Why Efficiency? - A Response to Professors Calabresi and Posner

Ronald Dworkin
WHY EFFICIENCY?
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CALABRESI'S RIGHT MIX

Professor Calabresi challenges my description of how his theory relates justice and efficiency.¹ But the example he gives from his book, The Costs of Accidents,² confirms that description instead. For he reminds me that he argues that justice should be a veto on the pursuit of efficiency, so that no scheme for reducing the overall costs of accidents should be accepted if it is in fact unjust. I agree that it is misleading to describe this picture as calling for a trade-off between justice and efficiency. It calls for a trade-off only in a limiting (indeed Pickwickian) sense of a lexical ordering of one over the other, which is better described as denying a trade-off. But this veto power or lexical ordering nevertheless supposes that a trade-off is in question—that it is, that is, conceptually on the cards. So it provides a particularly sharp version of the mistaken theory about efficiency that I said Calabresi holds, along with other economists of law who contemplate trade-offs but do not give justice the dominant power it enjoys in Calabresi’s version.

This is the theory that social wealth is worth pursuing for some reason distinct from justice. When Calabresi insists that the goals of cost reduction may conflict with principles of justice, in which case the latter principles have a veto power, he must be relying on exactly that theory. For unless social wealth is taken to be desirable in itself, as what I called a component of value, or as instrumental towards something else that is a component of value, it makes no sense to say that justice must operate as a veto over the pursuit of social wealth.

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In his present letter, he speaks of a trade-off or mix, not between justice and cost reduction, but between total wealth and its distribution. But it is doubtful that he has altogether abandoned the mistaken idea latent in the earlier distinction, that total wealth is of value in itself. In order to expose the problem I see I must make a further distinction. Whenever the idea of a “right mix” is in play two senses of that idea must be distinguished. The first is the idea of a trade-off or compromise between two goods or qualities independently desired. Someone who likes both parkland and crops, for example, must think about the best mix of park and cultivated fields on his property. He wants as much as he can have of each, but since the total property is limited these desires conflict, so he must sacrifice some of what he wants to have more of something else he wants. If he has chosen a particular mix as the “right” mix, and subsequently discovers a way to produce more crops from the land he has cultivated, he will regard this as an obvious and unqualified improvement. (He may or may not now alter the mix so as to leave more land as park.)

This “compromise” sense of a trade-off or right mix must be distinguished from the “recipe” sense, in which some mix of ingredients is the right mix only because it will produce the best final product. Someone making a cake may be concerned about the right mix of flour and eggs, not because he independently values each and wants as much as he can have of both, but because a particular mix is better than any other mix for making cakes. Suppose the right mix is two eggs to a cup of flour. A baker who is told that, in fact, he can add three eggs without thereby decreasing the flour he may add will not think that this suggestion points the way to an improvement in his situation, but only the way to disaster.

In his letter, Calabresi speaks of a trade-off or mix of wealth and distribution. Does he mean “right mix” in the compromise or the recipe sense? In my article, to which he refers, I supposed that he meant the compromise sense. I pointed out that in that case he must be assuming what I was in train of denying, which is that wealth is a component of value. For, if an egalitarian distribution is in itself a component of value—something worth having for its own sake—it makes no sense to compromise that value for something else unless that something else is also a component of value. If crops are taken to be of value, it makes no sense to have less crops for more parkland unless parkland is also something of value.

But he says in his letter that he agrees with me that social wealth is not a component of value. There seem to be two ways
left to interpret his position. He might mean by the right mix a recipe rather than a compromise. Or he might mean a compromise, but a compromise not between an egalitarian pattern of distribution and wealth as a component of value, but between that pattern and wealth as a surrogate for something else.

Does he mean a recipe? The story might go this way. Maximum utility is the only thing valuable in itself. The highest possible total utility will be produced by a recipe that combines something less than the highest total wealth with something less than the most egalitarian possible pattern; and that is the right mix of wealth and distribution. Now this is a recipe story because neither wealth nor an egalitarian pattern is valued for its own sake. They are treated as the baker who wants only cake treats eggs and flour. But that is just why I doubt that this story is his story. He seems to me to want to say that a more egalitarian distribution is something to be valued for its own sake. So that it might be worth having less overall total utility to have a much more egalitarian distribution. That is in the spirit of his agreeable pluralism—indeed he expressly disclaims a monistic interest in utility. So I assume that his story is not the straightforward utility-recipe story—at least until he advises me otherwise.

I come therefore to the more complex case, that is, I suppose him to have in mind a compromise rather than a recipe, but a compromise between an egalitarian pattern valued for its own sake and social wealth valued as a surrogate (or as a “false target”) for something else that is valued for its own sake. But now what is the something else for which social wealth is a surrogate? He might wish to say: total utility. The underlying compromise is between total utility and an egalitarian distribution; this becomes, on the surface, for practical purposes, the compromise between total wealth and an egalitarian distribution. Calabresi is not a monistic or absolute utilitarian, but he may be a partial, compromising one.

Is this his story? Before we decide that it is, I want to construct a different story to offer him. This is a recipe story. But it is an equality-recipe rather than a utility-recipe story. Before I describe this equality-recipe story I must say something about equality as a political ideal. I assume that we both accept, as fundamental, the principle that people should be treated as equals in the matter of distribution. But we know that it is a hard question just what that principle means. In the following Section I shall describe one plausible interpretation of the equal-treatment principle—one interpretation of equality.
If a fixed sum of identical goods is to be distributed, our treatment-as-equals principle requires that each must have an equal share of those goods. But in all but the crudest societies, different forms of goods fall to be distributed, because different forms of goods can be produced and because rights and opportunities must be distributed as well as other forms of property. In an actual community it is very much an open question, about which reasonable people may differ, just what a truly egalitarian distribution is. Suppose, for example, that we can distribute rights in nuisance or negligence in such a way that people hold either more nearly equal shares of a lower total production of goods or less equal shares of a larger total production. If the second state-of-affairs is Pareto superior to the first, then we will have no difficulty in saying that the first does not treat people as equals. For it shows contempt for people to refuse them benefits in deference only to others' external preferences. (I am assuming that the second state-of-affairs really is Pareto superior, so that no one is worse off even when any possible damage to self-respect that results from relative deprivation is taken into account.) But if the second state-of-affairs is not Pareto superior, because some people would have absolutely higher welfare in the first, then a different problem is posed. It is then necessary to discover why total wealth is increased in the second situation.

Sometimes, of course, a wealth-inegalitarian distribution is the product of a political or economic system that patently does not treat people as equals. Suppose, to take a blatant case, the distribution is the result of political decisions that give one group legal rights denied to another. But sometimes it is at least arguable that it is a wealth-egalitarian distribution that denies deep equality—that is, that wealth equality does not treat people as equals. Suppose, for example, a community each of whose members has roughly the same abilities and talents, but who have very different conceptions of how best to lead their lives. They have different preferences, in particular, over forms of labor and over the best mix of labor and leisure. But each is paid the same total wage for whatever work he in fact does, and wealth is equal.

We may want to make two complaints about this situation. First, it may be wealth inefficient, because a different set of wages—those fixed in a market for labor—would in the circumstances provide more incentives for production and increase total wealth. Sec-
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ond, it may be unfair, because wages do not reflect the true costs to others of each person's indulging his own preference over forms of labor. A different set of wages—those fixed in a market for labor—would more nearly treat people as equals because it would require each to take responsibility for the true costs of his own choices. If we hold a theory of how to treat people as equals that includes the principle that people must take that responsibility, we can therefore object to the arrangement on grounds of equality as well as grounds of efficiency. Our two objections may then, in fact, be identical: the arrangement is unfair (on this conception of equality) just in the way it is inefficient. We repair our distributional as well as our wealth complaints by moving away from wealth equality.

My example is artificial because it assumes that people are alike in talents, so that different choices of occupation represent simply different preference sets. In the real world different choices reflect different talents and initial opportunities as well. But even in the real world different choices of occupation depend in part on differences in preference sets, so that a wealth-inefficient wage scheme might be objectionable from the standpoint of equality because it came too close to providing equality of wages, even though the most wealth-efficient wage scheme would also be objectionable from the same standpoint. In the real world it would be a matter of judgment which degree of wealth efficiency in the wage structure came closest to achieving the demands of equality, all things considered. But it would presumably be a point somewhere between total wage equality and total wealth efficiency.

In many cases, moreover, equality would demand social arrangements that maximize wealth efficiency without regard to the independent distributional consequences of these arrangements themselves. Suppose (as Professor Posner argues in his article in this issue) a system of negligence in tort law is more wealth efficient than a system of strict liability, but (contrary to his further assumption) this endures to the benefit of a class of persons—call them inveterate pedestrians—who are not, however, distinct otherwise as forming a worse-off economic group. Strict liability is, we might say, distortive but not redistributive towards a more attractive pat-

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tern of distribution. (I am assuming all this, of course, only arguendo, because I know others would disagree.) In that case strict liability would be, from the standpoint of the deeper principle, egalitarian, because the pedestrians would be purchasing their activity at too low a price measured against an ideal egalitarian auction, and the mark and measure of the inequality would be just the wealth inefficiency. Equality would require, once again, a move toward the wealth-efficient regime of negligence.

A Recipe Theory for Equality

Someone who holds this theory of deep equality does not think that either total wealth or total utility, on the one hand, or wealth equality, on the other, is valuable in itself. He does believe that on some occasions genuine equality requires a move towards wealth equality, and on other occasions a move towards wealth efficiency. But he does not mean that, when these demands of justice are correctly assessed and met, something valuable has been sacrificed. Suppose deep equality calls for abandoning strict liability even though this means that some pedestrians will therefore have less welfare. If all were equally rich before—or even closer to being equally rich—then wealth equality has declined. But this is not a matter of regret as such, because in this case wealth equality would be unfair, and it is absurd to regret not having more of what, in the circumstances, we do not wish to have. That would be like regretting that one cannot put more eggs into the cake with the flour. Of course, someone holding this second theory would regret that pedestrians cannot have what they want. But that is regretting the loss that these people suffer, which he would regret whether or not others gain, and that is a different story. He does not regret the loss in wealth equality itself if he believes that deep equality does not require, but instead condemns, that form of equality.

Suppose, on the other hand, that deep equality requires an improvement in wealth equality that will have the consequence of decreasing total wealth. Of course, that decline in total wealth must mean that someone will have less than he otherwise would, and that may be a cause for regret. We regret, that is, our inability to make a Pareto improvement on a fair distribution, which we would certainly make if we could. But that does not mean that we regret sacrificing a higher aggregate level of wealth (or utility) for a lower in order in achieve justice, or even that we regard
this exchange as a sacrifice at all. Someone who holds the deep-equality theory will deny that there is even *pro tanto* a loss in justice when total utility declines, if the higher utility was produced by a distribution that did not treat people as equals.

So the story of deep equality is at bottom very different from the story of a compromise between wealth equality and the highest possible utility, even though the operational recommendations of the two theories may in some circumstances be much the same. Even though, that is, they will both pay attention to both wealth equality and wealth efficiency and call for a “right mix” between them. For the deep-equality theory is a *recipe* theory: It holds that justice consists in that distribution in which people are treated as equals (or, if this is different, in Pareto improvements on that distribution) and denies that there is any independent value, apart from the play of that calculation, in either wealth equality or highest aggregate wealth or utility. The compromise story takes wealth equality and total utility to be of independent moral value, so that a decline in either, even if required to improve the other, is *pro tanto* a loss in justice. On the compromise theory, that is, the “right mix” is of derivative or parasitic importance: It is valuable as the right compromise between two goals of dominant or primary value. But on the deep-equality theory the “right mix” is dominant and primary, and that is why it is misleading, though comprehensible, for a deep egalitarian to speak of any “trade-off.”

A second important difference between the theories is consequent upon this first one. For the compromise theory the question of justice is a question of balance, and the balance is both impersonal and intuitive. Impersonal because individuals become the instruments of achieving aggregate quantities—of equality as much as of utility. Intuitive because the correct balance must be a matter of inarticulate “feel.” For the egalitarian theory, on the other hand, the question of justice is a matter of fairness person-by-person rather than fairness of aggregate sums—and one’s judgment about fairness to persons depends on judging arguments for a particular result, not on striking intuitive and indeterminate aggregate balances.

These are, I think, important theoretical differences between the compromise and the deep-egalitarian theory. Of course, how important these differences are in practice will depend on the theory of deep equality one holds. The principle that people must be treated as equals admits, as I said, of different interpretations or
conceptions. That principle, one might say, is simply a schema for different theories of equality—different theories about what treating people as equals requires. Suppose one holds the following theory of equality: "People are treated as equals when they are made equal in welfare—except when differences in welfare will produce very much more welfare overall. No flat principle can be stated governing the operation of that proviso; everything will depend on intuitionistic judgments made in particular cases." On this theory the difference between the compromise theory and the deep-equality theory all but disappears, for the compromise has simply been embedded in the definition of deep equality.

But there are better and more precise accounts of deep equality than that. The utilitarian account of equality is certainly more precise. It holds that people are treated as equals when goods and opportunities are so distributed as to maximize average utility among them. Now if a compromise theory is conceived as requiring a compromise between equality of welfare and highest total welfare, then a utilitarian theory of deep equality will plainly yield different results, because it will deny that it is ever fair to compromise total welfare, over a given group, for equality of welfare within that group.

I prefer a different and more complex account of deep equality than the utilitarian account, which is the theory I relied on in the brief sketch of the last Section. This argues that individuals are treated as equals when an equal share of the resources of the community measured abstractly—that is, before these resources are committed to any particular production route—is devoted to the life of each. I doubt that this description makes much sense put so briefly, and I have tried to describe the theory and its consequences at some length in a forthcoming article. My present purpose is not to persuade you of the merits of this (or any other) account of deep equality, but simply to illustrate my claim that, under some such accounts, the compromise theory and the deep-equality theory will yield very different results, though neither requires that society be committed to either total wealth equality or total maximization of wealth.

A Polemical but Powerful Point

I hope to persuade Calabresi to embrace some deep-equality recipe theory rather than the compromise theory, and therefore to

give up all talk of a "trade-off" between distribution and wealth, conceived either as valuable in themselves or as surrogates for equality of welfare and maximization of welfare. What arguments should I use? My strongest positive argument, of course, would be the development of a compelling deep-egalitarian theory. We shall see about that. In the meantime I offer the following polemical, negative but nevertheless powerful point. I doubt that he will find a compromise theory appealing when he examines the foundations of any such theory.

The compromise theory I described a few pages ago—the compromise between equality of welfare and highest possible aggregate welfare—requires that one accept what might be called pluralistic utilitarianism. This theory holds that aggregate welfare is not the only good, but is at least one good to be compromised against both distributional and what Calabresi calls "other justice" considerations. The compromiser must, that is, be partly a utilitarian, because otherwise he could not take wealth maximization to be valuable as a surrogate for aggregate utility; but only partly a utilitarian, because otherwise he could not allow rights and other nonutilitarian factors to feature as he says he wishes them to do.

Utilitarianism is really two different theories; or, rather, there are two different ways of being a utilitarian. One holds that total utility is a value because pleasure (or happiness on some more sophisticated conception) is good in itself so that the more of it the better, quite apart from its distribution. This is teleological utilitarianism. The other holds that goods should be distributed so as to produce the highest average utility over some stipulated population, because only a distribution of that sort treats people as equals. That is the egalitarian utilitarianism I mentioned earlier in the present discussion—I called it the utilitarian theory of equality. The well-known classical utilitarian philosophers, like Bentham, seem to me to be egalitarian utilitarians, though this is perhaps arguable. Certainly the modern defense of utilitarianism, in the spirit of Harsanyi5 and Hare,6 for example, is explicitly egalitarian utilitarianism. Teleological utilitarianism seems to make very little sense. As Rawls (and many others) have pointed out, it recommends a world of teeming population each of whose lives is barely worth living so long as the aggregate happiness is larger than a

world with less people whose average happiness is much larger.\textsuperscript{7}

Now even a partial utilitarian must choose between these two ways of being a utilitarian. If he is an egalitarian utilitarian—if he holds that the right way to treat people as equals is to count each for one and only one in a Benthamite calculation—then he can nevertheless compromise highest average welfare for a variety of reasons—in order better to serve God, for example, or advance culture, or improve the genetic stock. But he cannot coherently offer to compromise highest average welfare over a given population in the name of simple wealth or welfare equality. Treating people as equals, on the utilitarian's conception of equality, demands the highest aggregate welfare, and one cannot coherently treat people other than as equals in the name of some deeper conception of equality. (One can, of course, \textit{refine} the utilitarian conception of equality—for example, by disregarding external preferences\textsuperscript{8}—so that treating people as equals is not quite maximizing average welfare. But this abandons a compromise in favor of a recipe theory.)

So if Calabresi holds to the compromise theory I offered, he must be a teleological utilitarian. It is, of course, not logically incoherent to believe that pleasure (or some other concept of utility) is a good in itself, apart from distribution, so that the world is \textit{pro tanto} better the more pleasure there is, no matter how miserable people then are. But it is not sensible, because teleological utilitarianism is not a sensible theory. It is not sensible to believe that pleasure in itself is a good, apart from distribution, no matter how miserable everyone is. That is pleasure fetishism, which is just as silly as wealth fetishism. Wouldn't Calabresi rather give up the idea of a trade-off between distribution and wealth?

POSTSCRIPT: Professor Calabresi in a footnote to his letter, comments on the foregoing remarks of mine. He suggests that the disagreement between us is now only verbal,\textsuperscript{9} which I find surprising. Whether we disagree in substance does not depend, of course, on whether he prefers to call justice what I call equality, or on whether he uses recipe words more than compromise words or \textit{vice versa}. But it does depend on the arguments in which these various words are used. I labored the distinction between recipe

\textsuperscript{7} See generally J. Rawls, \textit{A Theory of Justice} 22-27 (1971).
\textsuperscript{8} See R. Dworkin, \textit{Taking Rights Seriously} chs. 9, 12 (1977).
\textsuperscript{9} Calabresi, \textit{supra} note1, at 553 n.1.
and compromise because his remarks about the economic approach to law, even in the present letter, make sense only if justice consists in some compromise between the maximization and a desirable distribution of social wealth so that, even when some legal institution does not aim at justice overall, maximization retains its independent importance, as something called a "roadsign," or a distinct "instrument." I labored the distinction between egalitarian and teleological utilitarianism because the only respectable argument for assigning the maximization of wealth that role in that compromise begins in partial teleological utilitarianism. If Calabresi now rejects that version of utilitarianism, and holds instead to something like the account of the connection between distribution and deep equality (relabeled "justice") that I gave here, then he has, I believe, subverted even the modest claims for the role of efficiency in legal analysis that he made in *The Costs of Accidents*, and the rather different claims made in the present letter.

**Posner's Wrong Start**

Professor Posner believes that agencies of government, and particularly courts, should make political decisions in such a way as to maximize social wealth. In the present article he narrows his claim and offers a new argument. He wishes to show, not as before why society as a whole should seek wealth maximization in every political decision, but only why common law judges should decide cases so as to maximize wealth. He offers two arguments meant to be connected (or perhaps even to be only one argument). First, everyone (or at least almost everyone) may be deemed to have consented in advance to the principles or rules that judges who seek to maximize wealth will apply. Second, the enforcement of these principles and rules is in fact in the interest of everyone (or almost everyone) including those who thereby lose law suits. The first—the argument from consent—is supposed to introduce the idea of autonomy (and therefore a strain of Kant) to the case for wealth. The second—the argument from universal interest—insists in the continuing relevance of welfare to justice, and therefore is

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13. *Id.* at 491-97.
supposed to add a dose of utilitarianism. The combined arguments, Posner suggests, show that wealth maximization—at least by judges—provides the best of both these traditional theories of political morality and avoids their famous problems.

Posner illustrates the second claim by showing why, if negligence rules are superior from the standpoint of wealth maximization to rules of strict liability, it follows that all those who benefit from reduced driving costs—almost everyone—would be better off under a regime of negligence than a regime of strict liability.\textsuperscript{14} The first claim—about consent—is then supposed to follow directly: If it is in fact true that almost everyone would be better off under a regime of negligence than strict liability, then it is fair to assume that almost everyone would have chosen negligence if offered the choice between these two regimes at a suitably early time, and therefore fair to deem almost everyone to have consented to negligence even though, of course, no one has actually done so.

\textit{The Argument from Consent}

In fact both these arguments are more complex and I think more confused than first appears. (I discussed them both at length several years ago.\textsuperscript{15}) It is important to remember, first, that consent and self-interest are independent concepts that have independent roles in political justification. If I have consented in advance to governance by a certain rule, then this counts as some reason for enforcing against me the rule to which I have consented. Of course, in determining how much reason my actual consent provides we must look to the circumstances of my consent, in particular to see whether it was informed and uncoerced. In this latter investigation the question of whether it was in my self-interest to have consented may figure only as evidence: if it was plainly not in my self-interest, this might suggest, though it does not prove, that my consent was either uninformed or coerced. But the bare fact that my consent was against my own interest provides no argument in itself against enforcing my consent against my later wishes.

Conversely, the fact that it would have been in my self-interest to have consented to something is sometimes evidence that I did in fact consent, if the question of whether I did actually consent is for some reason in doubt. But only evidence: the fact of self-interest, of course, in no way constitutes an actual consent. In

\textsuperscript{14} Id.
\textsuperscript{15} R. DWORKIN, \textit{supra} note 8, at ch. 6.
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Some circumstances, however, the fact of self-interest is good evidence for what we might call a counterfactual consent: that is, the proposition that I would have consented had I been asked. But a counterfactual consent provides no reason in itself for enforcing against me that to which I would have (but did not) consent. Perhaps the fact of my earlier self-interest does provide an argument for enforcing the principle against me now. I shall consider that later. But the counterfactual consent, of which the self-interest is evidence, can provide no further argument beyond whatever argument the self-interest itself provides. Since Posner’s argument from consent depends entirely on counterfactual consent, and since counterfactual consent is in itself irrelevant to political justification, the argument from consent wholly fails. Posner’s appeal to “autonomy”—and his associated claim to have captured what is most worthwhile in “Kantian” theories—is wholly spurious.

Autonomy is, I agree, a different concept from consent. It contemplates what is sometimes called—perhaps misleadingly—authentic consent, meaning the consent of the true or genuine person. That dark idea is often elaborated as a kind of hypothetical or counterfactual consent. But then the authenticity is provided by—and everything turns on—the way the conditions of the counterfactual consent are specified. Kant himself deployed a complex metaphysical psychology to identify the consent of the genuine person counterfactually. Rawls constructs an elaborate “original position” for an arguably similar purpose. But Posner’s argument lacks any comparable structure, and so provides no reason to think that the counterfactual consent he describes has more claim to authenticity—and hence to autonomy—than any other choice people might have, but did not, make.

Why has Posner confused self-interest and consent in this apparently elementary way? His present article provides a variety of clues. Consider the following extraordinary passage:

The notion of consent used here is what economists call ex ante compensation. I contend, I hope uncontroversially, that if you buy a lottery ticket and lose the lottery you have consented to the loss. Many of the involuntary, uncompensated losses experienced in the market, or tolerated by the institutions that take the place of the market where the market cannot be made to work effectively, are fully compensated ex ante and hence are consented to.17

17. Id. at 492 (footnote omitted).
This passage confuses two questions: Is it fair that someone should bear some loss? Has he consented to bear that loss? If I buy a lottery ticket knowing the odds, and was uncoerced, it is perhaps fair that I bear the loss that follows, because I received a benefit ("compensation") for assuming the risk. But it hardly follows, nor is it true, that I have consented to that loss. What, indeed, would that mean? (Perhaps that I agreed that the game should be rigged so that I must lose.)

In some circumstances it may be said that I consented to the risk of loss, which is different, though even this stretches a point and in many cases is just false. Suppose (with no question of fraud or duress) I wildly overestimated my chance of winning—perhaps I thought it a sure thing. It may nevertheless be fair that I lose, if the ticket was in fact fairly priced, even though I would not have bet if I had accurately assessed my chances of winning. All this—the importance of distinguishing between fairness and consent—is even clearer in the case of the "entrepreneurial risks" Posner discusses.¹⁸ He imagines a case in which someone buys land which then falls in value when the biggest plant in town unexpectedly moves. He says that the loss was compensated ex ante (and hence "consented to") because "[t]he probability that the plant would move was discounted in the purchase price that they paid."¹⁹ The latter suggestion is mysterious. Does it assume that the price was lower because both parties to the sale expected the move? But then the plant's move would not have been unexpected. Or does it mean simply that anyone buying or selling anything knows that the unexpected may happen? In either case the argument begs the question even as an argument that it is fair that the buyer bear the loss. For it assumes that it has already been established and understood by the parties that the buyer must bear the loss—otherwise the price would not have reflected just the risk that the plant would move, but also the risk that the buyer would be required to bear the loss if it did move.

But in any event it is just wrong to say, in either case, that the buyer consented to the loss. Perhaps, though the buyer knew that the plant would very likely move and that he was getting a bargain price because the seller expected that the buyer would bear the loss if the plant did move, the buyer hoped that he might be able to persuade some court to rescind the sale if the feared

¹⁸. *Id.* at 491-92.
¹⁹. *Id.* at 492 (footnote omitted).
move did take place or to persuade some legislature to bail him out. It would be fair, in these circumstances, for the court to refuse rescission, but dead wrong to say that the buyer had consented to bear the loss. The argument of fairness must stand on its own, that is, and gains nothing from any supposition about consent. Autonomy is simply not a concept here in play.

So Posner may have conflated interest and consent because he has conflated consent more generally with the grounds of fairness. A second clue is provided by his remarks about what he calls “implied consent.” He acknowledges that plaintiffs in negligence suits cannot be said to have consented expressly to rules of negligence rather than strict liability—even in the way he believes buyers of lottery tickets have consented to losing. But he says that courts can impute consent to such plaintiffs the way courts impute intentions to parties to a contract who have not spelled out every term, or to legislatures whose statutes are dark with ambiguity. Once again Posner’s analogy betrays a confusion; in this case it is a confusion between unexpressed and counterfactual consent.

Lawyers disagree about how best to describe contractual or statutory interpretation. According to one theory, the court takes what the parties or the legislators say expressly as evidence—as clues to the existence of some individual or group psychological state which is an actual intention, though one that is never expressed formally in the requisite document. According to the competing theory, the court does not purport to discover such a hidden psychological state, but rather uses the fiction of an unexpressed psychological state as a vehicle for some argument about what the parties or the legislature would have done (or, perhaps, should have done) if they had attended to the issue now in question. These are different and competing theories of constructive intention, precisely because they describe very different justifications for a judicial decision. If a judge really has discovered a hidden but actual psychological state—some common understanding of parties to a contract or of members of a legislative group—then the fact of that common understanding provides a direct argument for his decision. But if the putative psychological state is fiction only, then the fiction can of course provide no argument in itself. In that case it is the arguments the judge himself deploys, about what the parties or the legislature would or should have

20. Id. at 494-95.
done, that do all the work, and the idea of consent plays no role whatsoever. When Posner says that the courts might impute consent to plaintiffs in automobile-accident cases, there can be no doubt which kind of description he means to suggest. He does not suppose that plaintiffs have really but secretly consented to negligence rules, taking a silent vow to that effect each morning before breakfast. He means that the imputed consent would be a fiction. He has in mind only counterfactual, not unexpressed, consent. But a counterfactual consent is not some pale form of consent. It is no consent at all.

The third clue Posner offers us is more interesting. He notices that Rawls (and Harsanyi and other economists) have built elaborate arguments for theories of justice that are based on counterfactual consent. He means to make the same sort of argument, though, as he makes plain, he has in mind a different basis for counterfactual consent and a different theory of justice. He asks himself, not what parties to some original position would consent to under conditions of radical uncertainty, but what actual people, each of whom knows his particular situation in full detail, would consent to in the fullness of that understanding. He answers that they would consent, not to principles seeking maximin over wealth or even average utility, but to just those rules that common law judges concerned about maximizing social wealth would employ.

But Posner ignores the fact that Rawls' (and Harsanyi’s) arguments have whatever force they do have just because the questions they describe must be answered under conditions of radical uncertainty. Indeed (as I have tried to make plain elsewhere) Rawls’ original position is a powerful mechanic for thinking about justice because the design of that position embodies and enforces the theory of deep equality described in the last part of this essay. It embodies that theory precisely through the stipulation that parties consent to principles of justice with no knowledge of any qualities or attributes that give them advantages over others, and with no knowledge of what conception of the good they hold as distinct from others.

Posner says that his own arguments improve on Rawls because Posner is concerned with actual people making choices under what he calls “natural” ignorance—he means, I suppose, ignorance about

21. Id. at 497-99.
22. R. DWORKIN, supra note 8, at ch. 6.
whether they will actually be unlucky—rather than under what he calls Rawls’ “artificial” and more radical ignorance. But this “improvement” is fatal. Posner does not contemplate, as we saw, actual consent. If he did, then the degree of “natural” ignorance to attribute to the choosers (or, what comes to the same thing, the date at which to define that ignorance) would be given. It would be the date of the actual, historical choice. But since Posner has in mind a counterfactual rather than an actual choice, any selection of a degree or date of ignorance must be wholly arbitrary, and different selections would dictate very different rules as fair. It would plainly be arbitrary, for example, to construct “natural” ignorance so that no one knew whether he was one of the few inveterate pedestrians whose expected welfare would be improved by strict liability rather than negligence rules for automobile accidents. But if natural ignorance does not exclude such self-knowledge, then Posner cannot claim that even the counterfactual consent would be unanimous. It must be a matter of the counterfactual choice of most people and that provides, as we shall see, not an improved version of a Rawlsian argument, but a utilitarian argument only.

In fact, the situation is worse even than that. For if only “natural” ignorance is in play, then there is no nonarbitrary reason to exclude the knowledge of those who know that they have already been unlucky—that is, the plaintiffs of the particular law suits the judge is asked to decide by imposing a wealth-maximizing rule. After all, at any moment, some people are in that position, and their consent will not be forthcoming then, even counterfactually. Posner plainly wants to invite consent under what turns out to be, not natural ignorance, but a tailored ignorance that is even more artificial than Rawls’ original position. For any particular plaintiff, he wants to invite consent at some time after that person’s driving habits are sufficiently well formed so that he is a gainer from reduced driving costs, but before the time he has suffered an uninsured nonnegligence accident. What time is that? Why is that time decisive? Rawls chose his original position, with its radical ignorance, for reasons of political morality: the original position, so defined, is a device for enforcing a theory of deep equality. Posner seems to be able to define his conditions of counterfactual choice only so as to reach the results he wants.

The Argument from Interest

Posner’s second main argument, as I said earlier, is an argument from the self-interest of most people. He offers to show that it is in the interest of almost everyone that judges decide common law cases by enforcing those rules that maximize social wealth. Even those people who do not drive, he notices, use motor vehicles—they take buses or are driven by others—and so gain from reduced driving costs. If a regime of negligence rules, rather than rules of strict liability, would reduce driving costs, and if nearly everyone would benefit overall from that reduction, then something very like a Pareto justification on the welfare space is available for negligence. Almost everyone is better off and almost no one is worse off. Of course not absolutely everyone will be better off—we can imagine someone who is always a pedestrian and never even a passenger—but “only a fanatic” would insist on complete unanimity when a Pareto justification is in play.24

This is Posner’s argument from nonfanatical Paretianism, shorn of its autonomy or consent claims. What are we to make of it? We must first of all try to become clearer about whom the “almost everyone” proviso leaves out. Suppose I am an automobile driver who benefits steadily over my whole life from the reduced driving costs made possible by the institution of negligence. One day I am run down (on one of my rare walks around the block) by a non-negligent driver, and I suffer medical and other costs far in excess of the amount I formerly saved from reduced driving costs, and will save from reduced ambulance charges and motorized wheelchair costs in the future. In what sense do I benefit from a regime of negligence, which denies me recovery, over a regime of strict liability? Only in the sense of what might be called my antecedent self-interest. I was better off under the system of negligence before I was run down, at least on the reasonable assumption that I had no more chance of being run down than any one else. After all (by hypothesis) I could have bought insurance against being run down with part of what I saved, as a motorist, from the lower driving costs. But of course after the accident (if I have not in fact bought such insurance) I would be better off under a system of strict liability. The difference can also be expressed not temporally, but as a difference in expected welfare under different states of knowledge. When I do not know that it is I who will be run down, my expected welfare is higher under negligence. When I do know that,

24. Id. at 495.
my expected welfare is higher under strict liability.

But what is the appropriate point (expressed either temporally or as a function of knowledge) at which to calculate my expected welfare? Suppose my case is a hard case at law because it has not yet been decided in my jurisdiction whether negligence or strict liability governs cases like mine. (It is, after all, just in such hard cases that we need a theory of adjudication like the one Posner proposes.) Now the fact that I would have been better off, before my accident, under a system of negligence seems irrelevant. I did not in fact have the benefits of a negligence rule. In such a case the question—under which rule will everyone be better off—must look to the future only. And I, for one, will not be better off under negligence. I will be better off under strict liability.

But suppose it is said that at least everyone else—or everyone else except the few who walk and never drive or are driven—will be better off. Only I and these inveterate pedestrians will be worse off. Is that true? It is true that (ignoring these inveterate pedestrians) everyone else’s expected welfare, fixed at the time of my lawsuit, will be improved. But it is not true that everyone’s actual welfare will be improved. For there will be some who will not, in fact, take out the appropriate insurance, and who will be unlucky. They will suffer so much uncompensated loss from nonnegligent accidents that they would have been better off, ex post, had the court laid down a regime of strict liability in my case, even when their reduced driving costs in the meantime, and their reduced ambulance costs thereafter, have been taken into account. Suppose you are one of these unlucky people. You sue. You cannot say that you have had no benefit from the system of negligence, but you nevertheless suggest that the system of negligence be abandoned now and strict liability instituted, starting with your case.

It cannot be said, as a reason for refusing your request, that you in fact gained more than you lost from the decision in my case. You did not—you lost more than you gained. But suppose it were true that you gained more than you lost. Let me change the facts once again so that that is so. Suppose that your present accident arises near the end of your expected life and that you did arrange insurance after the decision in my case so that you will now suffer only a short-lived increase in your premium if you lose your case. You have gained more in reduced driving costs in the meantime than you will lose even if you lose your case. Nevertheless it is not true that you will gain more in the future if the judge in your case refuses your request and maintains the system of negligence. Even under the new set of facts you will gain more if strict liability is
now instituted, starting with your case. Otherwise (being rational) you would not have made the request that you did.

I hope the point is now clear. If we set out to justify any particular common law decisions on Pareto grounds, then the class of exceptions—the class of those worse off through the decision—must include, at a minimum, those who lose the lawsuit and others in like cases. It does not improve the Pareto justification that the rule now imposed would have increased the expected welfare of the loser had it been imposed earlier. Nor that the rule was in fact imposed earlier so that his expected welfare was in fact increased at some earlier date. Nor that, because the rule was in fact imposed earlier, the loser in the present suit gained more from that past rule than he now loses. Each of these is irrelevant because a Pareto justification is a forward-looking, not a backward-looking, justification. It proposes that a decision is right because no one is worse off through that decision being taken. But then all those who are worse off from a forward-looking point of view must stand as counter examples to a proposed Pareto justification. Of course these different backward-looking considerations might well be relevant to a different kind of justification of a judicial decision. They might, in particular, be relevant to a familiar sort of argument from fairness. (I shall, in fact, consider that argument later.) But they are not relevant to a Pareto justification, which justification Posner is at pains to supply.

Is Posner saved here by his caveat, that only a fanatic would insist on absolute unanimity? Perhaps it does sound fanatical to insist that every last person must benefit—or at least not lose—before any social decision is taken. If we accepted that constraint almost no social decision would be justified. Nevertheless that is exactly what the Pareto criterion requires. It insists that no one be worse off, and if any one is, then the Pareto justification is not simply weakened; it is destroyed. Pareto is all or nothing, like pregnancy and legal death.

Why? Because unless the Pareto criterion is treated as all or nothing, as fanatical in this way, it simply collapses into the utilitarian criterion. In particular, it assumes the burden of both the conceptual and the moral defects of utilitarian theories. Suppose we state the Pareto criterion in the following, nonfanatical way: “A political (including a judicial) decision is justified if it will make the vast bulk of people better off and only a relatively few people worse off.” Surely we must interpret this test so as to take account of the quantity of welfare gained or lost as well as the numbers who gain or lose. Otherwise it might justify devastating losses to a
few in exchange for such trivial gains to the many that the sum of the latter, on any reckoning, falls short of the sum of the former. But when we do introduce the dimension of quantity of welfare gained and lost we also introduce the familiar problems of interpersonal comparisons of utility. One important claim for the Pareto criterion is that it avoids such comparisons; if it turns out not to avoid them after all, then this claim must be withdrawn.

A second claim for the Pareto criterion is a claim of political morality. Utilitarianism faces the problem of explaining to someone who loses in a Benthamite calculation why it is fair to make him suffer simply so that others may prosper. Critics of utilitarianism hold that any Benthamite justification offered to him will commit what I have called the ambiguous sin of ignoring the difference between people. Now if a fanatical Pareto justification is available for a given political decision, then this problem—explaining why someone must be worse off in order that others be better off—is avoided. I do not mean that Pareto justifications are wholly unproblematical. Someone who holds a deep-egalitarian theory of absolute equality of welfare will object to a decision that makes some better off and no one worse off if that decision destroys a preexisting absolute equality of welfare. But fanatical Pareto justifications do avoid the obviously more serious problem of justifying losses to some so that others may gain.

It is important to see, moreover, that this is not a problem of the numbers of who lose. Suppose only one person loses in a Benthamite calculation. If the fact that the gain to others outweighs, in total, the loss to that one person provides a justification for the loss to him, then that same justification must obviously be available when the number of losers increases to any number, provided, of course, that the aggregate gain still exceeds the aggregate loss. The issue of principle is raised, decisively, in the individual case. That is the eye of the needle; if utility can pass through that eye it gains heaven. So our relaxed Pareto criterion can have no advantage of political morality over straightforward Benthamism. Nonfanatical Paretianism is utilitarianism merely.

It is time for a reckoning. Posner is pleased to claim that wealth maximization combines the most appealing features of both the Kantian concern with autonomy and the utilitarian concern with individual preferences, while avoiding the excesses of either of these traditional theories. His argument from counterfactual consent is meant to supply the Kantian features. But this is spuri-

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25. See R. Dworkin, supra note 8, at 233.
ous: In fact the idea of consent does no work at all in the theory and the appeal to autonomy is therefore a facade. His argument from the common interest is meant to supply the utilitarian features. But it does this too well. He cannot claim a genuine Pareto justification for common law decisions, in either hard or easy cases. His relaxed version of Paretianism is simply utilitarianism with all the warts. The voyage of his present essay ends in the one traditional theory he was formerly most anxious to disown.

**Beyond Consent and Interest**

Can we discover, in Posner’s various discussions, some more attractive argument of fairness than those he makes explicitly? The following general principle (we may call it the antecedent-interest principle) seems somehow in play. If a rule is in everyone’s antecedent interest at the time it is enacted, then it is fair to enforce that rule even against those who turn out, in the event, to lose by its adoption, provided that they were, in advance, no more likely to lose by it than others were. That is not, as we have seen, the Pareto criterion, nor will everyone agree that it is, in fact, a fair principle. Indeed I shall provide reasons to doubt it. But it has enough initial appeal for us to ask whether it provides a base for Posner’s arguments for wealth maximization in adjudication.

The antecedent-interest principle cannot, of course, be used directly in favor of any particular wealth-maximizing rule a judge might adopt, for the first time, in a hard case. For any particular rule will fail the test the principle provides: It will not be in the interest of the party against whom it is used at the time of its adoption, because the time of its adoption is just the time at which it is used against him. But the antecedent-interest principle does seem to support a meta-rule of adjudication (call it alpha) which provides that in a hard case judges should choose and apply that rule, if any, that is in the then antecedent interests of the vast bulk of people though not in the interests of the party who then loses. Once alpha has been in force in a community for some time, at least, alpha itself meets the antecedent-interest-principle test. For each individual, alpha may unhappily make it more likely that some rule will be adopted that will work against his interests. For inveterate pedestrians, for example, alpha may make it more likely that the negligence rule will be adopted. But since each individual will gain through the adoption of other rules in virtue of alpha—in vete rate pedestrians will gain through all manner of common law rules that work in their benefit as well as the benefit of most others—it may plausibly be said that alpha itself is in the antecedent interest of
absolutely everyone. But even if it turns out that this is wrong—that a certain economic or other minority exists such that that minority characteristically loses by a wide range of particular rules meeting the test of alpha—then alpha can be suitably amended. Let us therefore restate alpha this way: In a hard case, judges should choose that rule, if any, that is in the then antecedent interests of the vast bulk of people and not against the interests of the worst-off economic group or any other group that would be generally and antecedently disadvantaged, as a group, by the enforcement of this principle without this qualification.

Now Posner believes that alpha (taken hereafter to be amended in this way) would require judges to adopt a wealth-maximizing test for common law adjudication, at least in general. If this is so, then the combination of the antecedent-interest rule and alpha might seem to provide an argument of fairness in favor of (at least general) wealth-maximizing adjudication at common law. That would be an important conclusion and, in my opinion, a clear advance over previous attempts to justify wealth maximization as a standard for adjudication. It is more convincing to argue that, under the conditions of common law adjudication, wealth-maximizing rules are fair, than to say either that wealth is good in itself or that it is causally related to other, independently stated, goods in such a way as to justify instrumentally the doctrine that society should single-mindedly pursue wealth.

So we have good reason to ask whether the antecedent-interest principle is fair. We should notice that if that principle could be sensibly applied by the parties to Rawls' original position, and if they chose to apply it, then they would select the principle of average utility as the fundamental principle of justice rather than the principles Rawls says they would select, (Harsanyi and others, as Posner reminds us, have argued for average utility in just this way.) We can immediately see one reason, however, why parties to the original position, under one description of their interests, would not accept the antecedent-interest principle. If they were conservative about risks and adopted a maximin strategy for that reason, they would avoid the principle, because it works against those who in one way or another have very bad luck.

We have already seen why this is so. Suppose alpha has been in force for generations. But the question of whether negligence or strict liability holds for automobile accidents has never been settled. Some person who is injured by a nonnegligent driver, and is uninsured, finds that a court, responding to alpha, chooses a negligence rule, and he is therefore ruined by medical expenses. He ar-
gues that this is unfair. It is not an appealing reply that the economic group to which he belongs gains along with everyone else under a regime of negligence. He loses. Nor is it necessarily true that, as things turned out, he gained more than he lost from alpha being accepted in his community. It is hard to guess at how much he gained. We should have to ask what other arguments were in favor of the rules that were adopted earlier in virtue of alpha in order to decide whether the same rules would have been adopted even if alpha had been rejected from the outset. But if he is absolutely ruined by his uncompensated accident he might well be better off, ex post, had alpha never been recognized.

Suppose we say to him, in reply to his complaint, that he should have known that alpha would settle any case testing negligence against strict liability for accidents, should have calculated that alpha required negligence, and should have purchased appropriate insurance against nonnegligent injury. He will answer, with some force, that we have begged every important question. First, it does not follow, from the fact that alpha in fact recommends negligence, that the argument that it does was, in the appropriate sense, publicly available. That argument might rest on reasonably recondite economic analysis developed and worked through for the first time in connection with this litigation. Second, our reply assumes that alpha is fair, so that he should have made provisions for insurance in its light, though that is just what he questions. He did not, of course, consent to alpha just because it was in his antecedent interest when established—that claim simply repeats Posner's initial mistake. Nor does he accept that it is fair to impose some standard on him just because he has had some benefit from it in the past, particularly if he had no choice whether to accept that benefit. We must show that the principle of antecedent interest is fair, not just assume it.

We shall clarify these objections, I think, if we construct a different principle (call it beta). Beta is not, in its basic formulation, a principle for adjudication, as alpha is, but it furnishes one. Beta is basically a theory of social responsibility. We might formulate it in its most abstract form this way. People should take responsibility for such costs of accidents (defined, as elsewhere in this Article, broadly) if responsibility for such costs would be assigned to them by legislation in an ideal community in which everyone acted and voted with a sense of justice and with mutual and equal concern

WHY EFFICIENCY?

and respect, based on information that is also easily, publicly, and reliably available to the actor. Beta (stated at that level of abstraction) might well be said to be only a schema for a principle of responsibility not a principle itself. Reasonable people who accept it will nevertheless disagree about what it requires because they disagree about how just people would act and vote. (Beta, we might say, admits of different interpretations or conceptions.) But even put so abstractly beta is far from empty. On the contrary, it is very demanding—perhaps too demanding—because it proposes to enforce legislation that would be adopted in certain unlikely circumstances but in fact has not yet been. Beta is a strong theory of responsibility because it is a theory of natural responsibility tied to counterfactual propositions about legislation. Someone might intelligibly believe that beta requires people to take responsibility themselves for the costs of nonnegligent accidents, and yet deny that they should do so until and unless the legislation described in beta is actually in force. He accepts, that is, that beta requires some particular assumption of responsibility, but rejects beta.

Though beta is a theory of natural responsibility, it furnishes a recommendation for adjudication, particularly against the background of a general theory of adjudication, which argues that, in principle, natural rights and duties should be enforced in court. Suppose someone now says, however, that beta is in fact nothing but alpha. Or (perhaps a bit more plausibly) that alpha is one interpretation or conception of beta. Either would be a mistake, and a serious confusion. For alpha will, under certain circumstances all too familiar, recommend judicial decisions that no plausible interpretation of beta could countenance. Suppose, as we just imagined, that a particular rule will in fact meet the requirements of alpha, but for reasons that are neither familiar nor generally available but are developed in adjudication in just the way in which recondite economic data or analysis might properly be developed looking towards legislation. Alpha will insist that that rule must be applied to someone who, even though aware of alpha, could not reliably have anticipated the rule. Beta, of course, will not eliminate all surprises: If people disagree radically about what it requires, because they disagree about the underlying moral issues, then someone may indeed be surprised by its application. But the grounds and incidents of this surprise differ greatly between the two principles.

A second difference seems to me more important. Consider the following familiar argument about the consequences of a principle like alpha. Suppose considerations of fairness recommend that members of some group—the poor, for example, or the un-
educated—should have certain contractual privileges or immunities, either through special rules or through general rules that will have special importance for people in their situation. But if a court adopts such a rule members of that group will in fact suffer in the long run, because merchants or other contractors will be less likely to contract with them, or will insist on compensatory price increases or other conditions, or will in some other way thwart the purpose of the rule in question. Alpha now argues against the immediately protective rule. If alpha is followed, someone loses in the present case who is told that, although fairness would justify a decision for him if his case could be considered on its own merits, he must lose in order to protect others in his economic class in the future. Beta, on the other hand, argues the other way. It regards the fact that others would act so as to undermine the requirements of fairness as irrelevant to the question of natural responsibility, and so irrelevant to the question put for adjudication. The merchants who will ignore the claims of the disadvantaged group, claims we assume _arguendo_ to be required by justice, are not behaving as they would in the counterfactual conditions stipulated for fixing natural responsibility.

Legislators would be wiser, no doubt, to consider the real world rather than these counterfactual conditions, and so to prefer alpha to beta as a guide for forward-looking legislation about contractual immunities, responsibility for accidents, and so forth. Some people might think that judges deciding hard cases at law should also prefer alpha to beta, though others, perhaps more sensitive to the differences between the questions put to the two institutions, will disagree. My present point is only that beta is different from alpha, both in what it requires and in its philosophical basis.

But beta will in fact require much of what alpha requires. If Posner is right about the fact and the distribution of the cost savings under a negligence rule, for example, both beta and alpha will recommend a regime of negligence rather than strict liability over a certain range of cases. Under even more plausible assumptions beta as well as alpha will recommend some version of the Hand test\(^{27}\) as the basis for computing negligence. Perhaps beta as well as alpha would characteristically recommend wealth-maximizing rules for the sorts of disputes that come to adjudication under common law. (Perhaps beta would recommend the wealth-maximizing rule in more of such cases than alpha would.)

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\(^{27}\) _See_ United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).
What conclusions should we draw? Beta seems to me inherently more attractive as a guide to adjudication than alpha does. Beta is itself a principle about natural responsibility, and so, as a guide for adjudication, unites adjudication and private morality and permits the claim that a decision in a hard case, assigning responsibility to some party, simply recognizes that party’s moral responsibility. Alpha is not itself a principle of responsibility at all, but only a guide to wise forward-looking legislation. It must rely on the antecedent-interest principle to supply an argument of fairness in adjudication, and that principle (as we noticed in considering the complaints of someone who loses when alpha is applied) is seriously flawed.

In any case, however, there is a fatal objection to relying on the combination of alpha and the antecedent-interest principle to justify wealth-maximizing decisions in our own legal system. I skirted over this problem in explaining the argument for alpha, but must confront it now. The antecedent-interest principle could never justify introducing alpha itself in a hard case, for if some member of the then community loses who would not otherwise have lost—either the losing party in that case or someone else—then the antecedent-interest principle is violated. It is only after alpha has been in force for some time that it could be in the antecedent interests of every then member of the community to have introduced it. It can never be fair to introduce alpha for the first time (if the fairness of doing so depends on the antecedent-interest principle) though the unfairness of having introduced it may disappear over time.

Is this a boring technical point, calling attention only to some presumed unfairness in a past long dead, or something of practical importance? That depends on what is taken to be the adoption of alpha. Can we say that alpha has already been adopted as a principle of adjudication within a legal system when the decisions the courts have reached (or tended to reach) are the same as the decisions that alpha would have required had it been expressly adopted? Or only when alpha has in fact been expressly adopted and relied on in reaching those decisions? The antecedent-interest principle supports alpha only after alpha has been adopted in the second sense. That principle supposes a moment at which people’s antecedent or expected welfare is improved by a social decision to adjudicate in a certain way, and that moment is not supplied simply by a set of decisions that would have been reached by an institution that had taken that decision. For no one’s expected welfare
would be improved in the way alpha promises simply by a course of decisions, however consistent with alpha, that did not carry a commitment to enforce alpha generally, and this is true even if that course of decisions worked to enforce alpha not by coincidence, but through some invisible hand, or even by the subconscious motivation of judges. What is essential is a commitment, and that can be achieved only by adoption in the second sense.

But since that is so, alpha has never been adopted in our own legal system in the pertinent sense, even if the positive claims of Posner and others about the explanatory power of wealth maximization are accepted in full. So we cannot rely on alpha to show that wealth-maximizing decisions in the past were fair through some combination of alpha and the antecedent-interest principle. Nor can we rely on that combination to justify any wealth-maximizing decisions in the future. On a more careful look, that is, alpha drops away as a candidate for the basis of a normative theory of wealth maximization.

We might well be left with beta. Beta does not, of course, rely on the antecedent-interest principle in the way alpha did. Beta is itself a principle of fairness—it is, as I said, a principle of natural responsibility—and though it will seem to some too demanding, it requires no help from the antecedent-interest principle to count as an argument of fairness in adjudication. So it is irrelevant that beta has never been expressly recognized as a commitment of our legal system. It carries, as it were, its own claims to be a principle of fairness. If it can be shown that past decisions were those that beta would have justified, that does count as an argument that these decisions were fair. If the same can be shown for future decisions, that, without more, recommends these decisions as fair.

So it would be well to carry further than I have here the possibility that beta requires common law decisions that (at least over a certain range of cases) are just those decisions that maximize wealth. If beta does have that consequence, then a Kantian justification of wealth maximization may indeed be available. Posner’s long search for a philosophical basis for his normative theory of adjudication may therefore end in what seemed, at the beginning, unlikely territory for him. For the roots of Kantian morality (as beta practically shouts) are deeply egalitarian. Incidentally, at the close of his letter Calabresi seems to use “policy” as I use “principle.” So it appears we do agree about the role of principle in adjudication though perhaps still disagree about what principle requires.