho-vegetarianism viewed as the alternative to capitalism (capitalism being, to Jaffee, the philosophy of gluttony and greed), which Law and Economics epitomizes, and to socialism, for which Jaffee has no use either since it assigns a big role to government. The alternative vision is not so much argued for as narrated; for part two is in the form of a *Bildungsroman* in which,

2. WILLIAM SHAKESPEARE, HAMLET, ACT III, SCENE I.

3. Leonard R. Jaffee, *The Troubles with Law & Economics*, 20 HOFSTRA L. REV. 777, 781 (1992) (Preface, explaining the article's form and style).

after many false starts, including three failed marriages, our peace-loving lentil-eater finds fulfillment in gardening, baking bread, crying in movies, and driving a Saab turbo.

Part one is built around a hypothetical case.⁴ A supplier of a component part (I'll call him S) has a contract to supply the part to manufacturer 1. Manufacturer 2 offers S more for the part, and S cannot supply both manufacturers, so he breaks his contract with manufacturer 1 and sells to 2 instead. This is an example of what the Law and Economics literature calls an "efficient breach." With manufacturer 2 willing to pay more for the part than 1, S can pay manufacturer 1's damages in full, yet still come out ahead, so S and manufacturer 2 are better off and manufacturer 1 is no worse off. The breach is therefore a Pareto improvement over compliance with the contract, so, according to the Law and Economics buffs, the courts should not do anything to discourage such breaches, as by imposing punitive damages (even though the breach is, in a sense, "willful") or by ordering specific performance of the contract.⁵

Jaffee argues that the situation may be more complicated than this. (1) Maybe the cost of the breach to manufacturer 1 is greater than the gain from the breach to 2 but the damages rules will not make S pay the full cost, because he lacks notice of 1's greater injury (the rule of *Hadley v. Baxendale*).⁶ (2) Maybe manufacturer 2 is offering a higher price for the part not because it's worth more to him but because he is a less skillful bargainer than manufacturer 1.⁷ (3) Maybe some of the costs of the breach fall on third parties (such as 1's employees, their families, and even their pets).⁸ (4) Manufacturers might become demoralized if suppliers could break their contracts with them.⁹ (5) Retribution is a source of psychological satisfaction and hence of utility, so punishing even an efficient breach might be, on balance, efficient.¹⁰

All these are possibilities, all right, but they do not show that "efficient breach" is an empty set. (2) is a trivial concern; firms that

4. *Id.* at 785.

5. For the flavor of the economic approach to breach of contract, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, ch. 4 (4th ed. 1992).

6. Jaffee, *supra* note 3, at 786-88, 793 n.11, 786-87, 794-98, 802-03, 804 n.20, 814-15, 819 n.24 and related text, 819-21, 821 n.25, 833 n.27 and related text, 840 n.29.

7. *Id.* at 786.

8. *Id.* at Part I, §§ C, D, E, 804 n.20, 824-25, 827-35, 833 n.27.

9. *E.g.*, *id.* at 785-88, 791-98, 831-33.

10. *E.g.*, *id.* at 788-95, 819-33, 870-71, 873, 908.

overpay for their inputs shrink and disappear. (1), to the extent that it is any problem now that consequential damages are more easily recoverable than in the heyday of *Hadley v. Baxendale*,¹¹ can be taken care of in advance by express negotiation over the point with the supplier or by inclusion of a liquidated-damages clause.¹² (3) can also be taken care of in advance by contracts between manufacturer 1 and his employees. If there are genuine third-party effects, there is a case both in law and in economics for specific performance; so also in (1) if manufacturer 1's remedy in damages is demonstrably inadequate. (4) and (5) are fanciful, especially where the manufacturer is a corporation.

Jaffee would like specific performance to be the rule and damages the exception, rather than the reverse as in our system; and he is right to point out that in a frictionless world, which he supposes to be the world of Law and Economics, specific performance or, for that matter, capital punishment of willful breaches, would never frustrate an efficient breach. When manufacturer 2 approached S, S, terrified of the consequences of a breach, would just refer him to manufacturer 1 and the two manufacturers would decide between themselves who should get the part. In the real world, however, this solution runs into the problem of bilateral monopoly. Suppose that manufacturer 1 can take the part or leave it, but that it is essential to 2's business. Nevertheless, when 2 approaches 1, this may be a tipoff that 2 is desperate, so 1 may hold out for a high price and 2 use all his wiles to chivvy it down—and the result will be high transaction costs and a possible breakdown in bargaining. And 2 may need the part more than 1 yet be the less skillful bargainer, and the costs to 2's employees, etc., if 2 doesn't get the part may exceed the costs to 1's employees, etc., if 1 doesn't get the part. Furthermore, since it is out of the question to order specific performance when the breach of contract is involuntary (even a court can't command the impossible and expect its command to be obeyed), a norm of specific performance would imply an inquiry in every case into the character of the breach, and that inquiry would be a further source of costs. Finally, in many cases specific performance would entail continuing judicial supervision

11. *Western Indus., Inc. v. Newcor Canada Ltd.*, 739 F.2d 1198, 1203-04 (7th Cir. 1984).

12. The literature expresses some concern that the customer may be reluctant to disclose his dependence on the supplier's performance, because that might induce the supplier to charge a higher price. This ignores competition in the supplier's market, which will prevent him from exploiting the customer's vulnerability.

of the contractual relationship, and judicial time is scarce.

There is more to part one of Jaffee's paper, though how much more I'm not sure because the combination of the weird style and the submersion of text by footnotes defeated my efforts at full comprehension. Still, insofar as I can understand part one, I don't think that Jaffee has succeeded in showing that the concept of efficient breach and the remedial implications of the concept are incoherent or self-contradictory. But I think I understand why he so dislikes the concept and is therefore eager to dispatch it. He thinks that it sanctifies the breaking of promises out of greed—specifically S's greed, but possibly also manufacturer 2's. S made a promise and he should keep it even if he could make more money by breaking it. This ignores, however, the plight of manufacturer 2. We should ask why he is willing to pay more for the part than manufacturer 1. The reason may be (as I have already suggested) that he will have to close down without it. Why blame S for helping him out of his plight merely because S's motives are self-interested?

I do not think that Jaffee has dealt a death blow to Law and Economics, but if he had I would wonder how this paved the way for vegeto-anarchism. The connection seems to be that Law and Economics is (in his view) a hopeless way of trying to come to terms with human greed, and his way is better. Although I am not an agricultural expert, I imagine that Jaffee is right in suggesting that if the human race turned vegetarian, then after the inevitable transitional dislocations, the cost of feeding the race would be lower than it is today; perhaps medical costs would be lower too. But I don't see why there would be less greed. The cost of many things is lower than it once was—the cost of transportation, for example, or of communications, or of illumination, or of listening to music—without the greed index having declined as a consequence. If the cost of one good or service (or class of goods or services) goes down, that frees up resources to buy other goods and services. For that matter, the fraction of the family budget that goes for food is much lower today than it was a century ago even though we are, most of us, still omnivores—and still greedy. There is a moral argument for vegetarianism, based on the capacity of animals to suffer,¹³ but I do not understand Jaffee to be pressing that argument in this paper. He does suggest that eating meat makes people vicious and warlike, but does

13. JAMES RACHELS, *CREATED FROM ANIMALS: THE MORAL IMPLICATIONS OF DARWINISM* 211-12 (1990).

not consider the counterexample presented by vegetarian Hitler.

Maybe I am laying too much stress on the vegetarian plank in Jaffee's platform. There is more. I mentioned his hostility to allopathic medicine, and that he likes to make his own food. It comes as no surprise that he is a pacifist. He won't even kill mice or roaches. "Eventually you get to feel toward bugs and mice as you might toward baby goats or little sheep."¹⁴ He praises the American Indians and the poor of China a great deal. He thinks that finance did bad things to the character of the German Jew. He is, as one could predict, very much down on television, fast food, food preservatives, unfertilized eggs, vitamin supplements, white bread, and bottle-feeding. He is, in fact, down on the West, viewed as the symbol of progress, modernity, and their handmaiden, technology. He wants us to adapt to our environment rather than (through everything from air conditioning to cloning) change the environment to make it suit our wants better (at the same time multiplying them)—the latter being the Western way. He is even critical of the wheel and would surely reject Marlowe's dictum (in *The First Part of Tamburlaine the Great*), great Renaissance commonplace though it is, that "Nature . . . Doth teach us all to have aspiring minds."¹⁵ Jaffee says, "Look not to Europe's heritage, but to Hunzas, traditional Georgians, Peru's Andean Indians, and China's simple folk. They do not want because they don't demand."¹⁶

The usual complaint about the politics of nostalgia is that it overlooks the bad features of the good old days—polio, the Inquisition, the Pale of Settlement, the slave trade, the Black Death, the exclusion of blacks and women from many occupations. The list is endless. Jaffee seeks to finesse this complaint by pushing his Golden Age way back: not to the 1950s, not to the nineteenth century, not to Cathay or Byzantium or the Roman Republic, but to—the Stone Age. (Even Heidegger didn't want to go back much before Socrates.) I may lack imagination, but I do not feel that I would be happier or more fulfilled living in the Stone Age. I know it sounds crass, but I would rather read a book than sharpen a flint.

I am not, however, disposed to argue the point with Jaffee. I don't think it is a subject for argument. I could tease him about the

14. Jaffee, *supra* note 3, at 907.

15. CHRISTOPHER MARLOWE, *TAMBURLAINE THE GREAT, PARTS I & II* 41 (John D. Jump ed., University of Nebraska Press 1967).

16. Jaffee, *supra* note 3, at 912.

Saab, but he could answer that it is difficult to live a Stone Age life in the modern world; one must make compromises. The idea of dealing with scarcity by limiting our wants has a distinguished pedigree that goes back to Epicurus. So Jaffee is in some good company, but it is pertinent to note that he has no suggestions for how to get from where we are back to the Stone Age. I doubt that he would endorse General Curtis LeMay's method. Stone Age people required a lot of space. For better or worse, there are now five billion people on Earth. Their happiness depends on modern technology, the division of labor, the existence of governments—and the science of economics.

Orwell remarked that Dickens's weakness as a reformer was that he looked to a change in the human spirit rather than to a change in institutions for solutions to the social problems that his novels exposed.¹⁷ Jaffee, too, looks to change in the human spirit to make life worth living. He wants people, turned off Law and Economics and, more broadly, capitalism, by the first part of his paper, to be inspired by the second part to change their lives. Stop eating meat.¹⁸ Stop being vaccinated.¹⁹ Stop eating fast foods.²⁰ Stop watching television.²¹ Some of his recommendations, such as the one about vaccination, are dangerous. Others are cranky (fast food in moderation never hurt anyone—and it does save time, as does bottle-feeding). Some may have considerable merit; he may be quite right that Western doctors are insufficiently receptive to Eastern techniques for treating pain and orthopedic disorders—though I don't think that those techniques were invented in the Stone Age. At the very end of the paper, Jaffee suggests that a nonconfrontational style is more effective in most negotiations.²² I couldn't agree more.

Even Jaffee's entire set of prescriptions, eccentric as the complete system seems, may have been an effective course of therapy for the unhappy narrator of part two, and perhaps it would be for others as well, though I suspect that Jaffee's rhapsodic and orotund tone when he is speaking prescriptively, as in the following hymn to motherhood, may not be the most effective vehicle for persuading the readership of the *Hofstra Law Review* to join him in his trek back to

17. Charles Dickens, in 1 COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 413 (Sonia Orwell & Ian Angus eds., 1968).

18. See, e.g., Jaffee, *supra* note 3, at 886-90, 893-900, 893 n.42, 895 n.44.

19. See *id.* at 909 n.51, 910; see also *id.* at 875 n.40, 894 n.43, 895 n.44.

20. See *id.* at 895 n.44, 911-14; see also *id.* at 868-75.

21. See *id.* at 853-76.

22. *Id.* at 924-32, 930 n.66.

the Stone Age: "A man of that time [the Stone Age], a man full in himself, who rejoices in the wealth of his imagination and the work of his flesh—that man will worship his woman, never see her slave."²³ I myself am left cold by the substance, as well as the style, of this passage, as I am by most of Jaffee's paper. It reminds me more of Jack Kerouac and Khalil Gibran than, as Jaffee invites us to compare him to, Kierkegaard and the authors of the *Bhagavad Gita*. The lack may be in me. But I am reasonably confident that, pending the transformation of the human spirit to which Jaffee summons us, we shall need the tools of economics to guide law in improving the life of our people.

23. *Id.* at 882.