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Recommended Citation

Jacob Eisler, *The Limits and Promise of Instrumental Legal Analysis*, 47 *Journal of Law and Society* 499 (2020),

Available at: <https://ir.law.fsu.edu/articles/766>

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Review Article

The Limits and Promise of Instrumental Legal Analysis

JACOB EISLER*

RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY by ERIC A. POSNER AND GLEN WEYL
(Princeton, NJ: Princeton University Press, 2018, 368 pp., £25.00)

PRICING LIVES: GUIDEPOSTS FOR A SAFER SOCIETY by W. KIP VISCUSI
(Princeton, NJ: Princeton University Press, 2018, 296 pp., £30.00)

I. INTRODUCTION: THE INSTRUMENTAL UNDERSTANDING OF LAW

Should law be understood as serving external social goals, or as an irreducible bearer of moral weight? This question has been a topic of fierce contemporary debate.¹ One tradition argues that legal rules should be evaluated by their consequential effects in service to some external, typically quantifiable value.² The success of this approach has produced a robust backlash, with some scholars asserting that law is a normatively unique bulwark of relationships between persons.³ In this view, the significance of legal rules

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[Correction added on 30 July 2020 after first online publication: The name of the scholar on page 7 is changed from ‘Robert Zipursky’ to ‘Benjamin Zipursky.’]

- 1 The debate has been most explicit in the private law context. See G. Keating, ‘Corrective Justice: Sovereign or Subordinate?’ in *The Oxford Handbook of New Private Law*, eds. H. Smith et al. (forthcoming), at (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438509).
- 2 See, for example, R. Posner, *The Economics of Justice* (1981) 115 (‘whether institutions are just or good is whether they maximize the wealth of society’).
- 3 See, for example, E. Weinrib, *The Idea of Private Law* (1995) 3.

cannot be fully metricized, nor can law be appropriately pressed into the service of some external goal.

Despite this backlash, unabashed and uncompromising treatment of law as instrument is still going strong. *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* by Eric A. Posner and Glen Weyl, and *Pricing Lives: Guideposts for a Safer Society* by W. Kip Viscusi provide two muscular instances of instrumental legal analysis. Both texts are forged in robust methodological commitments – auction theory for Posner and Weyl, the value of a statistical life (VSL) for Viscusi – and both suggest bold reforms that would benefit the authors’ favoured external good.⁴ An analysis of these influential texts, however, reveals the degree to which they neglect the status of law as an intrinsically moral element of the social and political order.

This review article demonstrates that the reforms proposed by *Radical Markets* and *Pricing Lives* would have problematic impacts upon the normative integrity and practical consequences of the law, particularly by undermining the stability of legal rights based on reason-giving norms. Both texts’ proposals potentially undervalue and undermine personal autonomy and diminish the ability of rights to protect this freedom from intrusion by the state and other private actors. Moreover, the relational critique shows that the two texts are analytically incomplete, insofar as both presume normative features of law that they do not address or investigate. This exposes the deepest challenge to instrumental reasoning and quantification as a basis for legal reform generally: because it rests upon intermediary abstractions, it does not intrinsically contain normative justification. The review article concludes by observing how interrogating the philosophical presumptions of the two texts could indicate what is necessary to provide this normative foundation.

II. THE AMBITIONS OF *RADICAL MARKETS* AND *PRICING LIVES*

Radical Markets and *Pricing Lives* both deploy law as a utility-maximizing tool, but otherwise possess distinctly different characters. *Radical Markets* aspires to transform social practice through innovative application of auction theory. It declares that Western society is stagnant (*RM*, p. 3) and proposes dramatic changes to basic features of social and political life. Conversely, *Pricing Lives* ardently advocates for a single technical tool, VSL, which already has an established presence in regulatory decision making. *Pricing Lives*’ refinement and incremental expansion of an established method is conservative compared to *Radical Markets*’ studied provocativeness.

Radical Markets argues that efficient social organization demands dissolving the fixity of legal rights and instead making social assets

4 Significantly, the ideas proposed in both texts have either been the subject of significant reforms already (*PL*, p. 36) or are the basis for ongoing activism (E. G. Weyl, ‘RadicalxChange: An Academic Agenda’ (2019) 78 *University of Chicago Law Rev.* 1).

mandatorily accessible through auction-style exchanges. That is, legal rights should not be stable, but should be perpetually accessible to the highest bidders. The first domain that Posner and Weyl address is the right of owners of property to exclude non-owners, which they declare responsible for vast inefficiencies and persistent inequity (*RM*, p. 34). Their solution is to replace monopolistic property rights with perpetual auctions, in which individuals must self-evaluate the worth of their property and pay taxes on this self-assessment ('common ownership self-assessed tax' or COST) (*RM*, p. 61). If a non-holder offers to buy the property for an amount greater than the holder's self-evaluation, the holder *must* sell it at that greater amount. This reform has two goals: reducing inequality through a robust and equitable tax base (those with more resources will pay greater COST to retain their property, and this public income can be used to redistribute wealth); and ensuring that property is ultimately possessed by those who value it most (*RM*, pp. 73–75). Yet the benefits that Posner and Weyl anticipate from COST require obliterating the traditional stability that property ownership offers.

Posner and Weyl propose similarly dramatic revisions to democratic process. They critique the one-person, one-vote principle as giving the ignorant as much power as the informed and thereby facilitating the tyranny of the majority (*RM*, p. 97). They propose a voting structure by which citizens can 'save' a cache of votes that can be deployed towards their favoured issues. They assert that such a structure will result in policies that more accurately track political will, as persons will save votes for issues they care about. To counter factional domination of specific issues, the weight of votes dedicated to a single issue decreases at a second-order exponential rate: 4 single-issue votes only count as 2, 9 single-issue votes only count as 3, 100 as 10 (*RM*, p. 106). This quadratic voting (QV) approach is adapted to representative democracy by allowing voters to both vote *for* and *against* candidates. It is thus more efficient to express multiple weaker preferences than to commit all votes to a single candidate (*RM*, pp. 119–120). Posner and Weyl suggest that QV would both inspire voters to greater moderation in the expression of their political views (by disincentivizing expressing extreme policy preferences), and to direct their votes to the issues about which they have knowledge and passion (*RM*, p. 124).

Radical Markets proposes three somewhat less radical reforms as well:⁵ a tax-revenue-yielding, auction-based sponsorship system for immigration (*RM*, pp. 147–148); exclusion of large stakeholding investors from participation in corporate governance (*RM*, p. 192); and financial compensation to all internet users for large-scale data harvesting (*RM*, p. 246). Cumulatively, the five proposals would dissolve existing rights protection. The contours of both private and public life would become more fluid and

5 These proposals have closer analogues in existing practice – sponsored immigration (*RM*, p. 149), trust busting (*RM*, pp. 175–176), and recognition of long-ignored forms of value contribution (*RM*, p. 209) – than COST and QV.

open to contestation, and, one might worry, invasion through state action that breaks apart existing stable commitments. COST, stakeholder exclusion, and compensation for data harvesting would destabilize each person's physical and financial world, and QV and immigration reforms reject civic affinity in favour of quantitatively evaluated preference maximization.

Beyond their particular proposals, Posner and Weyl show a tendency to press any material – and they range widely – into the service of auction-based efficiency. This yields distortions, particularly outside the discipline of economics. For example, in their discussion of the challenges of contemporary democracy, Posner and Weyl assert that Hobbes saw absolute monarchy as the only valid form of government, a claim that is simply wrong;⁶ a few sentences later, they hurriedly lump together Locke, Voltaire, and Rousseau – vastly diverse thinkers – as quasi-populist predecessors to Thomas Jefferson (*RM*, pp. 85–86). It would be churlish to condemn a book of this ambition for inconsequential errors. Yet the instrumentalization of content to fit narratives prefigures how readily Posner and Weyl brush away complications facing their proposals. Greater precision in the treatment of background content would have revealed challenges that *Radical Markets* could more squarely confront. For example, central to Hobbes' vision of successful governance is a shared value set among the polity, facilitated by sovereign influence on education.⁷ The importance of shared political norms poses a much thornier challenge to QV (which some have observed may increase polarization⁸). This distortive tendency presents itself in other facile uses of theory or history. For example, the casual invocation of liturgy in ancient Athens (*RM*, p. 55) too readily glosses over the network of subtle class relationships of which the custom was a part.⁹ Broadly considered, the willingness to sacrifice analytic accuracy to promote the dedicated narrative prefigures the jurisprudential weaknesses exposed by the relational critique.

Compared to the sweep of *Radical Markets*, Viscusi's *Pricing Lives* addresses one question: how can risk management benefit from the abstraction that each life has, statistically speaking, a monetary value? Viscusi shows how VSL has been deployed in a variety of regulatory, corporate, and litigation contexts. VSL can be calculated by assessing how persons respond to incentives in situations that increase the chance of their own death, as persons will 'price' risk. For example, faced with two otherwise comparable jobs, workers will demand more money to work the more dangerous one; similarly, consumers will pay more, proportional to the risk reduction, for

6 This is explicit in Chapter 17 of *Leviathan*, which identifies a commonwealth as ruled by a 'Man, or Assembly of Men'; T. Hobbes, *Leviathan*, ed. R. Tuck (1996) 121, emphasis in original. For a more extended account, see R. Tuck, *The Sleeping Sovereign* (2016).

7 Hobbes, id., p. 491; R. Tuck, *Hobbes: A Very Short Introduction* (1989) 66.

8 J. W. Patty and E. M. Penn, 'Uncertainty, Polarization, and Proposal Incentives under Quadratic Voting' (2017) 172 *Public Choice* 109.

9 R. K. Balot, *Greed and Injustice in Classical Athens* (2001) 84–85.

products (such as bike helmets) where higher quality can reduce risk. From these behaviours, it is possible to assert an estimate regarding, statistically speaking, what a life is worth (*PL*, pp. 6–7). VSL is primarily applied to determine if a particular risk justifies preventative action. If the total VSL saved by a regulation outweighs the costs of implementing it, VSL provides evidence that the regulation should be adopted. For example, imagine that air pollution from power plants could be reduced by installing scrubbers on smokestacks, but that adding the scrubbers would cost £300 million. How can you tell if it is worthwhile? If a (plausible (*PL*, p. 28)) VSL of £10 million is adopted, this suggests that the appropriate threshold is if the reduction in air pollution would save 30 or more statistical lives. As Viscusi details, there is often squeamishness about such calculations, because it arguably objectifies human life (*PL*, p. 10, pp. 218–220).¹⁰ He offers two central arguments against this squeamishness: the value of human life from VSL is often higher than that from alternative methods of valuation, meaning that VSL actually leads policymakers to adopt regulations that tend to *increase* safety (*PL*, p. 34, p. 218); and refusal to engage with the type of metricization entailed in VSL often results in safety risks being ignored altogether (*PL*, p. 53).

The structure of *Pricing Lives* can be divided into three thematic sections, though the themes do not receive equal attention. The first overview chapter provides the arguments for adopting VSL as a prevalent metric. This introduction mixes these arguments with a tantalizing though not especially systemic account of Viscusi's own role in the evolution of modern risk regulation (were Viscusi to write a tell-all account of his experience wrangling the federal infrastructure, one suspects that it would be a worthy read). The introduction is well worth reading for any scholar of risk regulation. It also lays out, though does not fully explore, conceptual arguments for VSL, such as the observation that workers' own salary demands in the workplace reveal that they price risk in a manner analogous to VSL (*PL*, p. 14). The next three chapters explore domains where VSL has been applied (government regulation) or not (corporate product safety) (*PL*, pp. 70–71). The chapter on government regulation is largely narrative, given VSL's established presence there. Conversely, Viscusi's perception that VSL has not been adequately used in the corporate context gives that discussion a more polemical bent. The assessment of VSL use by courts is more temperate, as Viscusi asserts that, while useful to evaluate liability for safety violations and to set punitive damages awards (*PL*, pp. 199–201), its deployment to determine damages for death is typically unwarranted where other regulatory safeguards are at play (though it is unclear why he advances this distinction, short of an intuitive concern regarding outsized damages awards) (*PL*, p. 192). A series of less context-specific chapters address the challenges of using VSL. For

10 For one influential expression of this objection, see F. Ackerman and L. Heinzerling, 'Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection' (2002) 150 *University of Pennsylvania Law Rev.* 1553, at 1566.

instance, should age matter in assessing VSL? Should the wealth of persons be incorporated into VSL calculations (for example, should regulation adopt a higher VSL when those it protects will tend to be richer, and thus would spend more on safety?) (*PL*, p. 114)? How ought VSL maximization be traded off against other regulatory goals?

Viscusi's expertise with statistical analysis of risk in the regulatory context makes *Pricing Lives* an invaluable reference work. Yet while the work does not explicitly proselytize for VSL, Viscusi's staunch commitment to VSL can be unreflective. For example, *Pricing Lives* only briefly mentions the prominent metrical alternative to VSL, 'cost of death', which aggregates medical costs and lost earnings (*PL*, pp. 4–5). Viscusi condemns cost of death as 'an arbitrary accounting measure' (*PL*, p. 5) (a claim that might come as a surprise to some, given its centrality in United Kingdom jurisprudence).¹¹ Yet it is contestable as a matter of justice whether quantification of personal preference to remain alive is the appropriate touchstone of financial life valuation, as opposed to the measurable loss caused by their death. VSL treats the value of remaining alive as (revealed) consumption. It assumes that this preference maximization is the most socially desirable goal, as well as that the calculation of this consumption is reliable. The normative concerns are handled by the argument that the use of VSL produces superior policy outcomes (*PL*, p. 142),¹² but such reasoning is circular, because the very desirability of those outcomes requires a philosophical touchstone that itself cannot be extracted from quantification alone. The descriptive assumption, meanwhile, presumes the accuracy of the wage differential based on the premium that workers demand for riskier jobs. Yet both empirical research¹³ and the effects of pre-existing, legally formalized power structures¹⁴ suggest that workers are likely to under-value the cost of risk where a given framework does not already price it in.¹⁵

- 11 *Lim Poh Choo v. Camden and Islington AHA* [1980] AC 174; Fatal Accidents Act 1976. The cost-of-harm method established by *Lim Poh Choo* remains the prevalent means of calculating damages. See, for example, *Ali v. Canton* [2013] EWHC 1730 (QB).
- 12 Other advocates of cost–benefit analysis have advanced sympathetic claims. See, for example, J. D. Graham, 'Saving Lives through Administrative Law and Economics' (2008) 157 *University of Pennsylvania Law Rev.* 395.
- 13 See, for example, J. A. Jacobs and R. J. Steinberg, 'Compensating Differentials and the Male–Female Wage Gap: Evidence from the New York State Comparable Worth Study' (1990) 69 *Social Forces* 439, at 441 ('the ability of workers to obtain compensating differentials depends on the politics of the workplace – that workers receive extra compensation for working in unfavorable or dangerous conditions only when they are powerful enough to insert this claim directly into their labor contract'); D. Weil, 'Valuing the Economic Consequences of Work Injury and Illness: A Comparison of Methods and Findings' (2001) 40 *Am. J. of Industrial Medicine* 418, at 434 (analysis of costs of accidents is generally too narrow and thus underestimated).
- 14 R. Korobkin, 'The Endowment Effect and Legal Analysis' (2003) 97 *Northwestern Law Rev.* 1227, at 1276.
- 15 P. Dorman, *Markets and Morality* (1996) 185.

Moreover, justifying the use of VSL through its instrumental effects conceals the philosophical issues regarding the appropriate goals of regulation, disregards the distortive effects of structural factors such as the offer-asking problem in calculating wage premiums, and can obscure other factors that generate unnecessary risk (such as corporate capitalism's singular focus on shareholder returns). Ironically, investigating VSL's philosophical underpinnings might *support* it against some alternatives, such as cost of death; VSL might be justified as an expression of will and thus facilitating personal autonomy. However, such an account would need to be defended from alternative modes of pricing (in other words, valuations based on direct political preference expression) and its practical dependence on existing power structures. An established literature on such debates exists, and it is somewhat surprising that Viscusi does not engage with it.¹⁶

III. THE RELATIONAL CHALLENGE

That the purpose of law is to maximize beneficial outcomes is highly contestable. Yet insofar as the *Radical Markets* and *Pricing Lives* justify this commitment, they do so through closed-off or circular reasoning. The first chapter of *Radical Markets* asserts that market reasoning is left with 'no rivals' given the failure of centralized planning (*RM*, p. 19). *Pricing Lives* begins with recognition of the aesthetic distaste that surrounds the monetization of the value of life, but justifies the practice by its results, and by observing that where such quantification of an interest does not take place, the interest tends to be ignored (*PL*, pp. 9–10). Furthermore, Viscusi tends to treat legal valuation of interests that cannot be quantified dismissively (*PL*, p. 141).

The reasoning of the two texts thus contains the assumption – explicitly or implicitly – that the substance and structuring of legal relationships has little intrinsic value other than as a means to serve some other value. It is this conclusion that allows the authors to advance their proposed regimes so aggressively, because the only justification required to alter the law is better service to the chosen metric. Yet the failure to consider that legal relationships might have other types of value is puzzling given that there has been a lively decades-long debate over the question of whether law is purely instrumental. Most prominently, a group of private law scholars has responded to the methodological dominance of law and economics by arguing that the law serves the moral end of maintaining just relationships. The most notably early exponent of this view is Ernest Weinrib in *The Idea of Private Law*,¹⁷ but he has since been joined by a host of other scholars including Jonathan Goldberg and Benjamin Zipursky, Jules Coleman, John Gardner,

16 J. C. Robinson, 'Philosophical Origins of the Economic Valuation of Life' (1986) 64 *Millbank Q.* 133; R. Dworkin, 'Is Wealth a Value?' (1980) 9 *J. of Legal Studies* 191; A. Sen, 'The Discipline of Cost-Benefit Analysis' (2000) 29 *J. of Legal Studies* 931.

17 Weinrib, *op. cit.*, n. 3.

Arthur Ripstein, Nicholas McBride, and Robert Stevens.¹⁸ The diverse views within this trend share two claims: that law moderates human relationships in the service of advancing irreducible moral values such as autonomy, flourishing, and dignity,¹⁹ and that justice as advanced by a system of legal rules is likewise irreducible. Legal rules cannot be adequately understood as serving external ‘socially desirable purposes’,²⁰ because this undermines law’s ontological primacy.

Much of the relational scholarship argues that law’s moral purpose gives it an internal logic independent of any derivative social effects.²¹ The defining assumption of *Radical Markets* and *Pricing Lives*, conversely, is that that law should solely serve some external socially desirable purpose (efficiency and wealth maximization, respectively). They thus fail to value the integrity of the system of legal rules on its own terms. This is particularly salient in *Radical Markets*, which advocates the destruction of existing relationships: property–person, voter–election, citizen–community. Yet the particularity of these legal relationships is not arbitrary; rather, it expresses a woven rationality of the participants in the system.²² Stated in the terminology of Aristotle, the ‘efficient’ disruption advanced by Posner and Weyl only gives regard to distributive justice, with no concern for corrective justice.²³

The consequences of *Radical Markets’* policy proposals exemplify this. Upending the protections offered by a coherent system of legal rules would have deleterious effects – both theoretical and practical – that Posner and Weyl do not acknowledge. Property rights mediate between the self, the external physical world, and the state. A Hegelian account expresses the foundational value: property extends the self into space, and the state’s recognition and protection of property rights formalizes this quality.²⁴ A feature of rule of law is the willingness of institutions – particularly courts – to defend such personal claims of right against unjust intrusion. Thus, rule of law’s protection of property rights maintains the freedom of the individual. Practically, property rights have been a battleground for expanding the social position of the *least* well-off. Most vividly, judicial recognition of goods that benefit those in precarious positions (such as welfare benefits) as property provides greater

18 J. C. P. Goldberg and B. C. Zipursky, ‘Torts as Wrongs’ (2010) 88 *Texas Law Rev.* 917; J. L. Coleman, ‘Tort Law and the Demands of Corrective Justice’ (1992) 67 *Indiana Law J.* 349; J. Gardner, *From Personal Life to Private Law* (2018); A. Ripstein, *Private Wrongs* (2016); N. J. McBride, *The Humanity of Private Law, Part I* (2019); R. Stevens, *Torts and Rights* (2007).

19 Coleman, *id.*, p. 375 (‘Torts invade rights because torts invade the autonomy of victims’); Gardner, *id.*, p. 199, p. 231 (private law secures both security *and* freedom); McBride, *id.*, pp. 11–26.

20 Weinrib, *op. cit.*, n. 3, p. 2.

21 *Id.*, p. 12.

22 Gardner, *op. cit.*, n. 18, p. 52.

23 Weinrib, *op. cit.*, n. 3, p. 78.

24 D. Knowles, ‘Hegel on Property and Personality’ (1983) 33 *The Philosophical Q.* 45, at 49.

security to the recipients of such rights.²⁵ Eliminating property rights would not only eliminate the inefficiency of settled property allocation, it would also dissolve a ‘guard[ian of] the troubled boundary between individual man and the state’.²⁶ This guardian not only protects the abstract free person from the collective, but creates legally protected zones of personal interest that may not be readily taken away by political processes. Given that those with political power and high social standing may more readily influence the government, the identification of a right as property can protect the weak as well as the strong.

By breaking down the stability of property relationships, Posner and Weyl likewise propose undercutting one of the basic domains of personal identity and security. They might argue that the exclusionary nature of ownership is precisely what makes the classical Hegelian justification for property inefficient, and that their new type of social organization would offer a more adaptable mechanism for social justice. Yet in undermining property as extension and guardian of the person, Posner and Weyl do not argue for advancing an optimized scheme of social organization. Rather, their claim transforms what it means to be a free or flourishing human in the first place. They aspire to a less materialist and thus more virtuous society, with individuals guided by an ‘optimal Buddhism’ (*RM*, p. 75). Such a foundational change cannot be justified merely by the invocation of efficiency.

Common partial ownership might be more defensible if *Radical Markets* offered a systemically communitarian reimagining of social identity. Yet QV contradicts any such possibility. Its core feature is enabling ardent minority wedge blocks to dominate specific policy domains over less ardent but numerically superior majorities. In arguing that this allows for a ‘richer and deeper’ preference satisfaction (*RM*, p. 124) than the one-person, one-vote principle, Posner and Weyl reject civic cooperation as the hallmark of successful politics.²⁷ The one-person, one vote principle is far from sufficient to create civic democracy, but it is at least compatible with democracy as a community of equals debating a full slate of political issues. In the right circumstances, voters are incentivized to understand a broad range of policies, to pursue the consensus (or at least *détente*) that may produce empathy with

25 For the seminal account, see C. A. Reich, ‘The New Property’ (1964) 73 *Yale Law J.* 733. For its entrance into the jurisprudence, see *Golberg v. Kelly* [1970] 397 U. S. 254. For a prominent challenge to this trend, see R. A. Epstein, ‘No New Property’ (1990) 56 *Brooklyn Law Rev.* 747.

26 Reich, *id.*, p. 733.

27 *Reynolds v. Sims* [1964] 377 US 533, 561–562. For the theoretical case, see J. Rawls, *A Theory of Justice* (2003) 202–203 (‘if the various sectors of society have reasonable confidence in one another and share a common conception of justice, the rule by bare majorities may succeed fairly well. To the extent that this underlying agreement is lacking, the majority principle becomes more difficult to justify... [but there are] no procedures that can be relied upon once distrust and enmity pervade society’).

opponents, and to recognize other citizens as partners rather than opponents.²⁸ This principle is a public law expression of the importance of equal human standing in politics.²⁹ Much as corrective justice vindicates personal integrity in private law, structural equality in voting power asserts a link between membership of a political community and sound democratic self-governance. The reality of contemporary democracy is far from an ideal of mutualist self-governance; fragmentation, polarization, and aggressive wedge block politics are common. QV, however, formalizes political fragmentation. By allowing voters to commit to issues with single-minded purpose and establishing a system of representative selection that equally weights opposition and endorsement, QV advances an agonistic version of democracy. The sole focus on political efficiency could further alienate citizens from one another.

The other proposals in *Radical Markets* likewise alienate persons from various aspects of their own identity. The proposal to reform immigration requires twinned assumptions: that greatly strengthening the immigration monitoring scheme is a desirable trade-off for the efficiency gains of sponsored visas (*RM*, p. 153); and that geographic and cultural cohesion of a community is an immaterial obstacle (*RM*, p. 149)³⁰ (indeed, that the cultural impact of economic migration will be beneficial (*RM*, p. 161)). These assumptions parallel those necessary for COST and QV: that efficiency justifies weakening the existing grounds of socio-legal relationships (in this case, cohesion of communities); that this disruptive efficiency justifies strengthening the state's enforcement apparatus (as is required to both monitor immigration and enforce COST auctions); and that traditional notions of community can, and perhaps should, be readily brushed aside. The proposal for compensating users for their provision of data, meanwhile, demands that the alienation of digital aspects of personal identity can be cured through a pay-off. Current law seeks, through measures such as the United Kingdom Data Protection Act³¹ and contractual consent to data use, to give each individual *some* modicum of control over their own digital identity as an extension of the legal self. It thereby aspires to treat digital identity with the same Hegelian dignity afforded to physical property. Such classical

28 The idealized form of this is expressed by deliberative democracy. See G. A. Cohen, 'Deliberation and Democratic Legitimacy' in *The Good Polity*, eds A. Hamlin and P. Pettit (1989) 17, at 23 ('[I]deal deliberation aims to arrive at a rationally motivated *consensus* – to find reasons that are persuasive to all who are committed to acting on the results of a free and reasoned assessment of alternatives by equals'). Even a more cynical or agonist conception of democracy, however, creates significant space for discourse and communication, thereby allowing persons to pursue their rationality; J. Schumpeter, *Capitalism, Socialism, and Democracy* (1987) 272.

29 R. Dworkin, *Taking Rights Seriously* (1997) 327 (identifying the one-person, one-vote principle as reflective of a particular interpretation of the equal status of persons).

30 This receives a passing mention in one sentence.

31 Data Protection Act 2018, s. 1.2(1)(a), s. 1.35(2)(a), s. 1.84(2).

consent-based measures may well not be up to the task,³² and significant doctrinal and technical innovation is necessary to balance the power of corporations and individuals in the data-gathering context. Yet by proposing a simple scheme of compensation, Posner and Weyl formalize the legal alienation of self in a dynamically evolving domain of personhood.

As it argues for expanding consequentialist reasoning in established contexts, *Pricing Lives*' disregard for the intrinsic value of law is subtler. Viscusi argues that VSL can be used to exhaustively decide liability in product liability contexts (*PL*, p. 64), that it should be the linchpin of damages for safety violations (*PL*, p. 73), that it can be used to determine allocation of risk across different demographic groups (*PL*, p. 108 (age), pp. 135–136 (wealth)), and that it should displace normative concerns with equity (*PL*, p. 141). Viscusi offers two broad arguments for applying VSL to such a wide range of decision-making processes. The first is wholly instrumental: he observes that compressing all analyses into comprehensive cost–benefit trade-offs increases safety, because softer multi-factor analyses tend to result in safety concerns simply being neglected (*PL*, p. 66, p. 73). The other is more subtle: Viscusi's approach suggests that considerations that cannot be captured through optimization of VSL ought not to be given weight in the decision-making process.

Viscusi thereby excludes other types of rationality from legal decision making, and, indeed, presumes the integrity of the mechanisms by which VSL is calculated. The most vividly doctrinal example of this is Viscusi's argument that satisfying VSL benchmarks should absolve manufacturers of liability for defective products (*PL*, p. 85). Such an analysis would replace the reasonableness (or reasonableness-like) analysis that is typically the crux of legal determinations of product defect.³³ The role of reasonableness in determining product defect illustrates that claims to private law justice are fundamentally relational. Reasonableness provides a basis to assess if the consequences of the victim's suffering should be allocated to the tortfeasor (the relationship between 'doing and suffering', as Weinrib describes it).³⁴ In proposing to replace the reasonableness assessment – which enables reflection upon duties that parties owe one another³⁵ – with a VSL test, Viscusi would eliminate the moral robustness of the current test.³⁶

32 S. Van Gulijk and J. Hulstijn, 'Ensuring Data Protection by Private Law Contract Monitoring: A Legal and Value-Based Approach' (2018) 26 *European Rev. of Private Law* 635.

33 Consumer Protection Act 1987, s 3.1, for example, identifies defect when a product is not as safe as persons are generally entitled to expect. While not reasonableness on behalf of the tortfeasor, it functions as a reasonableness assessment by the user. Some have suggested that such product liability assessments inevitably have the form of negligence assessments; J. Stapleton, *Product Liability* (1994) 234.

34 Weinrib, *op. cit.*, n. 3, p. 147.

35 Gardner, *op. cit.*, n. 18, p. 48.

36 Weinrib, *op. cit.*, n. 3, p. 218; Stevens, *op. cit.*, n. 18, p. 339.

This characteristic is present in many of Viscusi's proposals. For example, his suggestion that VSL analysis can comprehensively incorporate the risk valuation disparities caused by age or wealth differences ignores the fact that the ramifications of these characteristics cannot be compressed into a unitary metric (*PL*, pp. 112–113).³⁷ Such attributes invoke incommensurable moral judgments; the legal framework that accommodates them is likewise diverse. For example, economic inequality is a function of employment law, tax law, legislative wealth redistribution, and so forth. The effects of these laws on financial inequality impacts what premium workers demand for the risk that underlies VSL itself. Indeed, if the context – legal as well as social and cognitive – that underlies compensation for employment lacks either normative fairness or descriptive accuracy, VSL is undermined.³⁸

Compacting safety into a single uniform metric has two further problematic effects. First, each of these areas of law has a distinctive normative logic which cannot accurately be reduced to a single factor.³⁹ Second, Viscusi's analysis ignores any factor that cannot be incorporated into the metric. This is a characteristic problem for quantifying analysis. As Thomas McGarity states, '[w]hen information or values arise that cannot be factored into the benefit models, the modelers often simply ignore them'.⁴⁰ At times, this tendency to unitary consequentialist analysis leads Viscusi to make claims that are unequivocal oversimplifications, such as when he argues that the armour appropriate for military vehicles can be calculated by VSL (*PL*, pp. 38–39). He argues for medium armour from a VSL price-point perspective. There may well be situations in which heavy armour confers a benefit in terms of saving soldiers' lives, but does so at a cost higher than the VSL; likewise, there may be situations in which light armour is preferable (because it confers unique operational benefits),⁴¹ even if it reduces safety below the VSL trade-off point. Relying upon a single metric to guide such policy inevitably excludes factors central to morally and practically coherent decision making.

Underlying these challenges is a foundational limitation facing VSL. *Pricing Lives* treats VSL as a fixed point available as a versatile fulcrum for legal decision making. Yet, as Viscusi would readily admit, VSL is an abstraction derived from contextually expressed preferences (*PL*, pp. 24–33).

37 Even advocates of cost–benefit-based regulation have conceded that unitary metrics typically cannot capture social concerns such as inequality. See, for example, Graham, *op. cit.*, n. 12, p. 422.

38 The scholarship on employment law has been particularly focused on how existing employment opportunities and legal structures may influence worker salaries (which would in turn affect VSL calculations). See Korobkin, *op. cit.*, n. 14, p. 1277; S. Issacharoff, 'Contracting for Employment: The Limited Return of the Common Law' (1996) 74 *Texas Law Rev.* 1783, at 1795.

39 M. Walzer, *Spheres of Justice* (1983) 165–170.

40 T. O. McGarity, 'A Cost-Benefit State' (1998) 50 *Administrative Law Rev.* 7, at 58.

41 For example, in the context of asymmetrical insurgent conflicts, it may be more important that vehicles can withstand IEDs than that they can withstand armour-piercing rounds.

Calculating this abstraction invokes the pre-existing legal framework. The use of VSL in the context of inequality is again demonstrative. The observation that the rich have a higher expressed VSL than the poor hangs upon a host of legal (public and private) relationships expressed through property rights, taxation, the welfare state, and so forth. Any shift in this complex of legal rights and obligations would also shift VSL; yet the just arrangement of these rights is a function of moral and political choices. Introduction of basic income,⁴² for example, would change VSL by reducing the general appetite for risk in employment, especially among the least financially well-off. Yet whether basic income is a good policy requires a normative enquiry into just social arrangements that cannot be decided by VSL or similar quantitative analysis. Viscusi's attempts to use VSL as the first-order test for morally complex legal decisions cannot overcome the fact that the value of VSL itself hangs on the context of these decisions. The dilemmas that Viscusi seeks to resolve via VSL require moral judgments that would inform the VSL valuation, and thus are *ex ante* to VSL itself.

IV. THE CRITICAL POTENTIAL OF INSTRUMENTALIST REASONING: FORCING RE-EXAMINATION OF VALUES

The appeal of instrumental analysis is that it facilitates decisive action.⁴³ Yet as this review article has demonstrated, overzealous instrumentalism has problematic practical and theoretical effects. Synthesizing instrumentalist reasoning into the relational understanding of law, however, makes it possible to implement technocratic proposals without facing the pitfalls of unreflective instrumentalism.

Such an approach integrates the reasoned justifications for instrumental proposals into the relational (thus inverting the subordination that corrective theorists, for example, indict in instrumental reasoning).⁴⁴ The application of this approach will have a common-sensical, even prosaic quality: judges should rely on innovative conceptualizations of efficiency and VSL to inform the content of personal claims to legal right, regulators should incorporate them into their decision making (without *per se* displacing other normative considerations), and legislatures and voters should respond to them as their judgment suggests.

Neither Posner and Weyl nor Viscusi offer the philosophical groundwork for such balanced use of their methods. Yet for each it is possible to speculate how this might be done. VSL derives from an interpretation of human judgment in the context of a complex web of legal and social relationships.

42 M. Ghatak and F. Maniquet, 'Universal Basic Income: Some Theoretical Aspects' (2019) 11 *Annual Rev. of Economics* 895.

43 Sen identifies this as the 'case for explicitness'; Sen, *op. cit.*, n. 16, p. 935.

44 Keating, *op. cit.*, n. 1, p. 1.

The primacy that Viscusi assigns to this derived number must be tempered by recognition of VSL's dependence upon social and normative conditions that cannot be subsumed into it. For example, the determination of how VSL should be applied in regulatory contexts of wealth differentials might require a much more fulsome consideration of the background conditions that have produced inequality, and claims to justice or reform that persons make due to those conditions. Subsuming the claims of *Radical Markets* to a balanced corrective approach might require greater modification, because Posner and Weyl do little – other than invoking Western crisis – to indicate their normative commitments. However, if the radicalness of their proposals applies likewise to human moral status, their policy suggestions might be expressive of such a normative upending. Posner and Weyl thus must articulate how their radical revisions of social practice are grounded in an equally radical reconceptualization of human reasoning or personal flourishing.