Book Review: 'Law's Order, What Economics Has to Do with Law and Why It Matters', by David D. Friedman[*]

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- ***David D. Friedman, Law's Order, What Economics Has to Do with Law and Why It Matters, Princeton University Press, Princeton, New Jersey, 2000, $20.97.***

1. POSTner

Is Posner after Posner possible? David Friedman has shown that it is nearly possible: *Law's Order* is probably the most stimulating general introduction to the Economic Analysis of law in the last years. This and other qualities - such as his eloquent English and the controversial nature of some of his hypotheses -, makes Friedman's book a brilliant successor of Richard Posner, *Economic Analysis of Law*, 5th edition, Aspen Publishers, New York, 1998.

But as I said, only nearly. *Law's Order* is shorter than *Economic Analysis of Law*. The work starts with approximately 100 pages on the basic economic theory of Law (chapters 1 to 9), which according to Friedman is basically price theory: the author mentions game theory only to immediately and unfairly state that it actually doesn't work ("game theory … is ambiguous until you assume away large parts of the problem in the details of how you set it up", p.86). The rest of the book deals with property rights (chapters 10 and 11), contracts (chapter 12), the family (chapter 13), law of tort (chapter 14), criminal law (chapter 15), competition (chapter 16), a very brief *excursus* on social rules (chapter 17: the cases of the king-less country, Iceland, from the tenth century to the mid-thirteenth century; criminal law without prisons but with gallows and *transportation*, Great Britain until 1830, and the - so it seems - inevitable story of the Shasta Valley farmers), more on the law of tort and criminal law (chapter 18: among the most creative and open) to finish with a homage to Posner himself (chapter 19: an analysis of the conjecture from Landes/Posner on the efficiency of *Common Law*).

2. Between two seas

Another mostly positive feature of *Law's Order* is that potential readers can more or less choose between buying the paper edition or - if they have a lot of patience and enough time - consulting it on the web (www.best.com/~ddfr/laws_order/, and not www.best.com/~ddfr/laws_order/:, as recommended on page six of the paper edition). It should be noted that the paper edition needs the website, because it is there that the author has published the quotations, links to books and articles, the cases, the mathematical appendices and - strangely - some additional comments. The entire work is therefore halfway between two worlds that both need each other.

Is this necessarily a bad thing? Perhaps more than one incurable internet surfer will think that Friedman is sitting on the fence. Maybe so, but as on-line books are not easy enough to

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use yet (Friedman's is mainly aimed at teaching the economic analysis of law to American law students, the equivalent of our postgraduates) and in a lecture room with people interacting, the printed book is still a better tool than computers. Not for long, I assume. In any case, the reader would do well to consult the materials on the web.

3. Contempt for Justice

Like Posner, Friedman sometimes tends to make disparaging remarks in perfect, articulate English. Perhaps the most scorned institution of them all is one that Friedman considers almost imaginary, Justice. He writes that *Law's Order* intends to analyse legal systems by questioning the consequences of their application in a world where rational individuals adjust their behaviour to the rules they are faced with (p.4). Then, to the objection that this happens without Justice, the author answers that "justice does not give an adequate account of law, both because it is irrelevant to a surprisingly large number of legal issues and because we have not adequate theory of what makes some rules just and some unjust" (p.5). Friedman is consistent with this starting point and his analysis of Criminal Law assumes that the murderer's costs and benefits and those of his victim must be treated the same: if that produces the effect that homicide is wrong (with more social costs than benefits), the result is interesting, but if it has the opposite effect, it is perhaps even more interesting (p.230). This is economically sound, but it isn't enough for a lawyer: the least that can be said of such a view is that it excludes analysis of the processes of forming and changing preferences. In Friedman's analysis, there are only tastes, more or less expensive. But the author is right on one point: the allegation of moral anomaly that the jurist usually employs is, most of the time, a poor alibi in the face of the difficulty of tackling a rigorous analysis of the real consequences of such and such a behaviour.

4. Still Coase

In chapter 4 Friedman recites the *mantra* of the Economic Analysis of Law: the important thing is the transaction costs, *stupid!* The analysis would be excellent if it wasn't followed by a dense chapter 5: Friedman has not wanted to do away completely with *holdout*, judicial errors or the idea of public interest, and this chapter is probably useful in the lecture room (although again, is it possible to mention *strategic bargaining* just in passing, p.51, and to exclude game theory entirely?). Because both chapters give a glimpse of Friedman the teacher's dialectical skills: Imparting classes, asking questions and brushing aside, he must be sharp and incisive to the core, to say the least, and his book provides material for a whole academic semester. However, trying to use it in Spain as an introduction to economic reasoning for first or second year law students would be like kicking oneself in the teeth: one needs to know quite a lot about the Law to make full use of the book's potential.

5. Above all insured

Take one example: if you ask a politician or professional journalist if the adult citizens of this country should be allowed, if they wish, to have confidential genetic tests to detect any tendencies to develop a certain illness, you'll very likely get a yes. But if you then ask them if insurance companies would be able to subject people wanting to buy life insurance from them to these same tests, I think - I fear - that the answer would be no, with added

exclamatory emphasis: “No! No way!” It’s a pity: those who have the tendency to an illness and are aware of it will want to get insured, those who don’t have the tendency and are aware of it will never get insured. That is called adverse selection, but the hypothetical answers we get from politicians and journalists are simply a setback. If future generations read this or a similar book, things will undoubtedly improve. Friedman doesn’t know it, but he is Socratic too and not only in method. Chapter 6, on risk assignment through rules of law, is one of the great achievements of his book

6. Why isn’t criminal attempt unpunished?

One of the most fruitful contributions of economic thinking to legal analysis is its consequentialist approach: what will happen in the real world if we apply such and such a rule of law? But this demands an *ex ante* and not *ex post* analysis of the rules in question: punishing attempted murder implies deterring unpleasant results by punishing behaviour that increases the likelihood that the event will happen. The same can be said of speeding fines. Chapter 7 in *Law’s Orders*’ deals with these matters straightforwardly and gracefully. The reader will understand why, for instance, *ex post* sanctions must be more serious than *ex ante* sanctions, but he may miss a reference to the tendency of some judges and many juries to apply rules of law using only information available *ex post (Hindsight rule).*

7. For a legal expectations market

It’s difficult to know how much a life is worth although all of us take more care and precautions when we face a considerable risk of loosing it. But an old dilemma in compensation for nonpecuniary harm states that potential victims are not in principle willing to buy insurance against this type of harm or at least they don’t want to do cover themselves against the full extent of this risk (see InDret, Fernándo Gómez, Damages for Pain and Suffering**)** because the decrease in the ability to benefit from a sum of money, for example in the case of paralysis victims or people having lost a loved one, is so drastic that money needed to compensate it exceeds what the victim would agree to pay *ex ante.* Damages for pain and suffering, then, are a clear example of the difficulties that sometimes arise in preventing the accident *ex ante* and compensating the victim *ex post*. In chapter 9, these classic subjects of the Law of Torts are tackled in a way that manifests the author’s two basic qualities:

- Firstly, skilful command of the language: sentences such as: “The problem isn't multiplying by infinity but dividing by zero” say a lot, say it well and take little space and time.

- Secondly, proposals for solutions that appeal to the reader’s intelligence: the case in which the potential victims of non-pecuniary harm are not willing to buy insurance, but perhaps would like to *sell* it. Why not allow those who are in serious risk of suffering this type of harm to sell their legal expectations of recovery to firms specialising in claiming damages, if these finally arise?

8. Intermezzo: Advertising

I can't say the same for pages 103 to 111 of the book, an introductory *intermezzo* to the American legal system, predictable in a follower of the best Posner, but also perfectly avoidable. It seems that, first and foremost, little of interest was said about American law before 1958, the year when the *Journal of Law and Economics* started out, and second that the legal system in question is restricted to *Common Law*. The reader would do well to skip to chapter 19, where the posnerian conjecture on the efficiency of *Common Law* is discussed, and finally move to the book's Epilogue, pages 318-319. On page 317, we find the humble and very human confession that "Economics is neither a set of questions nor a set of answers; it is an approach to understanding behaviour". If pushed, I confess to holding the prejudices of a mature jurist: the more I read the economists, the more I seek the psychologists, but the more I read these, the more I miss the ethologists. There is no need for despair: we know more now than we did thirty years ago, when I was still a student. The young readers of this book will improve that in ten.

9. Property and contracts

Chapter 10 of *Law's Order* is a standard description of the dominant theory of property rights, a good introduction well worth reading even for law students not interested in the economic analysis of law. The only extravagance in the chapter is a literary speculation on poor old dogs (p.118-119) and the origin of private property, which is about as plausible as the dreamlike conjectures on the primitive horde, formulated in Vienna of the *Belle Époque*. And although Friedman recognises his excesses and warns us of them (p.119), one is not always sure one can tell when the author is writing seriously and when he is not.

In any case, the discussion on property rights is focused – or restricted – in chapter 11 to intellectual and industrial property rights and a good attack is always best. Friedman puts forward good arguments against intellectual property – the increase in the number of *Law's Order* readers does not increase the cost of writing it – and something similar happens with *InDret*. Always controversial, Professor Friedman challenges his readers on each page.

Chapter 12 of *Law's Order* is about contracts. In a contract, the parties draw up two lists. The first contains the conduct they will have to put into practice or refrain from depending on the conditions they have included in the second list. The two lists can be long or short, but are always incomplete because, among other things, drawing up a contract is an expensive activity. Contracts and contract law exist because of two fundamental reasons. First, they allow one to move from provision to obligation, in other words, from exchange to credit (there would be no moneylenders if it was impossible to demand fulfilment of the borrower's obligation to return the money lent). Second, they allow one to move from purely generic provisions to strictly personalised (which makes *hold-up* possible: if Balthus commits to painting my portrait on canvas, but there is no contract law, if I pay first, I have no assurance of obtaining the painting, but if Balthus starts painting before I pay, it will be he who runs the risk of not receiving payment).

In principle, the condition needed for A and B to sign a contract B is that A must have property rights over a resource that B might make more profitable. But Friedman, without ignoring this intuitive position, prefers to set off from the idea that a contract is a system of risk assignments (pp.161 and following). This is a point of view consistent with the importance that is attributed in *Law's Order* to moral hazard and adverse selection, but that

perhaps slightly overshadows an analysis which is fundamentally right. David D. Friedman is, in chronological order, a chemist, physicist, economist and professor of Law and Economics. On some occasions, the lack of formal legal education makes *Law's Order* a book that is arranged in rather a peculiar way. Chapter 12 starts talking about reputation as a system to secure the fulfilment of promises. It follows on with reasons for and against freedom of contract, then moves to a discussion on threats and rescue – with an aside on the pro's and con's of extraditing elderly ex-dictators such as General Augusto Pinochet (pp.152-153), to finish on the central theme of modern analysis of the law of contracts: how the incentives for avoiding breach do not create excessive reliance on the promisee.

Chapter 13, on family, sex and babies is an extension of the previous one. In the end, marriage and relationships outside wedlock are long term contracts with only a few notable particularities: asymmetry between the specific investment made in the marriage by man and woman, the important role of social norms, traditional increase of the costs in terms of opportunities with maternity and child rearing, etc. However, the subject is treated briefly and with more eccentric anecdotes. The fact that Friedman in this chapter recounts his misfortunes in a cat adoption agency, where he and his family were subjected to a psychological pseudo-scanner (pp.184-185) perhaps tells us more about his anarchist-conservative ideology than about the economics of adoption.

Generally, the chapters in *Law's Order* on contracts are a useful introduction into the economic analysis of contracts and discussion of the most classic cases, but (as I pointed out in section one of this review) it lacks some game theory perspective, although this gap is more evident in other chapters of the book, such as the 16th, on Antitrust.

10. Civil and criminal wrongs: Compensation and Punishment

Chapters 14, 15 and 18, on Law of Torts, Criminal Law and the relationship between them, contain some of the book's best pages: the unitary analysis of the law of tort (pp.197-201), is common to negligence and strict liability and is based on the idea that while the former comprises the noticeable precautions (the nature of the behaviour), the latter encompasses the non-noticeable (such as the amount of behaviour). This can be refuted (the degree of the activity is sometimes observable), but it brings another argument to the hypothesis of those of us who believe that the idea of duty of care is common in negligence and strict liability and that, moreover, it appears (redundantly) in three different moments of classic doctrinal analysis: in breach of the duty of care, causation and the definition of harm (see Indret, Causation and Liability).

Similarly, the contents of chapter 15, on Criminal Law, are a successful attempt to analyse Criminal Law while taking into account the cost of punishment as well as the fact that it is unreasonable to incur in the cost of preventing offences when the cost that these inflict is lower (pp.226 and following and below pp.283-284). The fact that readers might disagree with Friedman's argument about counting all the satisfactions criminals obtain by committing the act for which they are punished was mentioned at the beginning of this brief review. Something similar could be said about his post-posnerian tendency to shock the politically correct reader: the least that can be said about his digression on the possible appropriateness or not of creating a market for organs from people sentenced to death and executed, in order to reduce execution costs (p.237) is that, at least to date, Friedman the teacher may not be a good judge because sometimes he shows remarkable indifference to

common sense. As we pointed out at the beginning, we lack a theory on the dynamics of individuals' preferences in a given society, but in the absence of any reliable knowledge on the subject, it is perhaps reasonable to assume that the common response gives us an acceptable indicator of the basic social consensus on a particular set of norms, in other words, of the social preferences on the matter. If that is correct, the good Judge is the one who adds the caution of common sense to the best available knowledge.

In any case, it is worth reading *Law's Order*, probably one of the best introductions to the economic analysis of law ever written and in superb English. It can be accompanied by a good analytical device offered to the reader for free on the internet, it is updated and, finally, it is plenty of good ideas. Even those that the writer attempts to present as *shocking* end up just being surprising. It's better that way.