

Beware of books with the word "sex" in the title. You could find yourself being told that "sexual reproduction is a low-risk strategy analogous to that of an investor who holds a diversified portfolio of securities." While there are doubtless economists who might find such an assertion titillating,

you would not want to be in the same room with them. But economic analogies come easily to the legal scholar and circuit court judge Richard Posner, one of the founders of the "law and economics" movement that arose in the early sixties. Law-and-economics theorists span the ideological spectrum but share the view that economic analysis is useful in understanding law and its effects. In previous books, Posner has applied the tools of economics to questions of judicial decision-making, the role of the courts, the relation between law and morality, and the limits of interpretation. *Sex and Reason* addresses the relationship between biology and culture, the regulation of sexual behavior, and the value of marriage and conventional morality.

Posner was moved to write this book when it dawned on him that judges "know next to nothing" about sex outside their own limited experience—more limited than that of most people, he suggests. Yet they are confronted with a growing number of cases involving complicated sexual issues. Posner wishes to provide a "theory of sexuality that both explains the principal regularities in the practice of sex and in its social, including legal, regulation and points the way toward reforms in that regulation." The theory, says Posner, will be grounded in libertarian values and will rely on a "functional, secular, instrumental, utilitarian" mode of analysis.

Posner begins with the assumption that human sexuality is a mix of givens and choices. Givens include the sex

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SEX AND REASON

Richard A. Posner

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reviewed by ELIZABETH KRISTOL

drive, general differences between male and female sexuality, and the existence of homosexuality. Choices include individual sexual behavior and the ways in which cultures encourage or deter that behavior. Posner quickly moves to demystify sex; it is, he insists, subject to the same guiding principle as all other human activity: "rational man goes where the balance of costs and benefits inclines." For example, he suggests that sexual diversity flourishes in cities because a large and concentrated population reduces the "search costs" of finding a suitable sex partner. Cities also offer more privacy and anonymity than small towns, so there are fewer deterrents to aberrant behavior. Homosexual promiscuity, Posner theorizes, may reflect the costs of public intolerance; to avoid the risk of conducting relationships openly, homosexuals "will tend to substitute the sex act, which can be performed in a very short time and in private, for courtship, which is public and protracted." He also speculates that effeminacy may be a form of signaling, a "device for reducing the costs of sexual search." When people find their search for an appropriate mate obstructed, Posner says, they channel their drives into other areas, such as fetishism, voyeurism, or rape.

According to Posner, the single factor that most complicates the calculus of costs and benefits in the area of sex is the institution of "companionate" marriage—the notion, promoted by the early Christian church, that marriage should be founded on love and be a genuine partnership between husband and wife. This form of marriage greatly elevated the status of women from that in pagan societies, but accord-

ing to Posner it has had some unfortunate side-effects. It "problematized" a host of behaviors, including homosexuality, adultery, and prostitution, that were ignored or tolerated when arranged marriages were the norm. It helped foster a homosexual subculture, since homosexuals who would have married

in a system of non-companionate marriage found it difficult to do so when marriage demanded a high level of emotional and sexual intimacy. But the most profound effect of companionate marriage, Posner asserts, was the development of a puritan sexual morality that came into being to discourage husbands and their newly liberated wives from straying.

Marriage, in this view, is only as secure as the morality that keeps the struggling spouses in line. When moral or religious forces decline, as they have in most contemporary Western nations, societies may turn to law to regulate sexual behavior. This is a tendency that Posner the libertarian vigorously opposes. The state, he says, should regard sex as "morally indifferent." It should adopt the same laissez-faire attitude toward sex as toward any other activity, restricting it "only to the extent required by economic or other utilitarian considerations." These considerations, in his view, do not justify banning prostitution or most forms of pornography, or restricting the freedom of homosexuals to hold certain jobs or to adopt children. The battles surrounding surrogate motherhood cases could be avoided, says Posner, if only contracts were rigorously enforced. And he notes that the current adoption picture, with thousands of parents waiting years to adopt a baby or resorting to a black market, could be improved by shifting to a free market in baby-selling—or what he demurely prefers to call "parental-rights" selling.

Posner's clinical detachment leads him down some strange paths. His discussion of rape is especially cold-blooded. He struggles with the difficulty of producing a utilitarian justification for criminalizing rape (since the pleasure a sadistic rapist

gains from the act may exceed the pain of his victim) and finally comes up with three possible justifications: the rapist is a "sex thief"; rape increases the amount of fear in a community; and rape raises the cost of self-protective measures. True to his ground rules, sympathy for the victim and moral disgust are not allowed to dominate the calculus.

Posner's treatment of date rape is even less satisfying. He doubts that tougher laws against date rape would help women, since it is a difficult charge to prove. Moreover, he adds, the "median woman" might suffer if there were more stringent penalties for date rape. According to Posner, men would be deterred from dating by the specter of rape accusations, and women would respond to this decline in their social life by becoming more aggressive about initiating dates. This analysis reflects a peculiar view of women: it is not at all clear that they would rather maintain a fixed level of dating than screen out potential rapists—even if that means spending a few more evenings at home with a *Lean Cuisine*. Posner's relatively cavalier treatment of date rape is especially strange, given his casual assertion, earlier in *Sex and Reason*, that "quite normal" men would rape if there were no laws against it.

Moral revulsion may play a small role in the utilitarian analysis of rape, but it makes a number of surprise appearances elsewhere in *Sex and Reason*. In his treatment of homosexual marriage, for example, Posner is willing to take into account public prejudice against homosexuality. He fears that legalizing homosexual marriage would appear to sanction behavior that many people disapprove of. It would also put government in the "dishonest position" of painting an overly rosy picture of homosexual life. Finally, it would create certain "information costs"—for example, "if we invite people to a party and ask them to bring their spouses, we know that each man will either come alone or bring a woman and that each woman will either come alone or bring a man. . . . [This understanding] would be upset by permitting homosexual marriage." Only in the looking-glass world of utilitarian thinking can one downplay the impact of rape on its victim while fretting over the

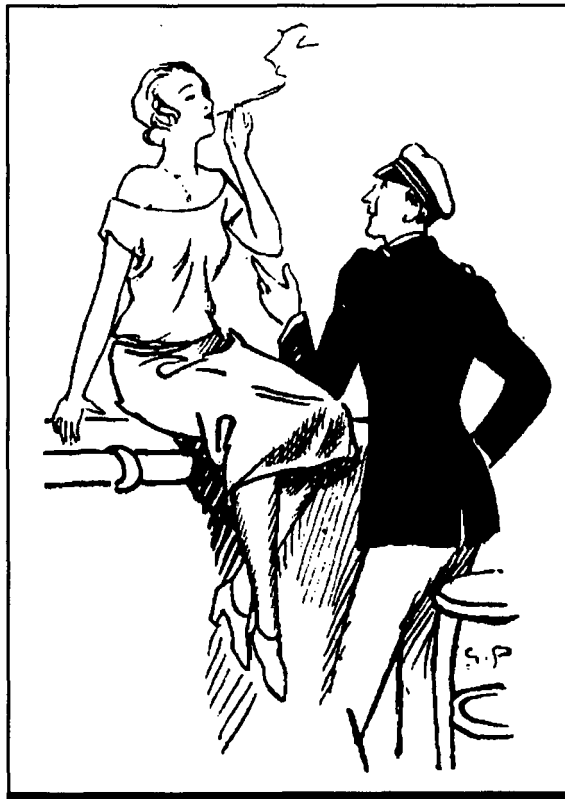
impact of homosexual marriage on a dinner party.

The infinite malleability of utilitarianism is most glaring in Posner's treatment of abortion. He goes through the motions of presenting an excruciatingly objective analysis, even weighing the possibility that abortion may actually *save* lives. If abortion were outlawed, he reasons, society would become overpopulated sooner, and people would refrain from having children; thus, "children would not be born who would have been born had abortions been permitted in the earlier period." This analysis leads him to ponder the contention that "abortion kills, as it were, only half a child," since when one factors in questions of timing and replacement value, it takes

gal abortion, and to these women's other children, present or future."

Posner concludes that the economic-utilitarian analysis of abortion is inconclusive. "We need a tiebreaker, a method for allocating the risk of nonpersuasion, such as a preference for limited government. . . . No impartial tiebreaker suggests itself." But the game was rigged from the start: all the variables in Posner's seemingly neutral economic calculus were of his own design, and had he programmed different factors into the calculus, or assigned them different values, he could have averted a stalemate. The notion of a "tiebreaker" seems especially disingenuous, given that the rest of *Sex and Reason* supports a pro-choice position and seems to do so for reasons other than the default setting of libertarianism.

Posner's pro-choice sympathies are underscored in his chapter "The Sexual Revolution in the Courts." Here Posner develops his vision of a judiciary that plays an activist role, not only in removing unnecessary restrictions on sexual liberty, but in reshaping American attitudes about human sexuality. Posner has high praise for the 1965-77 Supreme Court for creating a constitutional right of "sexual autonomy"; *Roe v. Wade* in particular "emerges as a statement of social policy congruent with the model of morally indifferent sex." Posner's only regret is that, by lumping sexual behavior under the rubric of "privacy" rather than "liberty," the Court shied away from explicitly endorsing sexual freedom. This, Posner charges, was "an attempt by semantic legerdemain to make sexual liberty appear to occupy a different plane of social value from economic liberty. It does not." Posner also criticizes Justice Blackmun's opinion for failing to "dramatize the hardships" of a woman forced to carry her fetus to term: "There is no mention of the woman who is raped, who is poor, or whose fetus is deformed. There is no reference to the death of women from illegal abortions." (This is a strange burst of compassion from someone who regards a rapist as a "sex thief.") Posner is gloomy about the fate of sexual liberty under the current Court: it will be many years, he laments, before the Supreme Court "again takes



1.83 abortions to reduce the population by one. He takes a stab at some quantitative analysis of his own, positing that "the benefits of 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." These benefits, he says, must be traded off against "the costs, unrelated to death, to pregnant mothers who would have gotten a legal abortion but would not risk an ille-

up the cudgels on behalf of sexual liberty."

For a brief shining period, though, "the Supreme Court had set the United States on a course of convergence with Sweden in matters related to sex." For Posner there can be no higher praise. Over and over in *Sex and Reason* Posner extols the virtues of the Swedish approach to sex. The problem with the United States, he says, is that we live in a confusing no-man's-land between permissiveness and repression. On the policy level we allow teenagers to obtain contraceptives, have abortions, and receive welfare assistance for their illegitimate children, but our public rhetoric still reflects puritanical sexual values. Sweden, however, has liberated itself from both public regulation of sexual behavior and traditional mores, and has thereby taken "a big step toward the model of morally indifferent sex." Sweden has even avoided the unfortunate by-products of companionate marriage, since in Sweden legal marriage—"a relationship imposing rights and duties that cannot be altered by contract"—has largely given way to contractual cohabitation, which is open to heterosexuals and homosexuals alike. A widespread replacement of conventional marriage with contractual relationships, says Posner, would make "the current realities of marriage transparent."

In one of the many footnotes in *Sex and Reason*, Posner states that his endorsement of morally indifferent sex applies only to "the public or political side of morality." But it is clear that Posner would like to eliminate much of the moral baggage from the private realm as well. He repeatedly praises Bertrand Russell, who in his 1929 book *Marriage and Morals* argued for more liberated attitudes toward premarital sex, sexual relations within marriage, and the sexual education of children. Posner agrees with Russell that Christian morality has done much harm. *Sex and Reason* is full of references to the "dysfunctionality" and "prudishness" of Christian sex ethics, and to the "puritanical attitudes" that prevail in "monotheistic" cultures. In an especially cheap shot, Posner takes on, as his sole example of Christian moral thought, the dated and discredited writings of Anita Bryant. Fortunately, says Posner, we now have the means to

slough off the vestiges of conventional morality: the "acid bath of economics" can help us peel away "layers of ignorance, ideology, superstition, and prejudice." Moral convictions, Posner implies, are largely a product of ignorance. "Were that ignorance dispelled, we might move rapidly toward the model of morally indifferent sex."

Posner admits that some of the policies he would favor to dispel ignorance are not exactly libertarian. Again, Sweden provides the inspiration: "The Swedish experience suggests that an aggressive program of explicit sex education, coupled with an aggressive program of making contraceptives available to teenagers, can reduce the rate of pregnancy to low levels in a teenage population that is even more active sexually than the corresponding American population." What makes the Swedish effort so effective, says Posner, is that the atti-



tude of morally indifferent sex that is promoted in the schools is reinforced at home by the parents. Posner would like to see American parents become similarly enlightened. This is a twofold departure from libertarianism: not only is Posner suggesting that we use the state to promulgate a specific set of moral values—in this case, those that "deproblematize" sex—but he is indifferent to the right of parents to inculcate values in their children without having those values undermined by the state. Posner's support of parental liberty seems to hinge on the values being transmitted: elsewhere in *Sex and Reason* he expresses sympathy for parents whose "autonomy"

was threatened when the state prevented them from obtaining birth control for their children.

Children don't loom large in Posner's worldview. He rarely factors in emotional and psychological considerations when discussing policy issues, and never evaluates the effects of behavior or policies on the formation (or deformation) of character. For example, when he discusses the evolution from traditional marriage to contractual relationships that, by his own account, would be marked by a higher level of transience and dissolution, Posner acknowledges only that children might experience a "diminution in resources"—a diminution that could be compensated for, if a society chooses to do so, by government expenditure. No study, he says, has ever proved that the absence of a father, *per se*, harms a child.

Posner's treatment of free-market adoption is hardly more nuanced. Anticipating the obvious question of how a child's interests would be protected in a market of baby-selling, Posner simply cites the inefficiencies and occasional errors of our current highly regulated adoption system. Besides, he says, we could always take the extra precaution of restricting free-market adoptions to babies under six months old, since "very few" child molesters are interested in infants and "very few" would buy a baby for future abuse. As for premarital sex, Posner deems it "a generally harmless source of pleasure and for some people an important stage of marital search." The only possible downside is pregnancy—a practical glitch that can be controlled by contraception.

Bertrand Russell can hardly be accused of having been a paragon of bourgeois behavior: his personal life was a tangle of failed marriages, affairs, and infidelities. But his *Marriage and Morals*, from which Posner takes such inspiration, shows far greater sensitivity than *Sex and Reason* to the social ramifications of sexual policies. Russell was especially fearful for the well-being of children, and stressed that only adults without children should enjoy sexual liberty, experimentation, and trial marriage. The famous sexual revolutionary urged unhappy couples to stay together for the sake of the children and admitted that "the break-up of the family, if it comes

about, will not be, to my mind, a matter for rejoicing." He claimed that only the institution of the family "preserves the habit of having children," and he speculated that, as women became increasingly liberated financially and sexually (something he wholeheartedly endorsed), fatherhood would become increasingly superfluous. Russell felt that the consequences of this development would be nothing less than revolutionary:

If this comes about, it will make a profound change in the psychology and activities of men, far more profound, I believe, than most people would assume. Whether the effect upon men would be good or bad, I do not venture to say. It would eliminate from their lives the only emotion equal in importance to sex love. It would make sex love itself more trivial. It would make it far more difficult to take an interest in anything after one's own death. . . . It would diminish their interest in history and their sense of the continuity of historical tradition. . . . To strike a balance between good and bad effects is scarcely possible, but it is evident that the effects would be profound and far-reaching.

Posner credits *Marriage and Morals* with advancing a notion of morally indifferent sex, but Russell stressed that even the most liberated view of sex must be rooted in morality. A modern "sex morality" should be free from superstition, said Russell, but it should still be grounded in two timeless principles:

There should be as much as possible of that deep, serious love between man and woman which embraces the whole personality of both and leads to a fusion by which each is enriched and enhanced. The second thing of importance is that there should be adequate care of children, physical and psychological.

In contrast, *Sex and Reason* has this to say about love: "Love can be given a precise economic meaning . . . it is a preoccupation with the unique particulars of another person, particulars for which there is, by definition, no substitute to be found in any other person." The burden is on Posner to show how love can flourish in a culture of "morally indifferent" sex, and how children can thrive in a society that devalues the family. □

RISING SUN

Michael Crichton

Alfred A. Knopf/335 pages/\$22

reviewed by JOHN PODHORETZ

"You're not suggesting, Sir Denis, that we are up against Dr. Fu Manchu?" . . .

"I believe there is no secret society of this character, however small or remote, which is not affiliated to the organization known as the Si-Fan. That natives of the Pacific Islands are indirectly controlled by this group, I know for a fact; why not Negroes of West Africa?"

—The Mask of Fu Manchu, 1907

Why not Americans in Los Angeles, 1992? Not since the early decades of this century, when Sax Rohmer wrote his series of potboilers about "the stupendous genius" Fu Manchu and his Si-Fan—"the most ghastly menace to our civilization which has appeared since Attila the Hun!"—has there been so outrageous a work of popular fiction as Michael Crichton's best-selling *Rising Sun*. It not only "delivers the unique Crichton mix—breathtaking suspense and cutting edge technology—at its most explosive," as the dust jacket promises, but also includes a three-page bibliography of various treatises on the supposed Japanese takeover of the United States.

But though Crichton directs his readers to the turgid whinings of Clyde Prestowitz and his ilk, his work is far closer to Rohmer's in spirit and tone. The Fu Manchu books popularized the idea of a pan-Asian "Yellow Peril." So does Crichton's, only his novel condemns an entire nation, not a fanciful genius with hypnotic powers and a very, very long moustache.

Rising Sun is ostensibly a police procedural about the murder of a Los Angeles party girl which has been captured on videotape that turns out to have been

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electronically doctored. The murder, in fact, is tied up in the politically controversial sale of a high-tech American company to a Japanese firm. So eager are the Japanese for the sale to go through that they obstruct the police investigation. They try to buy a house for one of the detectives and when he refuses, they have him investigated for child abuse. They even send assassins to dispatch a policeman in his home where his infant daughter must cower in terror on the floor.

You'll notice I keep using the word "they" to describe the Japanese. That's because it's Crichton's favorite word in this novel. Every character within whose eyes are slanted is interchangeable. Every one of them has the same secret motives and the same pernicious ends in mind—save a turncoat female who helps the police because she grew up handicapped and was therefore ostracized by her fellow Japanese. "I do not mind if they suffer a little now," she says, and adds, "Oh, I hate them!"

Rising Sun is not without virtues, as befits the author of such great airplane reading as *The Andromeda Strain* and *Jurassic Park*. Crichton has come up with a stunning plot—albeit one so technical and special-effects-laden that it will be far easier to understand when it hits your local movie screen next year. But for the most part, his book reads less like a novel and more like the transcription of a radio call-in show in Detroit right after one of the Big Three announces a bunch of layoffs.

A bitter cop: "This country's in a war and some people understand it, and other people are siding with the enemy."

Another cop: "What do you want to do, write your congressman? They're all working for the Japanese anyway." →