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## Thirteen Ways of Looking at the Law

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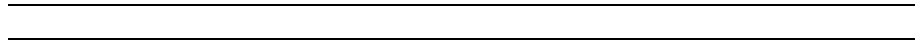
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BOOK NOTE

THIRTEEN WAYS OF LOOKING AT THE LAW

BY

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## BOOK NOTES

### THIRTEEN WAYS OF LOOKING AT THE LAW

FRONTIERS OF LEGAL THEORY. By Richard A. Posner.<sup>1</sup> Cambridge: Harvard University Press. 2001. Pp. vi, 453. \$35.00.

*I was of three minds*  
*Like a tree*  
*In which there are three blackbirds.*<sup>2</sup>

The emergence of external disciplines within legal scholarship seems to have fractured its intellectual focus.<sup>3</sup> Technical and specialized academic writing, moreover, appears to be drifting ever farther from the theaters of legal action.<sup>4</sup> Judge Richard Posner's latest book of essays, *Frontiers of Legal Theory*, challenges such perceptions: Even as it celebrates the breadth of interdisciplinary legal scholarship, it seeks coherence among myriad methodologies. Even as it delights in the abstract constructs of social science, it emphasizes their practical impact. And as one might expect of Judge Posner's work,<sup>5</sup> it pursues these apparent cross-purposes with assuredness and flair.

In assembling this eclectic set of essays, Judge Posner proposes to show that interdisciplinary legal scholarship can be a wide-ranging and yet *cohesive* enterprise. His hope is "to bridge the conventional academic boundaries that have made legal theory sometimes seem a kaleidoscope or even a heap of fragments rather than a unified quest for a better understanding of the law" (p. 14).<sup>6</sup> The unifying vision of legal scholarship that he advances, however, is achieved only by apply-

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<sup>1</sup> Judge, U.S. Court of Appeals for the Seventh Circuit, and Senior Lecturer, University of Chicago Law School.

<sup>2</sup> WALLACE STEVENS, *Thirteen Ways of Looking at a Blackbird*, in HARMONIUM 123, 123 (1931).

<sup>3</sup> Judge Posner connects this perception to trends within the academic disciplines themselves: "With the expansion in the size of faculty in virtually all fields [of academic research], specialization has increased, and with it the isolation of scholars from broad currents of thought." Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1322 (2002).

<sup>4</sup> See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

<sup>5</sup> See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* (1995). *Frontiers of Legal Theory* is something of a sequel to *Overcoming Law*, an earlier collection of interdisciplinary essays.

<sup>6</sup> To be sure, if any observer has the field of vision to track these academic movements with a steady eye, it would be Judge Posner, a pioneer in Law and Economics and longtime commentator on other "Law-and" approaches. See generally RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988); POSNER, *supra* note 5; RICHARD A. POSNER, *SEX AND REASON* (1992); Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998).

ing a narrow analytical lens — one that obscures insights peripheral to rational-actor models of human behavior. The result is a compact but confined perspective on legal thinking, too tightly focused on the theoretical possibilities of rational choice to encompass even the most proximate empirical findings on how people really live, choose, and act.

Nevertheless, *Frontiers* should easily accomplish its goal of making interdisciplinary legal scholarship “more accessible and useful to practitioners, students, judges, and the interdisciplinarians themselves” (p. 14). Like *Overcoming Law*<sup>7</sup> before it, *Frontiers* showcases Judge Posner’s virtuosity in deploying the methods and rhetoric of diverse disciplines to generate surprising conclusions about law and legal institutions. The thirteen essays — in sections titled Economics, History, Psychology, Epistemology, and Empiricism — span topics ranging from the economics of the Federal Rules of Evidence<sup>8</sup> to the intellectual legacies of Friedrich Carl von Savigny and Oliver Wendell Holmes;<sup>9</sup> from the optimal use of social norms<sup>10</sup> to statistical correlations between political stability and income equality.<sup>11</sup> Throughout, Judge Posner emphasizes the applicability (even indispensability) to legal practice of concepts from the social sciences:<sup>12</sup> Bayes’s Theorem,<sup>13</sup> regression analysis,<sup>14</sup> type I (false positive) and type II (false negative) errors,<sup>15</sup> and cognitive biases in decisionmaking.<sup>16</sup>

<sup>7</sup> POSNER, *supra* note 5.

<sup>8</sup> See Chapter Twelve, “The Rules of Evidence” (pp. 380–408).

<sup>9</sup> See Chapter Six, “Savigny, Holmes, and the Law and Economics of Possession” (pp. 193–221). Judge Posner explores Holmes’s early struggle toward judicial pragmatism: “What Holmes lacked was a social theory to take the place of the kind of internal legal theory that he denigrated in the German theorists [such as Savigny]. We now have that theory; it is called economics” (p. 207).

<sup>10</sup> See Chapter Nine, “Social Norms, with a Note on Religion” (pp. 288–315).

<sup>11</sup> Finding a positive correlation between political stability and level of income, but an indiscernible correlation between stability and inequality, Judge Posner disputes the argument that concern for political stability is a good reason to care about income inequality (pp. 115–21) and argues for emphasizing wealth maximization over distributional concerns. See Chapter Three, “Normative Law and Economics: From Utilitarianism to Pragmatism” (pp. 95–141).

<sup>12</sup> He observes that the successes of these methods “in illuminating some dark corners of the legal system and pointing the way to constructive changes have been sufficiently numerous to make [them] an indispensable element of legal thought” (p. 14).

<sup>13</sup> Bayes’s Theorem, a mathematical relation between prior and posterior probabilities, appears in Judge Posner’s model of optimal investment in the search for evidence for trial (pp. 343–45).

<sup>14</sup> Judge Posner uses regression analysis to explore the relation between political stability and income inequality (pp. 115–21) and to test whether the number of judges on a United States Court of Appeals affects the “quality” of the court’s opinions, as measured by the number of summary reversals by the Supreme Court (pp. 412–18).

<sup>15</sup> “Trading off type I and type II errors is a pervasive feature of evidence law” (p. 366). In Judge Posner’s criminal trial example (p. 366), a type I error would be a false conviction, and a type II error would be an erroneous acquittal.

<sup>16</sup> Judge Posner seems of two minds regarding cognitive psychology and its findings. He devotes one chapter (Chapter Eight) to criticizing the approach of Behavioral Law and Economics

The essays in *Frontiers* are expressly *not* about “legal theory” as commonly understood, however; Judge Posner specifically rejects what lawyers and law students might take the term to mean.<sup>17</sup> What, then, accounts for the title? A working premise of the book is that “the only approaches to a genuinely scientific conception of law are those that come from other disciplines, such as economics, sociology, and psychology” (p. 3). Accordingly, “it is appropriate when speaking of ‘legal theory’ at large to confine the term to theories that come from outside law” (p. 3). The radical nature of this usage — turning “legal theory” inside out — is entirely intentional.<sup>18</sup> Misnomers, after all, have the power to transform meaning. In this sense, the title of the book is not only ambitious and “wrong,” but also ambitiously “wrong.” Stitching together the book’s scattered topics into an intellectual corpus called “legal theory” is a rhetorical move that serves a grander design: to breathe life into a “research program” (p. 4) that can demonstrate the possibilities of “legal theory as a unified field of social science” (p. 15).

The essays amply demonstrate how a practitioner of “legal theory” (thus defined) could unflinchingly apply the clinical instruments of social science to even the most viscerally gripping legal questions. Chapter Two, for example, applies cost-benefit analysis to free speech jurisprudence, mapping the theoretical costs and benefits of regulating any form of speech onto variables in an equation.<sup>19</sup> In such a framework, the normative policy rule follows immediately from the question as posed (are costs greater than benefits?).<sup>20</sup> But the insights of economic

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— a school within Law and Economics that seeks to incorporate well-known results from cognitive psychology about distortions in decisionmaking — as overly hostile toward rational-actor models. Yet he also reveals an affinity for certain of that school’s ideas, referring frequently to the “availability heuristic,” for example (*e.g.* pp. 127, 243, 244, 256, 257).

<sup>17</sup> “The term ‘theory’ has long been used in law as a pretentious term for a litigant’s submission . . . or as a generalization proposed to organize a body of case law . . . , or as a purely internal theory of law, a theory ginned up by law professors with little use of insights or methods from other fields — most constitutional ‘theory’ is of that character” (pp. 2–3).

<sup>18</sup> Judge Posner remarks dryly about his inversion: “I realize it is a little late to be trying to appropriate the term ‘legal theory’ for the external analysis of law” (p. 2).

<sup>19</sup> Drawing inspiration from Justice Holmes’s “clear and present danger” test in *Schenck v. United States*, 249 U.S. 47 (1919) (pp. 64–66), Judge Posner offers what is essentially an expansion of Judge Learned Hand’s familiar negligence formula from *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). In Posner’s specification, the speech should be allowed if and only if

$$B \geq pH/(1 + d)^n + O - A$$

where  $B$  is the benefit of the speech;  $p$  is the probability that the harm  $H$  will occur;  $d$  represents the time-discounting of future costs and benefits;  $n$  is the number of years until the harm would be realized;  $O$  is the offensiveness; and  $A$  is the administrative cost of the regulation (p. 67). Judge Posner discusses the Hand formula (pp. 37–38) and notes the similarity of his analysis to Hand’s (p. 65 n.9).

<sup>20</sup> “[B]an the speech if but only if . . . the expected costs of the speech exceed the sum of the benefits of the speech and the costs of administering a prohibition of it . . .” (p. 67).

theory do not end with an accounting of pros and cons.<sup>21</sup> There may be externalities or other failures in the “speech market”<sup>22</sup> that divert rational individual behavior from what would be theoretically optimal. For example, “[c]ommercial speech is robust . . . because the commercial speaker normally expects to recoup the full economic value of his speech . . . . In contrast, hate speech is fragile because the costs are concentrated but the benefits diffused” (p. 85). Hence Judge Posner offers a cleverly counterintuitive result: hate speech might deserve *greater* protection than commercial speech. Moreover, because “[I]njury is the antidote to martyrdom” (p. 74), tolerating hate speech may actually reduce the incentives for some actors to engage in it.<sup>23</sup>

Not only are emotionally charged topics like free speech suitable subjects for social-scientific dissection in this research regime, but so is emotion itself.<sup>24</sup> Recognizing the discord between a conventional view of law as “a bastion of ‘reason’ conceived of as the antithesis of emotion” (p. 226) and the reality that litigation is “an intensely emotional process, rather like the violent methods of dispute resolution that it replaces” (p. 226), Judge Posner sets out in search of the conception of emotions most useful for determining their optimal treatment in the legal system: to what degree should jurors, police, judges, and other legal actors constrain their emotions? After all, “[I]ove notoriously can lead to bad judgments, and likewise fear and anger” (p. 228). And if love, fear, and anger need to be suppressed in the legal theater, how could legal institutions ensure the optimal emotional poise?

Judge Posner quells the dissonance by rejecting as “thoroughly conventional” the “dichotomizing [of] reason and emotion” (p. 227). To conjoin reason and emotion, he turns to recent elaborations by philosophers and psychologists on a line of thought dating back to Aristotle. Invoking what he calls a “cognitive theory of emotion” (p. 226),

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<sup>21</sup> To be sure, even an accounting of pros and cons is not a trivial task. Judge Posner rightly warns that merely formalizing Holmes’s calculus is “not the same thing” as making it operational (p. 67): “The problems of operationalizing the instrumental approach to free speech are formidable because . . . [w]e just don’t know a great deal about the social consequences of various degrees of freedom of speech” (p. 68).

<sup>22</sup> “The Speech Market” is the title of Chapter Two (pp. 62–94). Such a market is rife with potential “failures” of efficiency: property rights in information are difficult to establish; valuations can be elusive; and the market can be thin (or merely metaphorical) for speech that is neither bought nor sold (p. 84).

<sup>23</sup> More explicitly: “Tolerating inflammatory speech may . . . [make] it more difficult for speakers to prove that they are in deadly earnest about what they are saying” (p. 74). In the spirit of the economics-style analysis, one might also deploy a basic idea of classical economic theory, the “substitution effect”: making hate speech a less effective means of expressing hatred may simply induce haters to *substitute* nonspeech forms of expression, for example, physical violence. As with most questions of economics, this sort of theoretical indeterminacy can only be resolved by empirical analysis.

<sup>24</sup> See Chapter Seven, “Emotion in Law” (pp. 225–51).

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Judge Posner contends that emotion (like reasoning) is a form of cognition — an alternative (if more primitive) form of evaluating information and making decisions. It is a “cognitive shortcut” (p. 229) that distorts information in identifiable and systematic ways.<sup>25</sup>

One key emotion-linked distortion is the “availability heuristic,” the “tendency . . . to give too much weight to vivid immediate impressions” (p. 243). This distortion operates, for example, when legal actors “pay too much attention to the feelings, the interests, and the humanity of the parties in the courtroom and too little to absent persons likely to be affected by the decision” (p. 243). Judge Posner asserts that this distortion promotes “excessive lenity for the murderer who makes an eloquent plea for mercy, his victim being unable to enter a counterplea by reason of being dead; or an excessive tilt in favor of the rights of tenants . . . ; or a tax break for a struggling corporation” (p. 244). He also speculates that the use of ultrasound photographs of fetuses “canceled the rhetorical advantage that the proponents of abortion rights had enjoyed by virtue of the availability heuristic” (that is, from telling stories of women who have died in illegal abortion attempts) by bringing the “victim” of abortion into plain view (p. 244).<sup>26</sup>

The task for Judge Posner’s interdisciplinary project is either to cure these biases or to neutralize their effects on legal decisionmaking. His ultimate prescription is a strong dose of economic analysis of law, which he imagines to be cleansed of the availability heuristic and yet “empathetic because . . . it brings into the decisional process the remote but cumulatively substantial interest of persons not before the court — such as future victims of murderers, future seekers of rental housing, future taxpayers, and future consumers” (p. 244).<sup>27</sup> By using one set of external approaches (here, cognitive science and philosophy) to identify another (economic analysis) as the best framework for answering a legal question, Judge Posner demonstrates the possibilities of bringing multiple disciplines to bear on a single legal problem.

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<sup>25</sup> Though “an emotion expresses an evaluation of the information [that triggers it] and so may operate as a substitute for reasoning in the usual sense” (p. 227), in doing so it “short-circuits reason conceived of as a conscious, articulate process of deliberation, calculation, analysis, or reflection” (p. 228).

<sup>26</sup> Of course, the heartrending testimony of a murder victim’s loved ones might generate even more passionate reactions *against* lenity; and rather than merely leveling the field, ultrasound photographs of fetuses may have tipped the abortion debate in favor of latter day abortion opponents. Resolution of such differing accounts depends, again, not on abstract argument but on empirical observation.

<sup>27</sup> Yet Judge Posner demonstrates how rhetoric alone can achieve the same result — quoting Angelo from Shakespeare’s *Measure for Measure*, who says of mercy: “I show it most of all when I show justice; / For then I pity those I do not know, / Which a dismissed offense would after gall . . .” (p. 245) (quoting WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 2, sc. 2, ll. 101–03, at 127 (N.W. Bawcutt ed., Clarendon Press 1991) (1623)).

*When the blackbird flew out of sight  
It marked the edge  
Of one of many circles.*<sup>28</sup>

To appropriate the phrase “legal theory” is also to demarcate the bounds of meaningful inquiry. In this sense, the term “frontiers” in the title may refer not so much to the outer reaches of social scientific advance but to the *boundaries* of legal scholarship that Judge Posner seeks to define. The scope of the book is as notable for what it *excludes* as for what it includes: “I mean to exclude both philosophy of law . . . which is concerned with the analysis of high-level law-related abstractions such as legal positivism, natural law, legal hermeneutics, legal formalism, and legal realism — and the analysis of legal doctrine, or its synonym, legal reasoning” (p. 2).<sup>29</sup>

A strategy for defending such intellectual borders is articulated in the essays themselves. The chapter on free speech analogizes to the “forward defense” that the United States adopted during the Cold War, when “[o]ur front line was the Elbe, not the Potomac” (p. 82). Similarly, in free speech jurisprudence, “rather than defending just the right to say and write things that have some plausible social value, the courts . . . defend the right to say and write utterly worthless and deeply offensive things as well” (p. 82). In his Introduction, Judge Posner generalizes this observation to the whole of judicial review: “[T]he power of judicial review secures the core of the Constitution against infringement . . . . Litigation at the rind provides a bulwark against infringement of the rights in the core” (p. 21).

For Judge Posner, cost-benefit analysis (CBA) is the vital core of “legal theory” that he defends against critics and competing ideas.<sup>30</sup> In his normative analyses, CBA serves as the dominant device for policy evaluation; in his descriptive modeling, CBA is embedded in rational-actor models, describing agents who make all decisions as if calculating costs and benefits. And in *Frontiers*, “forward defense” accurately characterizes his means of protecting this core framework. He openly omits from his broad survey not only internal legal analysis but also the clearly *external* approaches of “Feminist jurisprudence” (p. 7), “So-

<sup>28</sup> STEVENS, *supra* note 2, at 123.

<sup>29</sup> One might wonder whether Judge Posner’s very act of exclusion implicates jurisprudence — that is, whether his philosophy of “legal theory” is itself a “philosophy of law.”

<sup>30</sup> As his essays on regulating free speech and controlling emotion in legal discourse demonstrate, Judge Posner applies CBA to a wide range of questions. He appears to treat even other varieties of economic analysis of law as secondary to CBA: the essay on the Federal Rules of Evidence suggests six possible economic approaches to evaluating the rules of evidence (pp. 337–38), but privileges one that is a simple CBA (p. 338). Chapter Three includes a defense of traditional CBA against an array of critics, including Professor Amartya Sen, who warns about valuations where no market and hence no prices exist (as in the case of endangered species) (pp. 123–41).



ciology of the law, and the law and society movement” (p. 10), “Law and literature” (p. 12), and “Critical and postmodern legal studies” (p. 13).<sup>31</sup> Given his broad construction of the term, he rightly locates these external approaches within his realm of “legal theory” — but only barely. He effectively exiles them to the borderlands, just short of the outright banishment he has imposed on jurisprudence and doctrinal analysis.

There would be no problem with Judge Posner’s promoting CBA or keeping disfavored schools of thought at bay, were not one of his aims also to extol the breadth and impact of interdisciplinary legal scholarship. His defensive posture tends toward exclusion rather than inclusion of approaches outside the core; where inclusive, it tends toward cursory acknowledgement rather than engagement and synthesis. The essays’ handling of emotion, epistemology, and psychology, for example, reveals a purposive remoteness from the topics themselves. The essays address these vast subjects only to the extent that they augment (or threaten) CBA and rational-actor analysis. The discussion of emotions, for example, merely characterizes them as deviations from rational decisionmaking.<sup>32</sup> The essay on the Federal Rules of Evidence, while briefly citing several studies of jury decisionmaking, otherwise brushes aside the “epistemological and psychological literatures dealing with rational inquiry” (p. 337).<sup>33</sup> And the rejection of the Behavioral Law and Economics school’s interpretations of data from psychological experiments<sup>34</sup> reveals the danger that Judge Posner’s “forward defense” might not only fend off internal and some (disfavored) external frameworks for legal analysis, but also deflect important empirical findings — in this instance, findings that turn out to be highly relevant for CBA and rational-actor analysis.

A constrained view of what constitutes valuable empirical inquiry may be self-defeating for Judge Posner’s project of advancing “legal

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<sup>31</sup> Posner explains that he excludes these topics because he has treated them fully in previous works (pp. 7–14). Yet his disdain for certain approaches is no secret. For example, he writes (in an essay on the use of history in legal discourse) that “[Nietzsche] does not deny that there are knowable facts about things that happened in the past; he is not a postmodernist crazy” (p. 146).

<sup>32</sup> The original title of the University of Chicago lecture from which he draws much of this essay is telling: “Emotion vs. Emotionalism in Law” (p. 445).

<sup>33</sup> Observing this move, one might wonder whether Part IV’s title, “Epistemology,” is yet another intentional misnomer.

<sup>34</sup> See Chapter Eight, “Behavioral Law and Economics” (pp. 252–87). For a lively interchange regarding this subject, including the original version of Judge Posner’s essay, see Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Christine Jolls, Cass R. Sunstein & Richard Thaler, *Theories and Tropes: A Reply to Posner and Kelman*, 50 STAN. L. REV. 1593 (1998); Mark Kelman, *Behavioral Economics as Part of a Rhetorical Duet: A Response to Jolls, Sunstein, and Thaler*, 50 STAN. L. REV. 1577 (1998); and Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998).

theory” — even if this term were to encompass only CBA and rational-actor analysis. After all, without empirical assessment of actual costs and benefits, and without data on how real people respond to incentives, CBA and rational-actor analysis offer little more than rhetorical frameworks. Judge Posner is an avowed advocate of empirical research,<sup>35</sup> and his most creative essays in *Frontiers* are those employing real-world data: a statistical analysis of Supreme Court reversals of circuit court decisions, for example, leads him to conclude that increasing the number of judges in a given circuit is likely to increase that court’s rate of “error,” as measured by summary reversals (pp. 411–20).

For the most part, however, these essays primarily exhibit Judge Posner’s enthusiasm for cleverly using abstract ideas to generate novel theoretical possibilities<sup>36</sup> — while only minimally engaging empirical findings from the field.<sup>37</sup> Simply as a practical matter, showing how social science methodologies can establish empirical facts may be a more compelling way to convince lawyers and judges — who daily must make do with whatever facts they can muster — to pay attention to the writings of interdisciplinary legal scholars.

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<sup>35</sup> “A dearth of quantitative scholarship has been a serious shortcoming of legal research, including economic analysis of law” (p. 411). Elsewhere, he writes that the book’s “emphasis on economics and on the need for more empirical study of law is not a new theme in my work” (p. 2).

<sup>36</sup> Neglect of empirical measurement would place the law’s use of economics close to what Judge Posner decries as the “law’s rhetorical use of history . . . [which is] entwined with the idolatry of the past that is a conspicuous feature of conventional legal thought” (p. 154). Replace “history” with “economics” and “past” with “the market” and the point is clear.

<sup>37</sup> It is surprising, for example, that a book celebrating the contributions of social science to legal scholarship does not mention the work of perhaps the two most methodologically sophisticated researchers in Law and Economics: Professors John J. Donohue III (who has assessed the economic impacts of civil rights legislation and of employment discrimination law) and Steven D. Levitt (who has examined the determinants of criminal behavior). See, e.g., John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583 (1992); John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603 (1991); Steven D. Levitt, *Juvenile Crime and Punishment*, 106 J. POL. ECON. 1156 (1998); Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime*, 87 AM. ECON. REV. 270 (1997); JOHN J. DONOHUE III & STEVEN D. LEVITT, THE IMPACT OF RACE ON POLICING, ARREST PATTERNS, AND CRIME (Nat’l Bureau of Econ. Research, Working Paper No. 6784, 1998). *Frontiers* cites neither author for his work; it mentions Professor Donohue in passing only as an example of a “liberal” legal economist (p. 50).