

The Futility of Utility

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Law and Social Norms by Eric A. Posner (Harvard University Press, 320 pp., \$39.95)

The human mind has long exhibited a restless ambition to bring the entirety of moral and political life, in all its complexity and its manysidedness, under the sway of a single cause or an exclusive principle. The dream of a unified and comprehensive theory may well be the dream of understanding itself. But what must men and women and the world in which they live be like in order to make this dream a reality? What strategy is best suited to satisfying the mind's ambition?

As it happens, at this very moment a pitched battle rages among professors who study politics and law over the question of which method or theoretical perspective provides the key—the single key, remember—to the proper understanding of human affairs. Consider the recent skirmish in *The New York Times* in which Ian Shapiro of Yale squared off against Morris Fiorina of Stanford. Shapiro, a political theorist and a coauthor of a provocative study called *The Pathologies of Rational Choice*, argued that the decades-long effort to apply economic analysis to politics has thus far proved barren. The highly abstract formal theories and the intricate mathematical models characteristic of the rational choice perspective, contends Shapiro, have issued in claims that are either trivially true or empirically false. And the method has left unilluminated, so far at least, many of the problems that most exercise people who care about politics: what caused the collapse of communism? Why do some democracies prosper and others perish? How can health care be reformed in a manner that is both efficient and just?

In a relaxed and jocular reply, Fiorina, a widely respected proponent of the rational choice perspective, insisted that there was really nothing to get all hot and bothered about. Only a few enthusiasts, he claimed, believe that politics ought to be analyzed in economic terms alone. In any case, he observed in a reassuring and conciliatory tone, political scientists are “inveterate borrowers,” who, in the 1950s, took from psychology and sociology, in recent decades have learned what they could from economics, and are now turning to biology as a source of insight about politics.

Neither Shapiro nor Fiorina is altogether convincing. For his part, Shapiro understates the genuine successes of the rational choice perspective, in particular its capacity to generate fertile hypotheses and to suggest productive lines of inquiry—in political science, concerning the impact of institutional rules on the outcomes of Congressional lawmaking; and in law, in

the study of the comparative advantages of the variety of remedies provided by courts in contract and tort litigation, and the likely consequences of alternative public policies and competing regulatory schemes. Meanwhile, and more seriously, Fiorina misleads in numerous ways. He implies that only a few isolated practitioners of rational choice are methodologically monistic. He presents the borrowing of political scientists (of which he takes note and approves) as a kind of eclecticism, when in fact it reflects a prolonged and resolute effort to model the social sciences on the natural sciences. And he suggests that the growing interest in biology represents a departure from the rational choice paradigm, when in reality social scientists are now looking at what biology has to teach about organisms' adaptive mechanisms in order to gain further insight into what counts as a choice that is rational.

In sorting out the fine points of the professors' arguments, however, one must not lose sight of the forest for the trees—or confuse leaves and branches for trunk and roots. The squabble between Shapiro and Fiorina scanted a fundamental question: is it humane learning, including history, literature, and philosophy, that should direct the study of human affairs, or should a scientific rationalism provide the authoritative model for the quest to understand moral and political life? For some reason, neither political scientist provides the slightest acknowledgment that his debate raises old questions, much less that he is taking sides in a hotly contested, richly reasoned, and time-honored quarrel. This is a quarrel that has featured Swift, Vico, Mill, and Nietzsche (who railed against the positivism and value-free scholarship of his day, and strove to supplant it with a form of historical inquiry that he called “genealogy,” which he defended on the grounds that it was more consistent with the requirements of its free human subject), Dilthey (who suggested that “understanding” is an entirely different intellectual activity from “explanation”), Weber, and Heidegger; and more recently Hannah Arendt, Leo Strauss, Michael Oakeshott, Alasdair MacIntyre, and Charles Taylor, who all argued, in one way or another, that the interpretation of human conduct in purely scientific terms, as strictly obedient to the laws of cause and effect, diminishes human freedom and human dignity. Perhaps the quarrel between Shapiro and Fiorina extends as far back as Socrates's admonition to the young Theaetetus to be wary of mathematics—intoxicated philosophers who, believing only in that which they can count and measure and weigh, would place study of the soul outside the domain of reasoned inquiry.

Both kinds of inquiry, of course, are indispensable. What reasonable person would wish to make his way in the world, or to claim to understand moral and political life, without the knowledge that comes from the thick and rich narratives characteristic of literature and history, or without the knowledge yielded by the scientist's formal elaboration and empirical testing of lawlike causal generalizations? And yet it cannot be gainsaid that, in the study of human affairs, the spirit of finesse (as Pascal put it), of delicacy and judgment, has primacy over the spirit of geometry, or mathematical precision and scientific rigor. This is so not least because the limit and the value of science cannot be fixed.

Another critical reason for the primacy of the spirit of finesse is that human beings are what Charles Taylor has described as “self-interpreting animals.” Their interpretations—their hopes and fears, their opinions and ideas, their language and culture—are a constitutive part of the reality that the student of human affairs seeks to understand. No amount of scientific rigor will save the student of human affairs who cannot distinguish gestures of respect from gestures of flattery, a noble defeat from a pyrrhic victory, a wounded heart from a heart of stone. It is not that rigor is out of place in the explanation of human conduct, or that the actions of human beings are not subject to law-like regularities and causal explanations. But the rigor that is required for the study of human affairs involves discerning accurately the meaning of an act for an individual and a community or a society, lest one, among other things, apply the wrong rules and overlook the correct causes.

II.

Eric posner wishes to improve the economic analysis of law by incorporating into it a more rigorous understanding of the impact on behavior of the social meaning of action. In his lucidly written and sharply argued book on the relation between law and “non-legal mechanisms of cooperation,” Posner contends that many conceptual confusions and embarrassing puzzles that have been generated by the economic analysis of law can be cleared up, and the research paradigm as a whole can be advanced, by taking account of the pervasive and powerful role of social norms:

The positive branch of law and economics assumes that the individual goes about satisfying his preferences, subject to a budget constraint, but unaffected by the attitudes of others. Preferences may be egoistic or altruistic or both, but nothing, other than the state, prevents individuals from preying on each other when it serves their interests. A person will steal, or drive carelessly, or murder, or lie, unless the state erects a deterrent in the form of laws against theft, negligence, murder, and fraud. This description of the world is partly true, but mostly false. Most people refrain most of the time from antisocial behavior even when the law is absent or has no force. They

conform to social norms.

Posner, as he himself notes, is not the first law professor to observe that legal scholars, especially those at home in law and economics, have tended to underestimate, when they have not ignored outright, the place of social norms in the explanation of human conduct. But unfortunately the critics—ranging all the way back to eminent legal realists such as Karl Llewellyn and up to thoughtful contemporaries such as Cass Sunstein and Lawrence Lessig—have invoked social norms as an explanatory variable in a “profligate and inconsistent way.” Inspired by the spirit of geometry, Posner aims to go beyond the critics by providing for the study of the relation between law and social norms a new and truly rigorous “methodology” or “analytic framework” or “model.”

Posner derives his new model from game theory, the basic methodology or analytical framework that underlies much of the economic analysis of law as well as the rational choice approach in political science. Game theory seeks to produce a system of propositions that is general, formal, and deductive. It starts from the austere assumption that human beings are self-interested actors who rationally maximize their utility by engaging in various kinds of strategic action. It suggests that the recurring challenge for such individuals is to find and to maintain the conditions under which they can cooperate, for in most cases cooperation is mutually beneficial, conferring gains on these self-interested rationalists that they could not attain alone. And it tacitly sends a hopeful message about the prospects of human life: without recourse to divine authority, or to transcendent principles of justice, or to a belief in human goodness, individuals can learn to live with each other in peace and in prosperity.

Thus cooperation is possible because human beings are rational creatures capable of weighing consequences and determining efficient means for achieving their ends. But alas, human nature—in particular our indomitable desire to satisfy our own interests, including on occasion our interests in benefiting others—is not altogether obliging in this matter. It also makes cooperation difficult. One difficulty created by our essential selfishness is that the establishment of the conditions under which we can rely on others—who, like us, are essentially selfish—to honor their promises requires the very trust and cooperation that the conditions are meant to secure. Once the conditions for cooperation have been established, moreover, circumstances will frequently present the partners in these cooperative schemes—husbands and wives, fellow citizens, parties to commercial contracts—with opportunities to advance their perceived interests by means of what game theorists call “defecting” or “opportunistic behavior,” and what ordinary people call lying, cheating, and stealing. This is what makes necessary the “enforcement mechanisms” provided by the state: through its weighty apparatus of legislative bodies, executive authority, courts, and police, the state establishes a crucial condition of cooperation by imposing hefty costs on individuals who violate the law and the formal agreements into which they voluntarily enter.

The trouble with standard game-theoretical accounts, Posner points out, is that although the state and its laws do not effectively reach many corners of moral and political life, one nevertheless finds individuals in these many corners successfully cooperating to their mutual benefit. Despite the absence of rigorous state enforcement of marriage vows, a considerable number of people still get married and honor their marital obligations. Despite the absence of legal sanctions for staying at home on Election Day and the unlikelihood of decisively influencing the outcome of a national election, millions still go to the polls. Despite clumsy and inefficient courts, big and small businesses continue to enter into commercial contracts and routinely comply with them.

Many observers may find little that is remarkable in such behavior. Indeed, it may seem obvious that the explanation for the persistence of marriage, voting, and commercial contracting lies in the promptings of conscience, the call of duty, the pride in honoring one’s word, or the perfectly common concern for one’s good name and the good opinion of others.

Such explanations, however, seem to stand outside the game-theoretical universe, which permits explanations of human conduct only in the terms of rational self-interest. Posner's achievement is to secure the game-theoretical universe against the difficulties posed by the many examples of cooperation in the absence of legal enforcement mechanisms, by explaining such conduct in terms that are consistent with game theory. Indeed, from the game-theoretical perspective, Posner's explanation is striking and elegant: it is not that in some domains of moral and political life "enforcement mechanisms" are unnecessary, but that non-legal enforcement mechanisms, in the form of social norms, play a much larger role in creating the conditions for cooperation than most economists have imagined.

The key to understanding the role of social norms in the regulation of human conduct, Posner argues, is to see them as a specialized kind of game, a "signaling game," in which the prize is a reputation for trustworthiness. Rational actors have a compelling interest in behaving in a manner that, though costly in the short run, provides long-term benefits by demonstrating their reliability:

... People engage in behavioral regularities in order to show that they are desirable partners in cooperative endeavors. Defection in cooperative endeavors is deterred by fear of reputational injury, but the signaling behavior independently gives rise to forms of collective action that can be of great significance. People who care about future payoffs not only resist the temptation to cheat in a relationship; they signal their ability to resist the temptation to cheat by conforming to styles of dress, speech, conduct, and discrimination. The resulting behavioral regularities, which I describe as "social norms," can vastly enhance or diminish social welfare.

"Good types" is what Posner calls the individuals who maximize their interests by complying with social norms. He is careful to note that he means nothing moral by the appellation, only that these individuals have "low discount rates" or a high concern for "future payoffs"—or, in less technical parlance, the capacity to defer gratification. Those individuals who, by flouting social norms, acquire a reputation for being dishonest and out only for themselves Posner calls "bad types," a term he uses amorally to mean only that they have high discount rates, or care relatively little for future payoffs; or, lacking selfcontrol, sacrifice a lot of satisfaction in the future for a little satisfaction right now.

What Posner seems to be saying, in accordance with the wisdom of the ages but translated into the language of economic theory, is that reputation, or maintaining a good name, is an immensely valuable asset. What will trouble some readers is the suspicion that Posner is also claiming, with Machiavelli, that it is more important to appear good than to be good; and that he is making this claim for the same reason that Machiavelli did, on the grounds that morality is a mirage, or at least a discourse that is reducible to something more fundamental and thoroughly nonmoral.

Once one grasps the rational interest in reputation that motivates individuals to comply with social norms, one can provide explanations from the economic perspective to perplexities that have defied analysis in economic terms: why, despite the considerable autonomy granted to families by traditional marital law, spouses still often honor marital obligations; and why individuals vote, given the almost infinitely remote prospect that their ballot will determine the outcome of the election; and why parties honor commercial contracts notwithstanding that the judicial system, whose responsibility it is to enforce contracts and to remedy their breaches, is costly and inefficient. Yet Posner's norm-based economic analysis of these perplexities begs a big question. Who says that economic terms provide the best terms or the only terms for the understanding of marriage, citizenship, and commercial contracts? Just because you can sustain yourself on a diet of bread and butter and beans and berries does not mean that it is reasonable to be satisfied with such austere provisions, or that you would not prosper on richer fare.

Consider Posner's analysis of family law. The puzzle from the economic perspective is why individuals generally obey their marriage vows:

On the one hand, people who form family relationships obtain valuable goods and services that are for the most part not available from the market and other outside institutions, and they do so without depending on formal contract law backed up by the threat of government enforcement. On the other hand, to the extent that people do not rely on government enforcement of marital obligations, they become highly vulnerable to opportunism within the family.

The "marital surplus"—an economic term that Posner uses to designate what are commonly thought of as moral phenomena, namely the "valuable goods and services" obtained through marriage—may vary from time to time and place to place, but generally speaking it "consists of the benefits from having children, the emotional benefits from companionship and sexual intimacy, mutual aid, and many other valuable goods and services." The marital surplus depends on compliance with "marital 'obligations'"—an ethical term that Posner uses to designate phenomena that he has already translated into economic terms, namely the common interest of spouses in maximizing the marital surplus. But how do people select their spouses? What actions and arrangements enable individuals to maximize the marital surplus? What would be "the optimal marriage laws"?

Courtship, contends Posner, should be understood as a strategic game. Aligning himself with Jane Austen—if the courtship and marriage of Elizabeth Bennet and Mr. Darcy can be captured in economic terms, what love can resist such redescription?—Posner argues that while the stakes are no longer as high as in Austen's day, "particularly for a young woman of elite society, whose future depended to a great extent on whether she made a good match," the courtship game is still played with intensity. In courtship, people look for signs of, and

send signals declaring their own, “healthiness, including fertility; wealth and wealth-generating assets including human capital; charm, humor, and other qualities that make for an attractive companion.”

Posner particularly emphasizes are the signals that people send to show that they are trustworthy. Trustworthiness is a prerequisite for enjoying all the goods associated with marriage “because only trustworthy people will incur the short-term costs necessary to produce the long-term marital surplus.” In courting, one can demonstrate one’s trustworthiness, for example, by giving expensive gifts selected especially for the object of one’s affection, for such gifts demonstrate that the gift-giver, in the interests of a long-term relationship, is willing to incur costs of time and money, and is wealthy enough to do so. Celibacy in courtship, the willingness to delay sexual gratification, can show devotion by virtue of the deprivation that one is willing to undergo. At the same time, premarital sex can also be a way for partners to prove that they are healthy and attractive.

And the need for signaling by no means abates in marriage. In game-theoretical terms, marriage is a relationship in which “each spouse deters the other from cheating by threatening to punish any transgressions of the marital obligations.” How does one know whether one’s spouse is cooperating or cheating? Since information is never perfect, signals must be sent. In the traditional family, the propensity to cooperate is signaled through gift-giving, regular celebrations, and a shrewdly designed division of labor and rewards between husband and wife. The wife takes care of the house and rears the children. When the children are poorly behaved, the wife incurs the immediate consequences at home each day, but, when the rearing goes well, she reaps the benefits of a close connection to her offspring. The husband works outside the home for wages. He is constrained to do his job conscientiously because he alone is responsible for wages. While he misses out on a close bond with the children, success in his career earns him honor and public recognition.

Posner observes that the new family, in which both spouses are likely to work outside the home and both take some responsibility for child rearing, has destabilized the family by creating new opportunities for cheating without forging compensating enforcement mechanisms, legal or non-legal. Yet his analysis is basically optimistic: people are rational actors, and so it is likely that non-legal enforcement mechanisms appropriate to the new family will arise, for “social norms are endogenous in games in which people maximize their interests through cooperation.” In other words, since social norms “do not exist independent of people’s interests, beliefs, and behavior,” new social norms, consistent with new interests, beliefs, and behaviors will come into being.

But what of the interim, of the perplexing period when old social norms are losing their efficacy and new norms are still forming? In times of change, can game-theoretical analysis offer any advice on how the law, or legal enforcement mechanisms, can be employed to

protect marriage, and increase the marital surplus? Posner considers briefly the law of divorce, intra-marital disputes, the treatment of children, and same-sex marriage. He concludes fairly quickly that in all cases “successful legal intervention” is unlikely, because

to change behavior substantially, the state would have to launch a full-scale assault against all the near substitutes of marriage, and this would mean bringing back archaic penalties on fornication, adultery, illegitimacy, and serial polygamy. Given the indifference to these behaviors among a large sector of the population, and the powerful interests that support them, a successful legal intervention—one that encouraged marriage, deferred cohabitation and illegitimacy, discouraged divorce, and maximized the marital surpluses—would have to be dramatic and highly coercive. This would be

neither desirable nor, as long as current trends continue, possible.

These are sensible conclusions. They are also, in the context of Posner’s theorizing, revealing conclusions. For while his invocation of social norms in the analysis of family law may not be “profligate” or “inconsistent,” Posner’s parsimony and consistency do not seem to have yielded him much of a gain in understanding, beyond the assuredly crucial lesson that the powers of habit, custom, and convention render the law a clumsy and blunt tool for effecting social change. Moreover, the economic analysis of family law and social norms does not seem to have obviated the need for moral judgment in determining which laws are optimal, as evidenced by Posner’s contention that “highly coercive” laws are “undesirable,” a judgment that seems to rest on the proposition that choice, or individual freedom, is a primary good. But it does make it more difficult, and it obscures the need, to explain what freedom is good for.

Posner applies his model of cooperation to a number of areas of law, and he consistently comes up with illuminating game-theoretical solutions to game-theoretical problems. Two more examples must suffice. Posner seeks to understand the so-called voting paradox—the problem, again, of why rational actors, whose individual votes almost certainly will not decide the outcome of an election, bother to vote—by viewing voting as a form of “patriotic symbolism.” Through the act of voting one engages in symbolic behavior that demonstrates that one is loyal to the state. It is rational to engage in the time-consuming act of casting a ballot precisely because your vote will have little effect on who wins: you show that you belong to the good type by participating in an onerous ritual that has no other likely benefit to you. (Or voting would be rational if, unlike in the world in which we happen to live, people whose opinion mattered to you actually saw you entering the voting booth.)

Consider also Posner’s analysis of commercial behavior. Why do merchants and businessmen honor contracts, when it is plain that courts—which usually lack expertise and suffer from heavy case backlogs—provide a highly imperfect enforcement mechanism? One reason is that rational actors who do business in a community and engage in repeat transactions with the same party, or who trade with many parties, have a rational interest in establishing a

reputation for honoring their agreements. As Benjamin Franklin counseled, honesty is the best policy. Posner goes beyond Franklin by suggesting that not only does morality pay, but there is nothing more to morality than the profit, or the satisfaction of preference, that it procures.

III.

Imputing such an opinion to Posner may seem inappropriate, for it might appear that his model of cooperation is careful to take no stand on the question of the morality's ultimate status. In fact, though, a specific view about the nature of morality is inscribed in the very manner in which Posner defines and analyzes social norms. Posner's use of the terms "social norm" and "norm" differs significantly from most people's understanding of the term.

In ordinary usage, "norm" refers both to a regularity and to a standard. When people say that the norm in our society is to treat each individual as equal in the eyes of the law, they mean that such equality is typical and that is just or good. Of course, what is typical is not necessarily just or good, and what is just or good is not necessarily typical. Discrimination on the basis of skin color was once typical in this country, but it was always unjust. For many social scientists, indeed, a "normative statement" is a moral judgment, a statement about values or what ought to be the case, and the opposite of a "descriptive statement," or observation about facts or what is the case. The point is that the ambiguity, the tension between behavioral regularity and moral standard, between the typical and the just or good, is built into our notion of a norm. And Posner's redefinition of social norm as a behavioral regularity eliminates the tension in such a way as to imply that the just and the good are intelligible entirely in terms of the behavioral, that all we need to know about morality can be understood in instrumental terms.

The polemic embedded in Posner's vocabulary is not excused by observing that it is the very purpose of a model or a formal theory to purify terms, to abstract, to to simplify. For Posner need not have seized on "norm" as a technical term to denote a behavioral regularity; he could have used "convention," or "social practice," or "behavioral regularity." Indeed, a recurring feature of Posner's model-making is the use of moral terms in nonmoral contexts. Thus a "marital obligation" is not a duty, it is an interest. It was Hobbes' subversive rhetorical strategy to reinterpret the laws of nature as prudent maxims of self-preservation, and thereby to eviscerate the moral content of the traditional moral vocabulary that he continued to employ; and in a vaguely similar way Posner routinely uses moral language in his analysis to refer to nonmoral or instrumental conduct. At the same time he eliminates the language of morality where it seems most essential—performing the remarkable feat of writing an entire chapter on marriage and the family without ever mentioning love.

The effect of the relentless message—excuse me, the relentless signal—sent by Posner's rhetoric is to proclaim that social norms are the only sort of norms there are, or at least the only norms worth studying for the purpose of understanding human affairs. Nor is this

message about morality only communicated rhetorically and subliminally. Posner squarely addresses the claim that principle can be a reason for action in politics; that on occasion individuals will refuse to make trade-offs; that some options and goods are incommensurable, and so certain deeds are wrong no matter how well one might be paid for performing them. Not true, he says. What purports to be principled action is always strategic action:

My argument is that although the incommensurability thesis often describes peoples' representations about themselves, it does not describe their actual behaviors, that is, the choices they make in everyday life, although their representations sometimes influence their behavior. People rationally make incommensurability claims in order to obtain strategic advantages in their interactions with others. Incommensurability claims do not reflect peoples' interests and values; they conceal them.

As with honor, duty, love, and every other good that makes a claim to stand above human beings and to draw our gaze upward, Posner's game-theoretical approach requires that principles must be explained as something else, namely, a form of rational self-interest. In Posner's account, people have an interest in appearing to be principled, in maintaining a reputation for acting consistently and placing some goods—friends, family, one's sacred honor—beyond market considerations. When we seek to appear to put devotion to some action or good or person beyond market considerations, it is always on the basis of market considerations.

When push comes to shove, if enough money is dangled in front of your nose, or if necessity bears down harshly enough in the form of threats to your life and limb, then you will find a way to put supposed incommensurables in the balance. This is how Posner would explain the behavior of the wealthy, well-bred men on the Titanic who leapt into lifeboats ahead of women and children; and of the numerous deserters on both sides in the Civil War; and of the spouses and lovers who, when temptation and the low risk of getting caught combine, violate with abandon their promises of fidelity.

But how would Posner explain the numerous gentlemen, by far the majority, who went down with the Titanic in honor of the principle women and children first? Or understand the large numbers of soldiers documented in James McPherson's stirring book *Of Cause and Comrades*, who enlisted in the Union Army and the Confederate Army on the basis of principle, and who entered the fray motivated by principle, and re-enlisted and returned to the hellish battlegrounds in the name of principle? Or make sense of those lovers, many unsung owing to the dictates of discretion and devotion, for whom the beloved is more precious than life itself? No doubt all such conduct can be re-described in game-theoretical terms. What is astonishing is how much less we know about our humanity when we do so.

IV.

Eric posner's model of human affairs reflects a generally upbeat outlook, belying the famous designation of economics as the dismal science. Locating the source of cooperation in selfishness, and finding deep rationality in what have appeared to many economists and noneconomists alike to be irrational forms of behavior, Posner's analysis suggests that letting people alone tends to advance both order and freedom. On occasion, it is true, he seems not so much to be telling us something that we don't know as telling economists something that they don't know, in terms that they can understand. And the austerity of his method inhibits Posner from making clear the values or the goods, particularly the good of individual freedom, that his analysis advances. For the most part, however, Posner's rigorous application of his model of cooperation to a rich variety of issues in moral and political life is deft and stimulating. Indeed, it provides an enlightening contemporary perspective on the ancient proposition, championed by, among others, Thrasymachus in Plato's Republic, that it is not justice that is choiceworthy but rather a reputation for justice.

To be sure, there are notions internal to Posner's perspective that warrant much greater elaboration. If all human beings are by nature rational actors, how is it that some communities form individuals who tend to have a low discount rate, or less of a habit of restraining themselves in the present for the sake of greater pleasure and profit in the future, and some do not? What qualities of mind and character—or, in the language of Hobbes, what moral virtues—does cooperation depend upon? What beliefs, practices, and institutions foster, or do not foster, the qualities of mind and character that support cooperation?

Posner's analysis also gives rise to questions that lead one beyond his framework. For surely our understanding of the law is bound up with opinions about metaphysics, morals, and man. The economic analysis of law aims to distinguish law from morals so as to produce a more rigorously scientific understanding of the law. Proponents of the approach sometimes claim that distinguishing law from morals does not decide the question of morality, but merely sets it aside. This may be the case in some efforts to distinguish law from ethics; but the protestations of methodological modesty notwithstanding, game-theoretical analysis effects this separation by taking a stand on the nature of the universe, the status of morality, and the quality of our humanity. With Hobbes (but without ever quite owning up to the filiation), the game theorist supposes that the world is matter in motion and nothing more; that there is no greatest good or ultimate aim, no human perfection or salvation; that the primary and only salient motive for human conduct is rational self-interest.

Of course, rational self-interest is a powerful motive of human conduct, and so it is to be expected that game theory will continue to shed light on many areas of moral and political life. But surely it is an open question— and it is likely to remain one, so long as people desire and think and love— whether, when all is said and done, the world is nothing more than matter in motion, and whether the soul can be reduced to what is doubtless one of its most common and powerful drives; and so surely it is a mistake to grant the game-theoretical approach the sovereignty in the study of human affairs that it avidly, and on occasion imperiously, seeks. Economics casts light, but economicism casts darkness.

When their thoughts turn to practice, proponents of the game-theoretical analysis tend to look upon law as a technique of rational social control. Not for them the antiquated talk about the majesty of the law, or the idea that the law is a noble calling, which summons from lawyers and judges love of fair process, a sense of proportion, personal integrity, the art of deliberation, the virtue of practical wisdom. Not for them the silly, sentimental speculation that the rule of law, understood as a system of rights and responsibilities in which each citizen is treated by the state as essentially free and equal, is a system befitting the dignity of man. The philosophical implications of the law must be overcome. The law must be demystified and translated into its homelier components, the better to serve the interests of us all.

But finally the law really cannot do without the dignity of man, if it is to command the assent and even the awe that it must command. To strip the law of its majesty, man must first be divested of his dignity. There may be rationality in all these clever actors making strategic moves for the aggrandizement of their interests; but there is not much dignity. Are men and women who have been divested of their dignity worthy of respect by the law? And is a law that has lost its majesty capable of commanding the respect even of these rational actors? These are questions, at once empirical and moral, that turn on the structure of the soul, or, if you prefer, on the logic of human desire. However these questions are finally answered, it is reasonable to believe that the game-theoretical standpoint, in its quest for comprehensiveness, diminishes us, if in no other way than by making us small in our own eyes. Insofar as we are small, game theory may explain what we do; but we are not only small.