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## He's Gotta Have It

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## BOOK REVIEW

### HE'S GOTTA HAVE IT

SEX AND REASON, by *Richard A. Posner*.\* Cambridge: Harvard University Press. 1992. Pp. 458. \$29.95.

REVIEWED BY CAROL SANGER\*\*

In 1929, James Thurber and E.B. White observed that [d]uring the past year, two factors in our civilization have been greatly overemphasized. One is aviation. The other is sex. . . . In the case of aviation, persons interested in the sport saw that the problem was to simplify it and make it seem safer. . . . With sex, the opposite was true. . . . The problem in this case was to make sex seem more complex and dangerous. This task was taken up by sociologists, analysts, gynecologists, psychologists, and authors. . . . They joined forces and made the whole matter of sex complicated beyond [our wildest dreams]. . . . Sex, which had hitherto been a physical expression, became largely mental. The country became flooded with books. The whole order of things changed. To prepare for marriage, young girls no longer assembled a hope chest—they read books on abnormal psychology. If they finally did marry, they found themselves with a large number of sex books on hand, but almost no pretty underwear.<sup>1</sup>

In response to the inadequacies of this flood of books, most of them written by writers who “clearly hadn’t been out much,”<sup>2</sup> Thurber and White undertook their classic study, *Is Sex Necessary?*, the first rational-choice analysis of sex. Their results foreshadow by some sixty years the

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1. JAMES THURBER & E.B. WHITE, *IS SEX NECESSARY?* at xix (1929).
2. *Id.* at xx.

central themes of Richard Posner's *Sex and Reason*<sup>3</sup>—an economic theory of sexuality. Thus both books are concerned with such issues as these:

*Substitutionality*: Compare Posner's discussion of the "superheated heterosexual [who] 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,"<sup>4</sup> with Thurber and White's account of how baseball, craps, and six-day bicycle races grew in popularity as "[m]an began to preoccupy himself with anything, no matter how trivial, which might help him to 'forget,' as the lay expression has it";<sup>5</sup>

*Search costs*: Compare Thurber and White's reflection on how bringing candy to one's beloved replaced fudge making as a courtship activity, thereby reducing a suitor's time investment,<sup>6</sup> with Posner's observation that the search costs of heterosexual sex are higher for prisoners than for free persons;<sup>7</sup> and

*The effects of urbanization on sexual practices*: Compare Thurber and White's account of why New York became the center of the sexual revolution—convenient location, magnificent harbor, and odd-shaped apartments "in which one must step across an open bathtub in going from the kitchen to the bedroom; any unusual layout like that arouses sexual desire and brings people pouring into New York,"<sup>8</sup> with Posner's prediction that "opportunistic homosexuality should decrease with the rise of cities because the privacy of city life facilitates nonmarital heterosexual sex, including prostitution."<sup>9</sup>

Yet despite these and other similarities,<sup>10</sup> the two books seem to exist in different worlds. It is not simply that *Is Sex Necessary?* is always a pleasure to read and *Sex and Reason* almost never is. That difference might be expected in any comparison between the work of clever humorists and that of clever economists. Rather, the difference between the two books, and the flaw in Posner's, lies in the interconnected premises—

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3. RICHARD A. POSNER, *SEX AND REASON* (1992).

4. *Id.* at 124.

5. THURBER & WHITE, *supra* note 1, at 48.

6. *Id.* at 40-41.

7. POSNER, *supra* note 3, at 121.

8. THURBER & WHITE, *supra* note 1, at 102.

9. POSNER, *supra* note 3, at 128.

10. Both books include eroticism among the benefits of sex. Compare *id.* at 111 (defining "erotic" as "the deliberate cultivation of the faculty of sexual pleasure") with THURBER & WHITE, *supra* note 1, at 185 (defining "erotic" as "[o]f or pertaining to sex, usually in a pretty far-fetched manner").

intellectual and factual—on which the authors proceed. In their intellectual quest, silly as it is meant to be, Thurber and White “early resolved to keep alive our curiosity about things. Wherever we went, we asked questions.”<sup>11</sup> In contrast, Posner’s effort is less one of curious exploration than of directed and mechanical problem solving: For every human sexual transaction there is an explanatory formula grounded in rational-choice principles. For example,

[t]he principal benefit of prohibiting abortions is the value of each fetus saved times the number saved, the latter being a function of the percentage of abortions that prohibition actually prevents or deters, which we are assuming (probably extravagantly) to be 30 percent, and the number of abortions required to reduce the population by one, which I am assuming to be 1.83. The benefits of the prohibition are therefore  $v$ , the value of one fetus saved, times  $.16n$  ( $.3/1.83 = .16$ ), where  $N$  is the average number of abortions that would be performed each year but for the prohibition.<sup>12</sup>

Yet that example aside, it is not his approach per se that is the problem. I agree with Posner that “the type and frequency of sexual practices . . . can be interpreted as rational responses to opportunities and constraints”<sup>13</sup> and that “the knowledge generated by economic analysis might well serve as a foundation for reforms in law and public policy.”<sup>14</sup> The trouble with *Sex and Reason* is that this is sex and reason from a boy’s point of view. What sex is, what count as “aspects of sexuality”<sup>15</sup> susceptible to economic analysis, how the benefits and costs of sex are measured, and what is or isn’t a “given” are organized and informed from the perspective of industrial-strength masculinity.

To start with, Posner’s inquiry relies on a hydraulic conception of sex. Sex begins, and to a large extent quickly ends, with male ejaculation.<sup>16</sup> This is not altogether surprising given that the fundamental propositions set forth in the chapter “The Biology of Sex”<sup>17</sup> are all drawn

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11. THURBER & WHITE, *supra* note 1, at xxi.

12. POSNER, *supra* note 3, at 286.

13. *Id.* at 111.

14. *Id.* at 7.

15. *Id.* at 5.

16. *Id.* at 90.

17. *Id.* at 85-110.

from the literature of sociobiology.<sup>18</sup> Thus we learn that men are naturally and vigorously promiscuous;<sup>19</sup> that jealousy and a strong sex drive have been genetically bred out of women;<sup>20</sup> that most men find "shapely" women more sexually arousing than other women;<sup>21</sup> and that the sexual strategies that result from these facts have "apparent universality."<sup>22</sup> Posner marshals heaps of evidence to support all this. For example, women's weaker sex drives are demonstrated by the fact that "lesbian couples have intercourse less frequently, on average,"<sup>23</sup> than either heterosexual couples or male homosexual couples (who of course must have intercourse most often because there we have *two* desperate penises). While I take no position on relative sex drives (it seems accurate to say they depend on whether superegos are in place to restrain those who would act by force), Posner's "proof" underscores that the "sex" under discussion is intercourse, or at least sperm release into some "insertee," as Posner puts it.<sup>24</sup> Adapting such sociobiological fundamentals to the vocabulary of economic theory, Posner takes the male sex drive—the need for males to have sex—as a given in the constellation of preferences. Posner's analogy is to keeping warm:

An economic analysis of clothing and shelter does not ignore climate—does not suppose, for example, that the preference of inhabitants of northern climes for housing that keeps out the cold is itself a choice to be analyzed by economists. The preference is treated as a given, and the focus of the economic analysis is on the costs and benefits of alternative methods of satisfying the preference.<sup>25</sup>

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18. While Posner stands ready "to defend the sociobiology of sex against its detractors," he also maintains that his analysis "would be unaffected if sociobiology were completely overthrown." *Id.* at 110. Perhaps this is so—but the text is riddled with discomforting little throwbacks to sociobiology. For example, in a discussion of adoption, Posner states, "Because people find infants lovable, a childless couple may want to acquire a child, and once an infant is introduced into a couple's home the couple will bond with it, just as they would with their 'own' child. So the genes are fooled." *Id.* at 406.

19. *Id.* at 92.

20. *Id.* at 91.

21. *Id.* at 94. In contrast, Posner explains that women are less attracted to relevant male body parts because

as random mating is no part of the female's optimal sexual strategy, it would be contrary to her interests to be sexually aroused by the sight of male sex organs. We expect her to be aroused by cues related to the male's likely ability to protect her and her offspring.

*Id.* at 93. These "cues" I take to be an American Express Card or Chicago Law School sweatshirt.

22. *Id.* at 93.

23. *Id.* at 91.

24. Hands count, as Posner points out that the economic search costs for masturbation are zero. *Id.* at 119-20.

25. *Id.* at 87.

Sex, for Posner, is a similar kind of prior preference. It is only “the decision to engage in a particular sex act,” not whether to engage in sex at all, that “is a matter of choice” and thus subject to economic analysis, although we might be swayed by<sup>26</sup> Carol Pateman’s point that “while without a minimum of food (or water, or shelter) people die, to my knowledge no one has ever died for want of an outlet for their sexual appetites.”<sup>27</sup>

Nonetheless, *Sex and Reason* is concerned, at its core, with man’s ongoing decision on whether to engage in one sex act or another—but not whether to abstain. Men are simply going to do it.<sup>28</sup> Posner argues that this is not altogether bad. He believes, for example, that masculine promiscuity may reduce the danger of incest: “[T]he male is not content with one sexual partner, who may happen to be a close relative; and the more sexual partners he has, the less likely are all or most of them to be his close relatives. . . .”<sup>29</sup> As this example suggests, lack of consent by the close relative, or by anyone else, for that matter, does not count for much in the equation.

Thus, like Thurber’s accusation about early writing on aviation, the sex in *Sex and Reason* has been simplified, with all the complexity and danger taken out.<sup>30</sup> This kind of simplification matters tremendously because, for most of human history, the complexities of sex, and certainly

26. *Id.*

27. CAROL PATEMAN, *THE SEXUAL CONTRACT* 198 (1988).

28. *Cf.* THURBER & WHITE, *supra* note 1, at 165-66. An entire chapter of that text is devoted to “Frigidity in Men.” *Id.* at 160-74. The chapter focuses particular attention on the aspect of male unresponsiveness known as the “recessive knee,” a phenomenon that arises when

a girl presses her knee, ever so gently, against the knee of the young man she is out with. . . . Now, a normal male in whom there are no traces of frigidity will allow his knee to retain its original position, sometimes even exerting a very slight counter-pressure. A frigid male, however, will move his knee away at the first suggestion of contact, denying himself the electric stimulus of love’s first stirring.

*Id.* at 165-66.

29. POSNER, *supra* note 3, at 94.

30. In contrast, for a view of sex that puts its endless complexities right back in, consider Eve Sedgwick’s list of sexual differentiations:

- Even identical genital acts mean very different things to different people.
- To some people, the nimbus of “the sexual” seems scarcely to extend beyond the boundaries of discrete genital acts; to others, it enfolds them loosely or floats virtually free of them.
- Sexuality makes up a large share of the self-perceived identity of some people, a small share of others’.
- Some people spend a lot of time thinking about sex, others little.
- Some people like to have a lot of sex, others little or none.
- Many people have their richest mental/emotional involvement with sexual acts that they don’t do, or even don’t want to do.
- For some people, it is important that sex be embedded in contexts resonant with meaning, narrative, and connectedness with other aspects of their life; for other people, it is important that they not be; to others it doesn’t occur that they might be.

its dangers, have largely been inflicted on women. Posner notes that sex has been "a major source of human pleasures and pains (the latter including death long before AIDS came on the scene)."<sup>31</sup> From this context, the pains of sex predating AIDS to which Posner refers may be syphilis. But for women, pain and death as the ultimate result of sex were far more likely to occur as an ordinary consequence of childbirth. As histories of childbearing have begun to make clear, women long understood that sexual intercourse was as closely connected to death as to any benefits secured through motherhood.<sup>32</sup> And this is to say nothing about such other dangers as rape or about such pains as poverty, a common enough result of child rearing—a central consequence of sex. As economist Victor Fuchs has demonstrated, responsibility for children is the biggest source of women's economic disadvantage.<sup>33</sup>

So while *Sex and Reason* can be properly challenged for its dubious economics,<sup>34</sup> its theories of homosexuality,<sup>35</sup> its troublesome assumption

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- For some people, the preference for a certain sexual object, act, role, zone, or scenario is so immemorial and durable that it can only be experienced as innate; for others, it appears to come late or to feel aleatory or discretionary.
  - For some people, the possibility of bad sex is aversive enough that their lives are strongly marked by its avoidance; for others, it isn't.
  - For some people, sexuality provides a needed space of heightened discovery and cognitive hyperstimulation. For others, sexuality provides a needed space of routinized habituation and cognitive hiatus.
  - Some people like spontaneous sexual scenes, others like highly scripted ones, others like spontaneous-sounding ones that are nonetheless totally predictable.
  - Some people's sexual orientation is intensely marked by autoerotic pleasures and histories—sometimes more so than by any aspect of alloerotic object choice. For others the autoerotic possibility seems secondary or fragile, if it exists at all.
  - Some people, homo-, hetero-, and bisexual, experience their sexuality as deeply embedded in a matrix of gender meanings and gender differentials. Others of each sexuality do not.

EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 25-26 (1990).

31. POSNER, *supra* note 3, at 10.

32. Indeed, the shadow of maternity extended beyond the possibility and fear of death.

Women knew that if procreation did not kill them, it could maim them for life. Postpartum gynecological problems, some great enough to force women to bed for the rest of their lives, others causing milder disabilities, hounded many of the women who survived childbirth. . . . Newly married women looking forward to life found themselves almost immediately faced with the prospect of permanent physical limitations that could follow their early and repeated confinements.

JUDITH WALZER LEAVITT, *BROUGHT TO BED: CHILDBEARING IN AMERICA, 1750 TO 1095*, at 28-29 (1986); see IRVINE LOUDON, *DEATH IN CHILDBIRTH* (1993); SALLY McMILLEN, *MOTHERHOOD IN THE OLD SOUTH: PREGNANCY, CHILDBIRTH AND INFANT REARING* (1990); RICHARD WERTZ & DOROTHY WERTZ, *LYING-IN: A HISTORY OF CHILDBIRTH IN AMERICA* (1977).

33. VICTOR FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 140 (1988).

34. See Gillian K. Hadfield, *Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 HARV. L. REV. 479, 491-99 (1992).

35. See William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333 (1992).

that reason is utterly distinct from emotion,<sup>36</sup> its peculiar treatment of race as a variable in rational-choice sex,<sup>37</sup> and its self-assured reliance on biological "givens,"<sup>38</sup> the focus in this review is on how the book short-changes both the reader and the inquiry by failing to consider rational-choice theory from the perspective of those who do not ejaculate—women—or, in another example of Posner's grim phrasings, "that-which-is-penetrated."<sup>39</sup>

For despite Posner's repeated claims about the novelty of his economic analysis of sex, women have been quite consciously considering matters of sex in terms of its costs and benefits for a long time, although only recently—and even now not universally—have sex and its consequences come sufficiently under the control of women so that their preferences sometimes take the form of real choice. In failing to include a woman-centered perspective in the application of economic principles, Posner has simply missed a huge number of examples, sources, and conceptualizations that might inform his thesis in ways that go beyond the musings that make up too much of *Sex and Reason*. I want to develop this argument by looking at three examples from the larger realm that Posner provides: contraception, sexual harassment, and rape. Each concerns sexual behavior for which women's varied perspectives and experiences would seem essential in understanding both the exercise of preferences and the appropriateness of legal responses.

Posner uses contraception to consider a number of sensible propositions: the complementarity of sexual practices (if the costs of contraception go down, the amount of vaginal intercourse is likely to rise [not to mention—which Posner doesn't—the possibility that women may *enjoy* protected intercourse more]);<sup>40</sup> the class-based impact of prohibiting the

36. See Martha Nussbaum, "Only Grey Matter"? Richard Posner's Cost-Benefit Analysis of Sex, 59 U. CHI. L. REV. 1689 (1992). For discussion of the necessary complementarity of reason and emotion, see ROBERT H. FRANK, PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS (1988); Martha Minow & Elizabeth Spellman, *A Passion for Justice*, 10 CARDOZO L. REV. 37 (1988).

37. See POSNER, *supra* note 3, at 138-39 (discussing possible implications of the "favorable sex ratio" of black men to black women: less opportunistic homosexuality, fewer heterosexual rapes, and less proclivity to abuse children sexually).

38. Two histories that clarify how culturally contingent are our understandings of sexual biology are THOMAS LAQUER, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD (1992), and CYNTHIA RUSSETT, SEXUAL SCIENCE: THE VICTORIAN CONSTRUCTION OF WOMANHOOD (1989).

39. POSNER, *supra* note 3, at 66.

40. Posner does note that the availability of contraception "encourages and strengthens marriage, especially companionate marriage, by reducing the cost of marital sex and by making the wife more companionable; no longer need she be continually pregnant and preoccupied with children to



sale of contraceptives by closing birth control clinics;<sup>41</sup> and the strong hand of Catholic theology in the politics of regulating birth control, an intervention that Posner properly decries.<sup>42</sup>

But what is missing is the way women actively reason about their use of contraception, the internal calculations that guide their exercise of rational choice. A valuable study in this area, not included among the "handful of [economic] studies"<sup>43</sup> Posner has located, is sociologist Kristin Luker's *Taking Chances: Abortion and the Decision Not to Contracept*.<sup>44</sup> Using data obtained from records and interviews with more than 500 women seeking abortions, Luker developed a "theory of contraceptive risk-taking" in which women's use of contraception is explained by their assessments of the costs of contraception and the benefits of pregnancy.<sup>45</sup> Luker's study reconceives why women do or do not use birth control.

Prior to Luker's work, the prevailing explanations of unwanted pregnancies centered on either contraceptive ignorance (women don't know how not to get pregnant)<sup>46</sup> or intrapsychic conflict (women do know how but unconsciously want to be pregnant so they make mistakes).<sup>47</sup> Luker found, however, that women were both more educated and more rational than these earlier theories had posited. The women she studied articulated a range of costs associated with the use of contraception, such as price and availability,<sup>48</sup> male attitudes toward the use of male or female contraception (spoiling spontaneity),<sup>49</sup> biological side effects<sup>50</sup> (such as weight gain from the pill), and social costs, such as acknowledging the fact of intercourse at all (will I look promiscuous?).<sup>51</sup> The benefits of pregnancy included proof of fertility,<sup>52</sup> shoring up an

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the exclusion of her husband." *Id.* at 269. But it might also be that a woman's control over her own fertility might free some time for activities totally unrelated to her husband.

41. *Id.* at 327.

42. *Id.* at 324-27.

43. *Id.* at 34.

44. KRISTIN LUKER, *TAKING CHANCES: ABORTION AND THE DECISION NOT TO CONTRACEPT* (1975).

45. *Id.* at 79-81.

46. *Id.* at 37-64.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 65-77.

existing marriage,<sup>53</sup> having a child to love,<sup>54</sup> and testing a man's commitment or a parent's control.<sup>55</sup>

The emergent rational-choice process Luker described is complicated by at least two factors. The first is the repetitive aspect of the reproductive enterprise. As Luker pointed out, "women are exposed to opportunities to take contraceptive risks literally thousands of times over their sexual careers."<sup>56</sup> This is a somewhat different tack from Posner's sociobiological premise that women "must try to make every pregnancy count."<sup>57</sup>

The second complication is that there are significant structural and personal barriers that make it difficult for women to realize the underlying "rationality" of their decisions to take [contraceptive] risks. . . . Lacking an understanding of why she is doing what she is doing and forced to accept the prevailing view that she is acting "irrationally," a woman is often condemned to repeat that process [of unwanted pregnancy] over and over again.<sup>58</sup>

We are familiar with similar assessments of irrationality in the context of decisions by unmarried teenage HIV-positive women to continue their pregnancy.<sup>59</sup>

But here, just the opportunity for economics and sex is action! Although the participants themselves might not explain it all with quite the same theoretical flourish, by identifying the rational components of reproductive behavior, decisions may well be predicted and social policies reconsidered. For many women, becoming a mother is one of the few forms of status available, often because meaningful opportunities for social recognition, economic security, and personal satisfaction through education or work are foreclosed or foreshortened.<sup>60</sup> Under such conditions, intercourse and the subsequent decision to bear and keep a child

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 111. This is a somewhat different tack from Posner's sociobiological opener that women "must try to make every pregnancy count." See POSNER, *supra* note 3, at 91.

57. POSNER, *supra* note 3, at 91.

58. *Id.* at 110.

59. As Carol Levine and Nancy Dubler observe in their study of HIV-positive women who chose to continue their pregnancy, "[m]ost public health officials, physicians, policy makers, and the general public consider the stark reality of HIV-infected babies inexplicable, unjustified, or immoral." Carol Levine & Nancy N. Dubler, *Uncertain Risks and Bitter Realities: The Reproductive Choices of HIV-Infected Women*, 68 MILBANK Q. 321, 322 (1990).

60. See Deborah Rhode, *Teenage Pregnancy and Public Policy*, in THE POLITICS OF PREGNANCY: ADOLESCENT SEXUALITY AND PUBLIC POLICY (Deborah Rhode & Annette Lawson eds., forthcoming). Motherhood as a source of self-worth is not limited to teenagers, minorities, or the

make sense and may have far less to do with making the pregnancy count than with making the mother count.<sup>61</sup>

Sexual harassment is the second area in which rational-choice analysis might flourish. Posner gives it a solid paragraph in the section on sexual abuse of adults, where he properly notes that "the woman is often afraid to complain for fear of jeopardizing her job."<sup>62</sup> Where, however, is the in-depth analysis we get on such topics as whether homosexual men make better uncles?<sup>63</sup> Working women subject to harassment must make complex and repeated calculations that weigh the value of their job, employment alternatives, and the likelihood of prevailing in a suit against their own self-worth. *Here* is reason and (coercive) sex. Of course, one lesson learned from the Anita Hill-Clarence Thomas hearings was that reason, quite respected in other settings, transforms into a variety of irrationalities, including delusion and jealousy, in the context of sexual harassment.<sup>64</sup> Posner would do well to ponder the way a rational-choice analysis should include the cost of having one's reason demigrated in this way.

Rape is a third area that reveals how women's viewpoints are simply not part of the Posnerian landscape. We might start with "the average forcible rapist," whom Posner identifies as a "sex thief."<sup>65</sup> This kind of vocabulary sets a nasty tone. *Forcible* rapist? Okay, okay, there is rape by trick, but if Posner wants to be cute about "sex thieves," he might at least use the noun "robber," given that, even under his demeaning description, the theft is in almost all cases accomplished by force or the threat of force. As for what is stolen, Posner reports the "feminist view": Because feminists are "unlikely to value virginity or chastity," they "see rape as a threat to their control over their reproductive capacity."<sup>66</sup> This is silly on two counts. First, women past reproductive age suffer loss when raped, and even feminists think that. Second, what feminists value is consent, and they value it even for virgins.

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unemployed. See KATHLEEN GERSON, *HARD CHOICES: HOW WOMEN DECIDE ABOUT WORK, CAREER, AND MOTHERHOOD* (1985) (describing the turn to motherhood by middle-class white women when their career paths become blocked).

61. I develop this argument more fully in Carol Sanger, "*M Is for the Many Things*," 1 S. CAL. REV. L. & WOMEN'S STUD. 15 (1992).

62. POSNER, *supra* note 3, at 103.

63. *Id.*

64. See Symposium, *Gender, Race and The Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1279 (1992).

65. POSNER, *supra* note 3, at 182.

66. *Id.* at 395.

Posner's assessment of rape is that it "appears to be primarily a substitute for consensual sexual intercourse rather than a manifestation of male hostility toward women or a method of establishing or maintaining male domination."<sup>67</sup> His evidence apparently confirms "the impression that most rapists want to have sex, not to make a statement about, or contribute to, the subordination of women."<sup>68</sup> This leads us back to Posner's initial premises about sex as a given.<sup>69</sup> There is nothing "abnormal" about the activity of raping; man in his natural state is a rapist. Consider Posner's binary categorization of rapists:

One [group] consists of men who would commit rape and seduce children if there were no laws against these acts. . . . Such men are, I imagine, for the most part quite normal. The other group consists of men who commit such crimes even in societies such as ours that impose heavy criminal penalties for committing them and who in addition are caught. *This* group—the undeterred who are stupid enough to be caught—may well be dominated by psychologically disturbed or mentally deficient men.<sup>70</sup>

In other words, what makes a rapist abnormal is not raping per se but rather raping in the light of laws that prohibit rape, with an added touch of derision tossed in for getting caught doing what is otherwise a natural act.<sup>71</sup>

This analysis of rape ignores the possibility that some men may include the consent of their partner *within* the preference to have sex, and not only because the law has so advised. Many men may simply define sexual intercourse to exclude rape. This is not an abandonment of rational choice, as Posner's analysis suggests. Rather, it is the recognition that self-interest may incorporate a prior concern, respect, or sympathy for another.<sup>72</sup> As Amartya Sen has pointed out, preferences and choices may not always coincide with personal welfare.<sup>73</sup> In a variety of

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67. *Id.* at 182.

68. *Id.* at 384.

69. *Id.* at 305.

70. *Id.* at 103.

71. His view of rape as naturally normal might explain Posner's conclusion that "[s]exually liberated men value [their wives' chastity and their daughters' virginity] much less [than sexually conservative men] and may therefore be inclined to weigh more heavily the rights of men accused of rape, especially since it is a class that potentially includes themselves." POSNER, *supra* note 3, at 395.

72. See generally AMARTYA SEN, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, in CHOICE, WELFARE AND MEASUREMENT 84 (1982).

73. *Id.*

circumstances—surely including sex—“the lack of personal gain in particular *acts* [may be] accepted by considering the value of *rules* of behaviour.”<sup>74</sup> The sexual behavior of suburban American couples in the 1950s provides an example of how sexual beings sometimes make choices understood to yield lower levels of personal welfare, at least in a physical sense: “Both husbands and wives generally believed that it was more important to have sexual relations when their spouses wanted it than when they wanted it.”<sup>75</sup> Furthermore, in response to their reduced erotic expectations, these couples did not resort to extramarital affairs or to rape.<sup>76</sup>

Does harm to those raped count at all under Posner’s scheme? Under certain circumstances, such as marital rape, there may be no harm. Posner explains that “[i]n a society that prizes premarital virginity and marital chastity, the cardinal harm from rape is the destruction of those goods, and it is not inflicted by marital rape.”<sup>77</sup> Indeed, in modern times,

the nature of the harm to the wife raped by her husband is somewhat obscure. . . . Especially since the goods of virginity and chastity are not endangered, the fact of [the wife] having intercourse one more time with a man with whom she has had intercourse many times before seems marginal to the harm actually inflicted. . . .<sup>78</sup>

Posner has, however, detected a possible *benefit* for women based on his suspicion that wives may fabricate claims of marital rape to gain “leverage in divorce negotiations.”<sup>79</sup>

Finally, Posner’s repeated view that rape is just sex and not subordination or domination requires comment. Rape is not a sex substitute; many men are sexually active with consenting wives or partners at the

74. *Id.* at 104.

75. ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA* 132, 134 (1988). When these postwar couples found that erotically charged marriages were not in the cards, as many did, few turned to divorce or extramarital affairs in consequence. They were apparently “unwilling to risk the loss of reputation, the stigma and economic hardship of divorce, or the destruction of ‘togetherness’ that were likely to result if they strayed from the prescribed code.” *Id.*

76. *Id.*

77. POSNER, *supra* note 3, at 389.

78. *Id.* at 390. The nature of harms of marital rape is not obscure to the victims, who report more long-term injuries than women raped by strangers. See DEBORAH L. RHODE, *JUSTICE AND GENDER* 250 n.57 (1989). Further, as Susan Estrich has explained, “betrayal by someone you know may be every bit as terrifying or more so, than random violence.” SUSAN ESTRICH, *REAL RAPE* 25 (1987).

79. POSNER, *supra* note 3, at 389.

time they rape other women.<sup>80</sup> Rape is now well understood as an act of aggression, an assault; the criminal codes recognize this in their reformulation of the crime from "rape" to "sexual assault." American immigration law has recognized sexual assault as a form of persecution, entitling the victim to asylum status.<sup>81</sup>

In short, rape is and remains a means of domination over every individual woman who is raped, over the much larger class of women who fear rape,<sup>82</sup> over the husbands of women who are raped,<sup>83</sup> and over entire communities where mass rape of enemy civilians has historically been a tactic used to disrupt existing social structures.<sup>84</sup> And as the recent mass rapes of Muslim and Croatian women by Serbian soldiers so vividly instruct us, mass rape is used to subordinate not simply by demoralizing an entire population but by deliberately obliterating it.<sup>85</sup>

Posner's conceptualization of sex trivializes the task he has undertaken. He spends much of the book puzzling out questions that interest him but that are not, on the whole, much use to either of his intended audiences, the American judiciary or the thinking public.<sup>86</sup>

*Sex and Reason* is dense with facts, with hard-to-believe "facts," with conjecture, and with arguments withdrawn after the reader has followed a winding path to nowhere. Maybe large breasts are *not* correlated

80. See A. NICHOLAS GROTH, *MEN WHO RAPE* 5 (1979) ("Rape is never the result simply of sexual arousal that has no other opportunity for gratification.").

81. See *Lazo-Majano v. Immigration & Naturalization Serv.*, 813 F.2d 1432 (9th Cir. 1988).

82. See MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR* (1989) (analyzing the pervasiveness and causes of women's fear of rape and its consequences in American society).

83. See JACQUELINE JONES, *LABOR OF LOVE, LABORS OF SORROW* (1985) (describing how the sexual use of African-American slave women by their white masters was a torment to the women's husbands as well as to the women themselves).

84. See SUSAN BROWN MILLER, *AGAINST OUR WILL*, ch. 4 (detailing 20th-century wartime rape practices: the rape of Belgian women in World War I; the literal "Rape of Nanking" in 1937; the rape of 200,000 women in Bangladesh in 1971).

85. Stephanie Nebehay, *20,000 Moslem Women Raped by Serbs, Investigators Say*, Reuters, Jan. 8, 1993, available in LEXIS, Nexis Library; see also *A Pattern of Rape*, NEWSWEEK, Jan. 4, 1993, at 32.

86. Early on, the reader is given a list of hypotheses to be tested subsequently by an economic analysis of sex. For example, Posner postulates that "clitoridectomy and infibulation are more common in a polygamous society than in a monogamous society." POSNER, *supra* note 3, at 7. In another instance, he states that "if a city, having attracted a large number of homosexuals, stops growing, the percentage of homosexuals will continue to increase." *Id.* at 6. I say take these hypotheses, please.

with successful breast-feeding.<sup>87</sup> Maybe the reason black men don't commit fewer rapes is *not* because they have lower search costs for heterosexual sex.<sup>88</sup> Maybe women's economic well-being has *not* increased even though women have switched their focus from the home to the market.<sup>89</sup> One begins to feel sympathy with former vice-presidential candidate Admiral James Stockdale and his bewildered query to the debate audience, "Who am I? What am I doing here?"<sup>90</sup> The *Sex and Reason* reader asks, "Who is this guy Posner?" and "What am I doing here?"

Throughout *Sex and Reason* the reader has a sense of being baited by Posner's vocabulary, examples, witticisms, and claims, most of which are supported by paragraphs of footnotes. One wonders, however, if it is really true that striptease dancers are likely to be lesbian<sup>91</sup> or that homosexual men are cut out to be great uncles.<sup>92</sup> A suspicious reviewer with time on her hands might be lured into spending worthwhile hours cite checking. Instead, I shall mention but one misleading interpretation of an article with which I am familiar, to suggest possible sloppiness and occasional disingenuity in other areas. With regard to abortion, Posner states that

[f]eminists, building on the common law principle that there is no duty to rescue a stranger in distress, have argued that to forbid abortion is to conscript women to save fetuses, and that a woman's refusal to save her fetus is no more a "killing" than her refusal to warn a pedestrian that he is about to slip on a banana peel.<sup>93</sup>

The source for this statement is Judith Jarvis Thomson's important pre-*Roe v. Wade* article, *A Defense of Abortion*, the initial premise of which grants that a fetus is a person from the moment of conception.<sup>94</sup> Thomson then substitutes the fetus with a born person—a famous violinist, Henry Fonda, Kitty Genovese—to explore the obligations and sacrifices one owes to another outside the fetal context.<sup>95</sup> After a thoughtful discussion of qualitative differences among Good, Minimally Decent, and Splendid Sainaritans, Thomson concludes that, with the exception of the prohibition on abortion, "no one in any country in the world is *legally* required to do anywhere near as much as [giving up long stretches of

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87. *See id.* at 94.

88. *See id.* at 139.

89. *See id.* at 172.

90. Sara Fritz, *Win or Lose, Perot Changing Rule of Game*, L.A. TIMES, Oct. 18, 1992, at 1.

91. POSNER, *supra* note 3, at 179.

92. *Id.* at 103.

93. *Id.* at 289.

94. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

95. *Id.*

one's life] for anyone else."<sup>96</sup> Posner's reduction of Thomson's argument to banana peels is nonsense.

With regard to Posner's vocabulary, I have already objected to his labeling of a rapist as a "sex thief."<sup>97</sup> The objection is not simply a matter of feminists having no sense of humor, but rather concern with taste, civility, and sensitivity, all largely missing from the book. For example, Posner repeats a tasteless joke about homosexuals and assholes<sup>98</sup> in much the spirit of a boy who can get away with saying a dirty word in front of his parents because he is only repeating what someone else said.

Consider further Posner's classification of homosexuals into two groups: "real" and "opportunistic."<sup>99</sup> Perhaps this is another attempt at being cute. For many people, however, the word "opportunistic" has taken on common usage only recently with regard to AIDS and "opportunistic infections." This is nasty stuff, and Judge Posner should be held accountable. Posner has argued that "[t]he benefits of literature for judges . . . must be sought in the craft values displayed in works of literature, notably *impartiality* (detachment, empathy, balance, perspective, a complex awareness of the possibility of other perspectives than the writer's own), *scrupulousness*, and *concreteness*."<sup>100</sup> Labeling homosexual persons as "opportunistic" misses even a simple awareness of the perspective of others and of the associative properties of language.

In sum, Posner has now done for sex what he did for literature five years ago. Here and in his 1988 book, *Law and Literature: A Misunderstood Relation*,<sup>101</sup> Posner has chosen two topics of tremendous intrinsic interest and set out to master them, although in a very particular sense of "mastery." The results are compendia that organize the fields and cross-reference the facts, but that manage to throttle any sense of the complications of obligation and delight that our engagements with sex or with literature are likely to encompass.<sup>102</sup> Posner's world of sex is like his

96. *Id.*

97. See *supra* text accompanying note 65.

98. POSNER, *supra* note 3, at 226.

99. *Id.* at 105.

100. RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 303 (1988) (citation omitted).

101. *Id.*

102. For a critique of Posner's treatment of literature as simply another area where traditional academic vocabulary and regular propositional discourse will get us anywhere we might want to go, see James Boyd White's review of Posner's *Law and Literature*. James Boyd White, *What Can a Lawyer Learn from Literature?*, 102 HARV. L. REV. 2014 (1989).



world of literature, which, as James Boyd White has noted, relies on propositional discourse and “works by prediction, not by understanding.”<sup>103</sup>

To be sure, Posner’s world of sex and economics does not suffer from the untidiness he observed in the law and literature movement—the lack of “programmatically thrust.”<sup>104</sup> *Sex and Reason* proceeds with programmatic masculine thrust as a given. But by limiting sex to what boys do and ignoring the centrality of rational decision making over sexual matters for women in a way that bears some resemblance to the complex circumstances of modern life, *Sex and Reason* disappoints both ultimately and immediately.

If you want to read about rational choice and sex, try Thurber and White’s *Is Sex Necessary?* or Luker’s *Taking Chances*. If you want to understand the *heart* of Posner’s argument, you might try Oscar Hijuelos’ deeply contextualized fictional account of masculine sexuality, *The Mambo Kings Play Songs of Love*.

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103. *Id.* at 2047.

104. See POSNER, *supra* note 100, at 1.