1980

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LEGAL ANALYSIS AND THE ECONOMIC ANALYSIS OF ALLOCATIVE EFFICIENCY

Richard S. Markovits*

INTRODUCTION

Recently, intense interest has been generated by Professor Richard Posner's hypothesis that the economic analysis of allocative efficiency (or wealth in Posner's terms) provides a reliable algorithm for defining common law rights. The appeal of this hypothesis to various groups is entirely understandable: to those

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1. See Posner, The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication, 8 HOFSTRA L. REV. 487 (1980). Some proponents of this hypothesis might prefer the following somewhat different formulation: judge-made decisions about the relevant set of rights can be accurately predicted by determining which rights definition would be the allocatively most efficient for a court to develop and enforce. This latter formulation makes it clear that the hypothesis is not concerned with whether the relevant decisions are legally "correct." Note that both these formulations fail to specify whether the hypothesis refers to the allocative efficiency of the relevant rights decision at a given point in time, or to a tendency of such decisions to become more allocatively efficient over time.

2. Proponents of this hypothesis have vacillated when describing its precise domain; at times, they seem to speak as if it covered all nonstatutory rights, including both fundamental fairness-type constitutional rights and moral rights in pre-legal societies. In less effusive moments, they have restricted its coverage to a subset of common law rights—namely, those that involve issues whose allocatively efficient resolution would damage no significant political group.
who seek certainty in results it appears to offer right answers;\(^3\) to those who desire methodological clarity it appears to offer straightforward instructions for legal problem-solving;\(^4\) to those who oppose redistributions to the poor it appears to offer a policy argument as well as a justicizing precedent for their own distributional preferences;\(^5\) and to the imperialist economist and economist/lawyer it offers congratulations for possessing a skill that is more useful than would otherwise have been the case. This Article will attempt to show why—despite its obvious appeal—Posner's hypothesis must be rejected.

The first three sections of this Article will analyze various deficiencies of the attempt by Posner\(^6\) and others\(^7\) to demonstrate that the analysis of allocative efficiency is a useful algorithm for the solution of common law problems. The first section will criticize the way in which Posner has defined the concept that is central to his whole analysis: the concept of an increase in wealth or allocative efficiency. As we shall see, Posner seems to have been unaware of how difficult it is to operationalize this concept. In this symposium, he mistakenly assumes that the Kaldor-Hicks test can determine whether any given policy will increase allocative efficiency in the sense that decisionmakers employ this term and, equally importantly, in the sense that is most useful for policy analysis.\(^8\) As we shall see, viewed from these perspectives, the Kaldor-Hicks test has several crucial deficiencies which lead its employers to underestimate the allocative efficiency both of policies designed to aid the poor and of government interventions in general. The second section then examines the evidence Professor Posner cites in

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3. The appearance may be illusory since two or more rules may be equally allocatively efficient.

4. Once more, the appearance may be illusory since the actual method that allocatively efficient courts would have to employ in our worse-than-second-best world would be far more complicated and would involve far more judgment than Posner seems to suppose. For a full discussion of the appropriate method, see Markovits, \textit{A Basic Structure for Microeconomic Policy Analysis in Our Worse-than-Second Best World: A Proposal and Critique of the Chicago Approach to the Study of Law and Economics}, 1975 \textit{Wis. L. Rev.} 950.

5. As we shall see, this appearance is also somewhat illusory: if the concept of allocative efficiency is defined to conform with the expectations of the decisionmakers who employ such data, the goal of achieving such efficiency will conflict less often with egalitarian distributional goals than Posner and others have argued.


ANALYSES OF ALLOCATIVE EFFICIENCY

this symposium to support his hypothesis that the common law is allocatively efficient: in particular, this section will show that the common law of torts (which Posner claims has adopted the negligence standard as defined by Learned Hand) is not allocatively efficient—that is, is almost certainly not the most allocatively efficient set of standards a common law court could adopt. Obviously, given the dubiousness of Posner’s evidence, it becomes even more important for him to explain why the common law should have evolved toward allocative efficiency. The third section of this Article reviews the two types of arguments with which Posner or others have tried to explain the supposed allocative efficiency of the common law. I will show that no one has yet given a persuasive “economic” account of why disputants and/or judges should act so as to make the common law allocatively efficient and that Posner has failed to justicize a system of allocatively efficient rights. In sum, the first three sections of this Article are designed to show that Posner and the Posnerians (1) have failed to define their basic concept in a satisfactory manner, (2) have failed to adduce persuasive evidence that the common law is allocatively efficient, and (3) have failed to account for the supposed allocative efficiency of the common law.

The fourth section of the Article lists a number of reasons why this result should not be surprising. In particular, this section delineates four a priori grounds for doubting the explanatory power of economics in many legal contexts: more specifically, the fourth section examines the extent to which the ability of economics to illuminate various legal issues is undermined by its inability to distinguish (a) prejudices from tastes, (b) entitlement interests from psychological and welfare interests, (c) liberty as independence from liberty as license, and (d) right-bearing entities from nonright-bearing entities. Finally, the fifth section will delineate in very broad terms my own preliminary views about the relationship between allocative-efficiency analysis, legal analysis, and general policy analysis in our culture and will examine the implications of my approach for the proper way to investigate income distribution and tort law questions. I will argue (a) that there is a crucial distinction between ought claims (which are based on ultimate values) and obligation-right claims (which are based on obligational values), that unlike most other government decisions, common law and fundamental fairness-type constitutional decisions always involve obligational values and their correlative rights, and that our deepest obligational value is respect for the individual defined as a
chooser of his or her own ultimate values and life plan; (b) that neither the general methods of positive science nor the particular methods of economics can enable one to determine the implications of this value for specific legal questions; but (c) that economics can provide considerable help to analysts who are seeking to determine the legal and moral implications of these obligational values.

THE DEFINITION OF "AN INCREASE IN ALLOCATIVE EFFICIENCY OR WEALTH"

Obviously, definitions of such concepts as "an increase in allocative efficiency" can never be right or wrong in the sense in which these terms are normally employed. Thus, debates about such definitions must focus on two other types of questions: (1) Is a particular operational definition consistent with the way in which the concept is in fact being employed and (2) is the approach in which the concept is being employed as useful as other approaches and conceptual systems that one might devise? This section will be primarily concerned with the first of these two questions. I will argue that the operational definition of "an increase in wealth or allocative efficiency" that Posner now appears to be adopting—the Kaldor-Hicks test—is inconsistent with the way in which applied welfare economists and decisionmakers employ benefit/cost or allocative-efficiency data when evaluating particular policies. However, I will also indicate why I find the general approach currently employed by decisionmakers more useful than any alternatives yet devised.

Professor Posner has been decidedly vague about the operational definition of his central concept, increase in wealth (allocative efficiency). In fact, until this symposium, Posner has done nothing more than assert that a society's wealth will be increased by any change that "brings the economic system closer to producing the results that effective competition—a free market operating without significant externality, monopoly, or information problems—would produce."¹⁹ Unfortunately, where one is not dealing with a Pareto-superior move—which makes someone better off without making anyone else worse off—it is no simple matter to operationalize this concept of more "effectively competitive" results. In his contribution to this symposium, Posner adopts the

Kaldor-Hicks [hereinafter K-H] operationalization of this concept, although to be fair one would have to read in certain qualifications implied by various positions Posner has previously taken. According to K-H, a change is said to increase wealth or allocative efficiency if its beneficiaries could bribe its victims to accept its adoption. Although in its original form the K-H test envisages compensation's being made with real goods, I will proceed on the typical applied welfare economist's assumption that all payments, gains, or losses are being made in dollars.

In brief, I object to the K-H generalization of the concept of an increase in allocative efficiency because it is inconsistent with the way in which this concept is employed by those who use it to evaluate policies. In particular, on the premise that policies affect individuals in ways that are equivalent to adding or subtracting a certain number of dollars to or from their bank accounts, policy analysts who use allocative efficiency or benefit/cost estimates assume that such data tell them the relative or absolute sizes of the additions and subtractions the relevant policy could be analogized to producing—if the transfers envisaged would neither change any prevailing prices nor alter anyone's real income in other indirect ways. More particularly, at least where individual rights are not at stake, such evaluators normally proceed by identifying the winners and losers and weighting their respective dollar gains and losses according to one or more ethical or political distributional values. The overall evaluation of the relevant policy thus depends on whether the weighted dollar gains of the policy's beneficiaries exceed the weighted dollar losses of its victims.10

10. I should admit at the outset that there are problems with using monetary rather than real measures. In fact, theoretical welfare economists have never succeeded in integrating money into their general equilibrium approach in any meaningful way. However, I do think that appropriate monetary measures are both useful and meaningful in the present context. In order to show why, it is necessary to explain the function that I think theoretical welfare economics is supposed to perform. In brief, in my opinion, the point of theoretical welfare economics is to provide positive economic information that is relevant to policy evaluation whether by citizens or public decisionmakers—and to clarify the relevance of the information provided. As I have just indicated in the text, where individual rights are not at stake, evaluators in our culture base their decisions inter alia on estimates of the dollar gains and losses the relevant policy is supposed to generate. Of course, the fact that we would like to have such dollar measures does not ensure that meaningful measures of this kind can be obtained: the fact that we are accustomed to calling the devils from the deep does not mean that they will come in any meaningful sense when we do call them. Obviously, if such measures cannot be obtained, any monetized definition of allocative efficiency—including the one I am about to propose—must be rejected. The current wisdom among theoretical welfare economists is that no meaningful dollar measures can be designed.
Unfortunately, the K-H test does not provide the positive economic information on which such analysts wish to base their evaluations. In order to explain why, I will first propose my own operational definition of the concept of an increase in allocative efficiency—or more generally of the effect of a policy on allocative efficiency—and then explain the respects in which my definition is more consistent with practice than the K-H definition. According to

Before proceeding, therefore, I will explain why I have rejected this conclusion. In this connection, it will be useful to review the academic debate that led to its adoption. The debate over this issue arose in the context of an attempt by macroeconomists to use market prices to compare the value or "allocative efficiency" of one output package versus another. In this context, economists confronted the following difficulty: In the normal case in which a particular policy changed not only the output package the economy produced but also the relative prices of the constituent products, the new output package (OP2) that would result from the adoption of a particular policy might very well have a higher "market value" than the original output package (OP1) if the postpolicy set of prices (P2) is used but a lower value if the original set of prices (P1) is used—that is, (OP2)P2 > (OP1)P2 while (OP2)P1 < (OP1)P1. In the end, economists concluded that this problem was unsolvable and that such market-price measures could not be used whenever it arose. See Samuelson, Evaluation of Real National Income, 2 Oxford Econ. Papers 1 (1950).

In fact, although such market-price measures were in fact not adequate, this conclusion has little to do with the inconsistency situation on which the debate focused. Indeed, even if the new output package had a higher (lower) market value than its predecessor when both prepolicy and postpolicy prices were used, that is, even if there were no inconsistency, this fact would have only limited allocative significance, for market prices are insensitive to one substantial component of the allocative value of a package of goods—namely, the amount of consumer surplus realized by their consumers (the difference between the price consumers would have been willing to pay for the goods they received and the price they had to pay for them). Thus, even if the market value of the output package a particular policy could provide were higher than the market value of its predecessor regardless of the price set employed, the allocative value of the new output set might be lower if less consumer surplus were generated in the new situation than in the old. However, although this fact shows why market prices cannot be used in this fashion to evaluate various policy proposals, it reveals nothing about the meaningfulness of using other sorts of dollar measures that do reflect consumer surplus for this purpose. For example, if one assumes that the relevant policy would not affect any of the goods that national income accounts do not adequately reflect—clean air and security, for example—and would not affect inflation, it would be appropriate to determine a policy's allocative efficiency by comparing (1) the sum of the market value of the original output package valued at the original market prices and the consumer surplus its consumer realized—(OP1)P1 + CS1—with (2) the sum of the market value of the new postpolicy output package valued at the new market prices and the consumer surplus its consumers would realize—(OP2)P2 + CS2.

But economists did not react by making such an adjustment. Instead of supplementing the pure market-price approach with consumer-surplus data, they abandoned the attempt to make dollar evaluations altogether. Thus, Samuelson proposed the so-called Samuelson comprehensive criterion [hereinafter SCC] according to which one package of goods was said to be allocatively more efficient than another only if for any distribution of income the allocatively efficient distribution of the former pack-
my definition, a policy increases allocative efficiency if and to the extent that the number of dollars its beneficiaries would have to receive to leave them as well off as they would be if the policy were adopted exceeds the number of dollars its victims would have to lose to leave them as badly off as they would be if the policy were adopted, assuming that no one’s real income is affected either directly by the sequence of events which led to his receiving the 
egation{age would always leave someone better off and no one worse off than the allocatively efficient distribution of the latter. See id.} Unfortunately, so defined, the concept of allocative efficiency has no use whatsoever and serves solely to confuse discussion. Thus, following Samuelson’s line, a number of excellent economists have claimed that one must attribute someone’s preference for a policy to his distributional values whenever the policy does not pass Samuelson’s comprehensive criterion despite the fact that in many such cases the real basis for the policy preference was the policy’s allocative efficiency in the everyday sense in which I will employ the term. See Mishan, Welfare Criteria: Resolution of a Paradox, 83 ECON. J. 747, 759-60 (1973).

I would now like to conclude this discussion by explaining (1) why Samuelson’s criterion has no value whatsoever, (2) why a policy that fails Samuelson’s test may still be allocatively efficient and one that passes the SCC may not, and finally (3) how in practice one would be likely to predict the allocative efficiency of any policy in my sense of that phrase. In brief, the SCC is unimportant because economists never have to advise policymakers about the allocative efficiency of a policy which changes the package of goods produced in a known way but alters the distribution of them in an unknown way. Since economists and policymakers do not operate from distributionally blind positions, the relevant question is always whether one policy or set of policies that would generate one collection of goods (or more accurately one set of Pareto imperfections) and one distributive pattern is allocatively more efficient than another policy or set of policies that would generate a different collection of goods and a different distributive pattern. In answering this question, the Samuelson comprehensive criterion will not be very helpful. Thus, as I have already asserted, a policy that failed to pass the SCC might still give its beneficiaries more equivalent dollar gains than it imposed equivalent dollar losses on its victims. Thus, even though the output package the policy produced (OP2) might not be allocatively superior to the original output package OP1 at all income distributions, OP2 at income distribution two (YD2) might still be allocatively more efficient than OP1 at YD1. In fact, the relevant policy might even increase allocative efficiency if OP2 were allocatively inferior to OP1 at all possible income distributions. In particular, this result would obtain if the policy reduced consumption optimum misallocation—the amount of misallocation associated with the way in which the relevant output package was distributed among its possible consumers—by more than it increased the kind of top level optimum misallocation on which the SCC focuses. (Remember in this connection that the SCC assumes contrary to fact that the relevant OPs are always distributed in an allocatively efficient pattern.) Accordingly it might clearly be misleading to attribute to his distributional preferences anyone’s approval of a policy that failed the SCC. For example, an evaluator might approve of such a policy despite the fact that he or she placed a lower average weight on its winners’ equivalent dollar gains than on its losers’ equivalent dollar losses if the policy were allocatively efficient in my everyday sense. Similarly, even if OP2 would be allocatively more efficient than OP1 at any YD where the packages in question were distributed efficiently, that is, even if the policy passed the SCC, the policy might still be
money in question or indirectly by the secondary effects of the financing of the payment (by any tendency of the finance payment to change the prices he must pay for goods, the price or quantity of goods he sells, or the real income of other individuals whose welfare he values). 11

This definition differs from and is superior to the monetized K-H test in three respects. First, my test measures the winners' gains by the amount they would have to receive to compensate them for losing rather than the amount they would be willing to give up to get the policy while it measures the losers' losses by the amount they would have to lose to be left as badly off as the policy would leave them rather than the amount they would have to be paid to accept the policy. The superiority of this aspect of my test reflects the following three facts: (1) The equivalent dollar value or cost of any policy to any beneficiary or victim will depend on his or her real wealth at the time at which the policy is enacted; (2) my approach takes that fact into account by making all parties evaluate their gains or losses on realistic assumptions about the money they allocatively inefficient in my sense. This result would obtain if the policy increased consumption optimum misallocation by more than it increased top level efficiency. Clearly, then, anyone who approved of such an inefficient policy in my sense must do so for distributional reasons and not for the allocative-efficiency reasons that SCC followers would suggest. In short, since passing the SCC test is neither a necessary nor a sufficient condition for increasing allocative efficiency in the everyday sense of that phrase, it is misleading to use the term in the SCC sense.

Of course, in the end, one would not try to evaluate the allocative efficiency of a policy in any of the ways I have so far described: (1) by predicting and comparing the relevant output packages; (2) by supplementing such OP data with consumer-surplus information; or (3) by asking affected parties to report their expected equivalent dollar gains and losses. Such approaches will be both expensive and unreliable. Thus, neither reports about changes in their consumer surplus nor reports about changes in welfare will be credible since the relevant parties are likely to be both ignorant and biased. For example, since the parties that are affected by any policy will realize that their response will help to determine whether it is adopted by influencing estimates of its allocative efficiency, its beneficiaries will have an incentive to exaggerate their gains and its victims will have an incentive to exaggerate their losses. In practice, a sophisticated welfare economist would proceed instead to ask whether the relevant policy seemed likely to increase (decrease) allocative efficiency (1) by altering the economy's various Pareto imperfections in ways that reduce the net amount by which they distort the private profitability of various decisions to the economy's various economic actors, (2) by changing the extent to which such actors maximize their own interests, and (3) by changing the distribution of income in ways that are likely to alter the amount of misallocation generated by such distortions and nonmaximization. For a more detailed description of this approach to allocative-efficiency prediction, see Markovits, supra note 4, at 990-92.

11. The importance of this qualification is discussed infra, p. 822.
would possess at the time of the policy’s enactment; and (3) it thus avoids the distortions introduced by unrealistic assumptions of this kind, which will often affect significantly one’s estimate of the allocative efficiency of the policy in question. Let me discuss each of these contentions in turn.

The possible wealth elasticity of a party’s demand for or against a policy can easily be demonstrated. Take, for example, a policy that would benefit I by reducing by ten cents the price he had to pay for some good he was interested in purchasing. If I’s demand for this good is wealth elastic—if given the good’s price the number of units I would purchase will increase with his wealth—the savings the policy will enable I to achieve will be higher if he can obtain the policy without paying a bribe than if he can do so only by compensating the policy’s victims (II). Hence, the number of dollars I would be willing to accept instead of the policy will be different from the number he would be willing to pay to obtain it. For analogous reasons, the number of dollars for which the victim II would be willing to accede to a policy may be different from the number of dollars she would be willing to pay to prevent a policy.

With the K-H test, I will determine how much the policy will save him on the assumption that he has to pay to obtain it while II will evaluate the policy on the assumption that her wealth will be increased by a transfer before the policy is adopted. Since the K-H test does not envisage the bribe’s actually being paid it will distort I’s and II’s estimates of the value and cost of the policy by making them base their estimates on false assumptions about their wealth positions at the time of the policy’s implementation. By way of contrast, my approach induces I and II to estimate the value and cost of the policy on realistic assumptions about their relevant wealth positions. My question—how many dollars would make you as well off as the policy?—makes the winners evaluate the policy on the assumption that they would not have to give up anything in order to obtain it. Similarly, the question—what dollar loss would leave you as badly off as the policy?—asks the losers to evaluate its cost to them on the assumption that they would not be paid any compensation if it were adopted.

Of course it is conceivable that the distortions K-H would generate in I’s and II’s responses would offset each other. In general, however, this will not be the case. This conclusion reflects the fact that in our actual world, in which Pareto imperfections—monopolies, monopsonies, externalities, taxes on the margin of in-
come, human error—abound, transaction-costless bribes of the type that K-H hypothesizes will generally have an effect on allocative efficiency. This result can be established most easily where externalities are involved. For example, since people who are poor may make individually maximizing but allocatively inefficient decisions to drive breakdown-prone, polluting cars, to live in disease- and fire-spreading tenements, or to commit crimes, a bribe paid by the wealthy to the poor might increase allocative efficiency by reducing the extent to which the poor engage in such misallocative behavior. Although the necessary examples would have to be far more complex, precisely the same point can be made where the Pareto imperfection is monopoly and the groups in question are not wealthy and poor respectively. Since then the bribe hypothesized but not required by the K-H test will not in general be efficiency neutral, the test will not be a reliable indication of a policy's allocative efficiency in the sense in which this concept is actually employed—even if we ignore the other problems I will discuss. Thus a policy that passes the K-H test may be allocatively inefficient since the hypothetical bribe may increase allocative efficiency by more than the policy itself will decrease it. Similarly a policy that fails the K-H test may be allocatively efficient since the bribe the K-H test hypothesizes may misallocate resources by more than the policy itself would increase allocative efficiency.

12. I should add that one cannot overcome this deficiency of the K-H test by supplementing it in the way envisaged by the Scitovsky [hereinafter S] test. The S test for an increase in allocative efficiency was a response to the so-called Scitovsky Paradox (the fact that both a policy and its “reversal” could pass the K-H test). Scitovsky, A Note on Welfare Propositions in Economics, 9 Rev. Econ. Stud. 77 (1941). More particularly, the S test excluded from the allocatively efficient category policies that passed the K-H test if the original losers could bribe the original winners to accept its “reversal.” Thus, according to the S test, a policy is said to increase allocative efficiency only if (1) it passes the K-H test and (2) its victims could not bribe its beneficiaries to agree to its reversal. Id. at 86-87. Unfortunately, the S test is also unacceptable. It simply adds another irrelevant qualification for a policy to be called allocatively efficient, namely that the policy not be Pareto inferior to a transaction-costless bribe from its victims to its beneficiaries. This qualification is irrelevant because a policy that is Pareto inferior to such a bribe may still be allocatively efficient when compared with the status quo, for in a Pareto-imperfect world transaction-costless bribes may be allocatively efficient. In fact in the real world a policy may even be the most allocatively efficient option available—either because such a bribe would not in fact be transaction costless or because it would not be politically feasible. Thus, a policy that fails either or both parts of the S test may still be allocatively efficient, since as we have seen its failure to pass the first part (the K-H test) may reflect the allocative inefficiency of the bribe that test hypothesizes while its failure to pass the second part reflects nothing about its efficiency relative to the status quo. Similarly, the fact that a policy passes both parts of
I should perhaps note that this deficiency of the K-H test may have led Posner to unduly pessimistic conclusions about the allocative efficiency of policies designed to aid the poor. Since the number of dollars that poor individuals would have to be paid to induce them to reject such a policy will tend to exceed the number of dollars they would be willing and able to pay to obtain the policy, the K-H approach will tend to make such policies seem less ef-

the S test does not guarantee its allocative efficiency, since as we have seen its passage of the first part (the K-H test) may reflect the allocative efficiency of the hypothesized bribe while its passage of the second part of the test may reflect its superiority to a bribe that would itself be allocatively inefficient.

Since the Scitovsky Paradox has received considerable attention in this symposium, see, e.g., Bebchuk, The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?, 8 Hofstra L. Rev. 671, 685-87 (1980); Coleman, Efficiency, Utility, and Wealth Maximization, 8 Hofstra L. Rev. 509, 519 n.14 (1980), it might be useful for me to make two further comments about it. First, the reversibility phenomenon that Scitovsky noted is not in fact a paradox: its occurrence simply indicates that a policy that is allocatively inferior to a compensating bribe paid by its victims to its beneficiaries would be part of an allocatively efficient package, consisting of the policy and a compensating bribe paid by its beneficiaries to its victims. Once one realizes that such transaction-costless bribes may affect the extent of resource misallocation in a world with Pareto imperfections, there is nothing paradoxical about the result. Second, when discussing the reversibility phenomenon, one must be careful to ensure that the second policy one is discussing in fact reverses the first in the sense that is relevant for this type of analysis. Even so astute an analyst as I. M. D. Little has thoroughly confused this issue. Thus Professor Little's exposition of the Scitovsky paradox is invalidated by his misspecification of the reversal of the policy he was investigating. See I. M. D. LITTLE, CRITIQUE OF WELFARE ECONOMICS 96-99 (2d ed. 1957). Little's exposition focused on a consumption optimum case (in which the set of products produced was predetermined) in which one party was a monopolist who was also integrated forward into consumption. If unrestrained, such a monopoly would result in consumption optimum misallocation since it would be associated with de facto price discrimination in that the maximizing price for the monopolist (I) to charge his customer (II) will be different from the shadow price he charges himself for this product—the marginal revenue he could obtain by selling an additional unit rather than consuming it himself. The policy Little investigated was a policy which would require the monopolist to allow his customer to purchase as much as she wanted of this product at a submonopolistic fixed price. In effect, this law exchanged one relevant kind of Pareto imperfection—the partially integrated monopoly—for another—a law that prohibited the seller from maximizing. Let us assume that that law would pass the K-H test. Little then asked whether a law that he described as reversing the first might also not pass the K-H test. Id. at 100-01. In fact, however, the "reversing" law he proposed required the monopolist to charge the price he originally found profit-maximizing. Unfortunately, this second law does not in fact reverse the first, for the original maximizing price will probably not be maximizing in the new situation the second K-H test envisages. Since the second K-H test (the one applied to the reversal) envisages the original losers' bribing the original winners before the second law is passed—that is, since K-H envisages I's and II's having very different wealth positions than they had before any law was passed—it is most unlikely that the original monopoly price will also maximize the monopolist's welfare in the situation the second K-H test envisages—because I's and II's demands for the relevant good will almost certainly be income elastic. Thus the
icient than they are by measuring the gains they generate for their beneficiaries in an incorrect way—by measuring them according to the lower numbers of dollars they would be willing to pay for the policy rather than the higher number of dollars they would be willing to accept instead of the policy. In fact, the K-H approach will also tend to make such policies seem less efficient than they are by incorrectly measuring their victims' losses by the higher number of dollars they would have to be paid to induce them to accept the policy rather than by the lower number of dollars they would be willing to pay to prevent its adoption (though this distortion is likely to be less significant than its predecessor since the policies with which we are now concerned will often impose straightforward dollar losses on their taxpayer victims, that is, losses that the victims would be willing to accept for the same number of dollars they would be willing to pay to prevent the associated policy's adoption).

The second difference between my test and the monetized K-H test is that my definition (1) asks those who are hypothesized to receive dollar payments to imagine that their receipt and use of the money in question will not affect their real incomes indirectly by changing anyone else's real income, or supplying or purchasing behavior and (2) asks those who are hypothesized to surrender dollars (goods) to imagine that their surrender of the dollars (goods) in question will not affect their real incomes indirectly by changing anyone else's real income, or supplying or purchasing behavior. Basically the reason that this feature makes my definition superior is that since the equivalent payment (surrender) in question is hypothetical, there is no reason to make any particular assumption about who would give up (receive) the goods that the winner (loser) was hypothesized to receive (lose) much less about whether the winner (loser) in question will be either benefited or harmed by the secondary effects that would result from related changes in only law that could properly be said to reverse the first law Little discussed would be one which permitted the monopolist to maximize. In this context, then, one should speak of one law's reversing another only if it returns the economy to a position in which it has the same set of Pareto imperfections that it had before the first law was passed. To be even more specific for these purposes, one should define such imperfections not in terms of their manifestations—e.g., a given price-marginal cost gap or a given degree of discriminatory pricing—but rather in terms of the underlying Pareto-imperfect structures—a given monopoly that is partially integrated forward. This distinction is important because the price-marginal cost gap or discriminatory pricing associated with a given structural imperfection may vary with the associated distribution of income.
ANALYSES OF ALLOCATIVE EFFICIENCY

such other parties' real incomes. Hence, the most appropriate approach is to block out such secondary effects rather than to assume that the loser will pay the winner—or as in K-H that the winner will pay the loser—and to take the secondary effects of this particular payment scheme into account.

The third difference between my test and K-H is that mine tells the winners to evaluate the policy on the assumption that they do not have to pay for it and the losers to do so on the assumption that they will not be paid for it. The superiority of my test in this regard reflects the possibility that the winners may place a lower value on a paid-for policy than on a free policy—even if the secondary effects described above are ignored and the winners' demand for the policy is not income elastic—as well as the analogous possibility that the losers may place an extra cost on a damaging policy's being adopted without their being compensated—even if no secondary effects or relevant income elasticity are present. This possibility may arise because a government requirement that the winners compensate the losers may undermine the policy's tendency to indicate the justness of the winners' demands or manifest respect for them or sympathy for their position in a context in which the winners value such vindication or sympathy by more than other groups disvalue it. In other words, this possibility arises because for some winners a paid-for (market-obtained) policy may be different from an otherwise identical free policy.

Consequently, when winners and/or losers value policies as vindications of their positions or manifestations of concern and sympathy, K-H may distort the relevant analysis by bringing into play valuations attributable to compensation which is in fact purely hypothetical. In the type of case with which we are now concerned, the K-H test may fail because the requirement of compensation may affect the psychic significance of the government's behavior. This inadequacy of the K-H test reflects its creators' adoption of an assumption that is employed throughout economic analysis—that is, the voluntary-market-transaction assumption that the true allocative value of any commodity (service, policy) to any fully informed, maximizing individual can be measured by the lowest price for which he would voluntarily sell it or the highest price for which he would voluntarily buy it. Unfortunately, this assumption ignores the fact that for many individuals the act of purchasing certain products, services, or policies changes their essential quality. This assertion is perhaps most convincing where sexual services or friendship is involved. Paid-for sexual services or friendships are
manifestly not the same thing as their nonmarket counterparts. Hence, the number of dollars which most individuals would be willing to pay for sexual services will be different from the number of dollars they would have to be given to make them as well off as the voluntary sexual relationship made them (even if their demand for the services were not income elastic and no self-definitional issue were involved). Similarly, and equally obviously, one cannot measure the dollar value of a friendship to someone by the number of dollars she would be willing to pay the supposed friend to form this relationship. In fact, for many, part of the value of having a friend would be destroyed if they had to pay anyone to arrange for the friendship's development. Admittedly these examples might be dismissed as special cases. However, the range of such non-marketable expenses may be far wider than Posner and many other economists appear to suppose. Thus, for many, the experience of going to a public park which belongs to them as members of a society may be different from the experience of going to a physically identical private park for which they have to pay. And again, for many, the value of having their minimum welfare protected by a state social security system may exceed the value of privately purchased protection with identical coverage. Clearly, to the extent that these relationships obtain, the voluntary-market-transaction approach will underestimate the allocative efficiency of the government's providing such services.\(^{13}\)

\(^{13}\) Posner's failure to grasp this difference between “paid-for” and “not-paid-for” benefits may also have distorted his analysis of the allocative efficiency of privacy protection. See Posner, The Right of Privacy, 12 GA. L. REV. 393 (1978). Thus, to the extent that part of our desire to be loved and trusted consists of a desire for unearned (unpaid-for) love and trust—to be loved and trusted unconditionally for “what we are” rather than for “what we have done”—the allocative efficiency of legislative policies and common law doctrines protecting privacy may be higher than Posner supposes.

In other contexts, the voluntary-market-transaction assumption may fail because of certain entailments of voluntary acts rather than because of certain entailments of market transactions. More particularly, in some contexts, the voluntary-market-transaction assumption will fail because voluntary acts have a costly self-definitional character. For example, the number of dollars for which an individual could sell his arm and remain equally well off may be far higher than the number of dollars that would compensate him for the accidental loss of an arm. Similarly, the number of dollars for which the members of the present generation of an old, established family could sell the family's historic land, house, and furnishings might be far higher than the number of dollars that would compensate them for their loss. This line of reasoning might provide an allocative-efficiency reason both for eminent domain and/or the practice of paying at least some individuals the market value of their property rather than the price they would have to receive to make them willing to sell it voluntarily. A related allocative-efficiency argument can be made for forcing medical
Accordingly, if definitions of "increase in allocative efficiency" are to be judged by their consistency with the way in which allocative-efficiency data are currently employed by policy analysts, the K-H test for such an increase—and the Scitovsky test as well—must be rejected in favor of my own. Of course, one might still argue for the ultimate superiority of the K-H test, that is, one might still maintain that superior policy conclusions would be reached if decisionmakers structured their analyses in a different way which made proper use of the data the K-H test can provide. I should emphasize, however, that one cannot base such an argument on the ground that the current approach unfairly reduces the apparent loss any impoverished losers sustain by measuring this loss by the number of dollars they are willing and able to pay to prevent the policy's adoption. In brief, this objection is ill-founded because the current system does not make the overall evaluation of such parties' losses depend so much on their ability to pay, for under the present system any such equivalent dollar losses are weighted before they are compared with the winners' (weighted) gains. Thus, under the system I have described, a utilitarian

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14. See note 12 supra.
decisionmaker who believes in the declining marginal utility of money might decide against an allocatively efficient policy whose victims are poorer than its beneficiaries; that is, he or she might conclude that the weighted equivalent dollar losses of the losers exceed the weighted equivalent dollar gains of the beneficiaries. Indeed, the primary advantage of the present approach is that it separates out such distributional judgments and allows the economist to provide data that is relevant for decisionmakers of all distributional persuasions.

This section has attempted to show (1) that Posner has been particularly sloppy when defining his basic concept of an increase in wealth or allocative efficiency,\(^{15}\) (2) that the definition he has se-

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15. Although Posner accepts the Kaldor-Hicks definition of "an increase in allocative efficiency," Posner, supra note 1, at 491, some of his previous positions qualify this test in a way that is worth examining. In particular, Posner often speaks as if he would not count what Dworkin calls "external preferences" when analyzing a policy's impact on wealth. R. DWORKIN, TAKING RIGHTS SERIOUSLY 234-38 (1977). That is, he would not count the dollar gains or losses various parties realized because they approved or disapproved of the policy for reasons that had nothing to do with its material consequences for them. See Posner, Utilitarianism, Economics, and Legal Theory, 8 J. LEGAL STUD. 103, 133-34 (1979). Admittedly, Posner is not always consistent on this issue. For example, at times he is willing to count altruists' external preferences when assessing the allocative efficiency of a policy. See id. at 131. In one sense, Posner has a very good reason for taking this position: if one allows moral values to enter into economic analysis in this way, it will be much more difficult to develop a test that distinguishes between allocative-efficiency theories and moral theories of judicial decision. On the other hand, as we shall see, in the end Posner must be concerned not just with predicting but also with explaining and justicizing his economic theory of judge-"made" law. Obviously this will be much harder to do when certain sorts of gains and losses are excluded from his definition of increase in wealth or allocative efficiency, for by definition a dollar external-preference gain is worth as much to its recipient as a dollar material gain. Hence, I do not think that he is justified in excluding external preferences from his analysis.

Such external preferences will also be relevant for individuals and public decisionmakers interested in evaluating the ultimate desirability of some public policy not required or prohibited by the rights of one or more parties. More particularly, such external preferences will be relevant whenever the political needs or ultimate values of the evaluators do not lead them to place a zero weight on any external preference-based dollar gain or loss. Although such zero weighting may sometimes be appropriate—for example, where an individual's external dispreference for a policy that will benefit blacks reflects his racial prejudice—I do not think that this case is typical. Thus, I disagree with Dworkin's contention that external preferences never should be counted. See R. DWORKIN, supra, at 275. I do not think that one denies nonhandicapped people treatment as equals when one considers the external preferences some have for benefiting the handicapped. In fact, I am not even certain that Dworkin's treatment-as-an-equal principle would be violated by a decision that counted the fact that many people would take pleasure at a benefit's being conferred on a much-loved individual. Although admittedly such situations are both more controversial and more difficult in practice to distinguish from cases in which prejudices
lected is inconsistent with the way in which allocative-efficiency data are analyzed by policy analysts, (3) that his definition tends to make interventions designed to improve the position of the poor seem less efficient than they in fact are, and (4) that his definition—and indeed the economist's general voluntary-market-transaction approach to such issues—tends to make government production in general seem less socially valuable—or indeed less allocatively efficient if that term is most usefully defined—than a more sensitive analysis would reveal.

are operative, Dworkin's principle might also not be offended by an evaluator's considering the external preference Italians (Jews) have for rewards being given to Italians (Jews), at least as long as the evaluator places equal weight on the similarly motivated external preferences of all other individuals. Accordingly, I think that in theory the economist should always provide information about the external preferences for or against particular policies though given their possible moral doubtfulness they should always be separately identified: I would therefore count them in any analysis of the allocative efficiency of a particular policy—though I would identify them as such (just as I would provide other data on the distributional impact of a policy) when fully describing it to a discriminator.

Posner's position resembles Dworkin's in one other respect: both talk as if there were right answers to legal questions (though Dworkin has qualified his position on this issue more recently). Thus, if one's standard for evaluating whether judges have done their job correctly is the effect of their decision on allocative efficiency—and Posner often does speak as if that is his standard—there will usually be a right answer for the judge to reach: the answer that will increase allocative efficiency when compared with any of its alternatives. At times, Dworkin has often spoken as if Hercules could also discover the right legal answer if he pursued his analysis far enough back into the institutional morality of his community. However, as Dworkin seems now to acknowledge, even a Hercules will often not be able to produce a right answer in truly hard cases. Let's assume with Dworkin that Hercules' task is to determine the institutional morality of his community and that in order to do so in hard cases he will have to decide which conception of human dignity best captures community practice—e.g., postdicts best the relevant legal precedents (minimizes the extent of legal errors) and gives the best explanation for those decisions that are inconsistent with the conception in question—that is, comes closest to establishing the kind of reflective equilibrium which the Dworkinian judge seeks. Id. at 105-30. (I should note that in some cases the data to be accounted for would probably include nonlegal rights claims made or not made by members of the community.)

Unfortunately, a logical barrier will often preclude Hercules from performing this task. Presumably, the different conceptions of human dignity among which Hercules must choose are distinguished by the different weights they place on various dignity-related values. If so, there will be many hard cases in which it will not be possible to compare the size of the errors implied by alternative dignity conceptions. Let's assume that Hercules must choose between two conceptions of human dignity, DC1 and DC2, that have different implications for the case at hand. Even if the same decisions are not consistent with DC1 on the one hand and with DC2 on the other, it may not be possible to choose between DC1 and DC2 by determining which conception minimizes the amount by which their erroneous decisions were wrong. Thus, DC1 may minimize the extent of the errors made in these cases when such errors are measured by the values and value weights associated with DC1 while DC2 minimizes the extent of the errors made where such errors are measured by the
THE ALLOCATIVE EFFICIENCY OF THE COMMON LAW:
A REVIEW OF POSNER'S TORT LAW CLAIM

Obviously, limitations of both time and space preclude my undertaking any comprehensive review of Posner’s claim that by and large the common law is allocatively efficient. However, I think that I can illuminate the basic problems with Posner’s analysis by focusing on the common law example Posner cites most often in his contribution to this symposium: the negligence standard in tort law.\(^{16}\) Posner’s claim that the common law of negligence is the most allocatively efficient standard courts could employ rests on his assumption that the common law’s negligence standard is captured by Learned Hand’s negligence formula.\(^{17}\) Roughly speaking, Hand’s formula evokes a kind of monetized Love-Thy-Neighbor standard, according to which a defendant is considered negligent if it would have been in his interest to incur additional accident-avoiding costs if he would have been the conventional victim of any accident he caused. More particularly, since Hand implicitly assumed that all relevant parties were risk neutral, his formula declared a defendant negligent if the private dollar cost he would have had to incur to reduce the probability or likely severity of the accidents he might cause was lower than the amount by which he would thereby have reduced the weighted average expected accident costs\(^{18}\) he was likely to inflict on his accident’s conventional values and valued weights associated with DC2. I see no way out of this difficulty (which is analogous to the unnecessary problem economists faced when they tried to compare the market value of two different packages of goods where the relative prices of the individual goods when package one was produced differed from their relative prices when package two was produced. See note 10 supra). Obviously, the logical problem will be even more severe if the list of erroneous decisions associated with DC1 is different from its counterpart for DC2. When this logical impasse arises, Hercules simply cannot base his choice between DC1 and DC2 on his observation of the legal (and moral) behavior of his community: there will be no right obligational answer (in the sense in which I will define that term below). Instead, Hercules will have to base his decision on nonobligational (ultimate) values. One could of course specify a method of choosing among such values that removed all of Hercules’ discretion in the strong sense, but I do not think that our legal system provides such a technique. I suspect that Dworkin would object to this discussion by attacking the implicit model of conceptions contained in the sentence that begins with the dubious word “presumably.” I would be interested to hear more about the logical structure of a “conception.”

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18. In order to calculate the weighted average expected accident costs, one
victims.

At least six different objections can be made to Posner's contention. The first is the least important and most easily remediable. Hand's formula does not adequately deal with the potential accident victims' probable risk aversion. However, it is simple enough to amend Hand's formula so that it takes into consideration not just risk aversion but the victims' risk aversion. So amended, the Hand formula would compare the cost of the defendant's accident-inducing project not with the amount by which it would reduce the weighted average expected accident costs but rather with the associated reduction in all potential victims' certainty-equivalent accident costs—the sum of the weighted average expected accident costs and the extra amount necessary to compensate all potential victims for bearing the attendant risk. In other words, under the revised formula, the crucial question would be whether the defendant would have incurred additional accident-preventing costs if (1) she was her accident's (conventional) victim and (2) she was equally risk averse to the accident as its potential victims; that is, the defendant would be held negligent if the number of dollars accident prevention would cost her was lower than the number of dollars her potential victims would have to be given to be made as well off ex ante as her accident-preventing activity would make them.

The second objection to Posner's analysis is his assumption that the Hand negligence formula accurately represents the governing standards of the common law of torts. At least four points should be made in this connection. First, Posner's contention that tort law is governed by the negligence standard is controversial at best. Posner's discussion of tort law doctrine focuses heavily on turn-of-the-century cases (1875-1905), in which a negligence standard appears to have been employed. As Posner recognizes, would take the costs that would be generated by each possible accident the defendant might cause, weight each such figure by the probability that such an accident would occur, and sum the resulting amounts. The weighted average expected savings the accident-avoiding behavior would generate would then equal the amount by which the behavior would reduce the size of this sum.

19. In many situations courts probably could make valuable though admittedly crude guesses about the difference between the risk averseness of the defendant and the victim (based in part on their size and in part on the number of such risks to which they would be exposed).

20. My understanding of the first three points was significantly advanced by conversations with various colleagues at the University of Texas Law School, in particular with Larry Goffney, Rocky Rees, and Guy Wellborn.

both pre-1870 courts and contemporary courts often claim that they are employing a strict liability standard (liability without fault) rather than a negligence standard. Admittedly, one might argue that strict liability doctrines actually implement the Hand negligence formula: as I will argue in a moment, to my knowledge, an articulated negligence standard has never been applied to many of the ways that parties might have been able to reduce the cost of accidents and their avoidance. Thus, I know of no case in which a manufacturer has been held negligent for failing to reduce his or her output or for choosing to stay in business. Conceivably, some (many?) strict liability doctrines actually serve to correct the courts’ failure to apply the negligence doctrine to all relevant choices. On this account, one would expect strict liability standards to govern where and only where there is good reason to believe that the relevant party could have reduced the cost of accidents and their avoidance by making decisions that the negligence doctrine should have required her to make (but has not been interpreted to require her to make)—for example, by reducing her output, going out of business, doing research with highly uncertain payoffs, and so on. Certainly, some torts doctrines are compatible with this hypothesis. Thus, the products liability doctrine (used by some jurisdictions) that a manufacturer cannot be held liable for a risk that was not “knowable” suggests that what is called strict liability in the product-design area may in fact be an extension of the negligence standard: if the risk was not “knowable” (in the sense that the manufacturer could not be held negligent for failing to do research that would uncover it), holding the manufacturer liable could not induce her to reduce the cost of accidents and their avoidance by doing research that would enable her to reduce the risk or by reducing her output (since any related reduction in her accidents would presumably be offset by an increase in the accidents caused by the “unknowable” risks associated with the production of the additional units of the other goods whose output would be increased when hers was reduced). I should note that I personally doubt that all or most strict liability doctrines can be accounted for in these terms. Certainly, no one has yet done so in a comprehensive way. Hence, I do think that the fact that the common law contains a large number of strict liability doctrines does undermine Posner’s claim that the common law standard for tort liability is

Second, Posner's claim is also undermined by the fact that many cases that are decided under a negligence standard do not employ a Hand-type formula for determining negligence. In particular, where accidents are caused inadvertently, discussions of liability tend to be based on a reasonable-man model (under which individuals are often not held liable for exercising bad judgment) rather than on Hand's formula—on doctrines summarized by Sections 289-290 of the Restatement of Torts\(^\text{24}\) rather than on those summarized by Sections 291-293.\(^\text{25}\) In fact, experts tell me that in

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23. Many other judicially created doctrines also are inconsistent with Posner's claim that the common law of torts can be characterized as a Hand-type negligence-contributory negligence scheme—e.g., doctrines that create charitable and governmental immunities, comparative negligence doctrines, etc.

24. § 289. Recognizing Existence of Risk
The actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising

(a) such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have; and

(b) such superior attention, perception, memory, knowledge, intelligence, and judgment as the actor himself has.

25. § 291. Unreasonableness; How Determined; Magnitude of Risk and Utility of Conduct
Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.
practice, this “reasonable-man model” appears to be interpreted selectively in such cases to excuse plaintiffs who would have been negligent under the Hand formula from findings of contributory negligence and to hold liable professionals who are not at fault (who used an optimal procedure that did not eliminate the possibility of an error that, for example, all surgeons make a small percentage of the time). However, I must admit that the use of a reasonable-man model in cases of inadvertent accidents might make economic sense since actors who cause harm inadvertently may not respond to economic incentives in the way that theories that presuppose maximizing individuals would predict.

Third, in practice, it seems to me that common law courts that appear to be employing a Hand-type formula often consider factors that an economist interested in allocative efficiency would not deem relevant and place inefficient weights on factors such economists would deem relevant.²⁶ Thus, the Restatement of Torts’ purported summary of the Hand formula (Sections 291-293) as applied by the courts appears to give a role to the utility or social value of the accident-causing act which is inconsistent with the goal of maximizing allocative efficiency.

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²⁶. Unfortunately, the citation of individual instances in which allocatively unwarranted factors or weights are considered or analyzed would not really refute Posner’s claim since he is perfectly willing to admit that some cases may be incorrectly decided from the perspective of his hypothesis. A really thoroughgoing review of the common law of negligence is therefore required if Posner is to be refuted on this basis. Although I have no inclination to undertake such a review myself, I would like to note that Posner cannot substantiate his claim simply by showing that the common law has taken into account factors that would be relevant for an allocative-efficiency analysis: for his purposes, he must show that the common law has given these factors the weight that would be appropriate in such an allocative-efficiency analysis. Obviously, both Posner and his critics must also avoid drawing too many conclusions from a limited sample of appellate cases.
Fourth, as I have already suggested, even where the common law has employed the “economist’s” Hand formula to hold a defendant negligent for not incurring certain kinds of accident-preventing costs, it clearly has not applied this formula consistently to all the possible ways that a defendant might have reduced the certainty-equivalent accident costs he or she has generated. In order to illustrate this point, let us list the various ways in which a manufacturing firm might reduce the amount of certainty-equivalent accident costs it generated: (1) by changing to a known alternative production technique; (2) by changing to a known alternative location; (3) by discovering and using new production techniques or locations—that is, by engaging in, and using the fruits of, research into alternative production techniques and locations; (4) by reducing its unit output; (5) by altering the product variant it produced; or (6) by going out of business altogether. If we assume that the Hand test is allocatively efficient, an allocatively efficient common law would hold a defendant negligent if his or her failure to engage in any of these accident-reducing activities violated the Hand standard. In fact, however, the common law of torts has focused almost exclusively on the first option just described—that is, on whether the defendant has produced his output with due care. Thus, at least to my knowledge, no common law court has ever held a defendant negligent for failing to go out of business, for refusing to reduce his or her output, for failing to change his or her product variant (where the accident results from the production rather than the use of the product variant), or for failing to do research whose outcome was highly uncertain. Of

27. Precisely the same possibilities will be present where pollution costs rather than accident costs are involved.

28. Economists would consider a shift to a new location a change in production technique (or where location is important to consumers, a change in product). I have separated out such location changes because they may be covered by a different body of legal doctrine from the other sorts of possible production technique changes that are relevant.

29. As any good lawyer would intuit, the distinction between (1) and (2) on the one hand and (3) on the other is not nearly so clear as the text suggests. Thus, where the general outlines of a new production technique are known and there is a very high probability that a successful innovation of this type will result if the relevant expenditures are made, courts will be more likely to treat the relevant research as part of the adoption of an alternative known production technique.

30. The common law of nuisance is such a mess that I hesitate to say whether the Hand formula has prevailed under the nuisance rubric in relation to the change-in-location possibility.

31. But see note 18 supra. I should note in this connection that this failure of
course, as I have already suggested, in some such cases the courts may have used a strict liability standard to hold liable defendants whose behavior really was negligent in Hand's sense. Indeed, Posner has himself noted this possibility. Thus, according to Posner, industries were declared to be ultrahazardous (and therefore subjected to strict liability) where there was substantial reason to believe that they could have reduced the cost of accidents and their avoidance by reducing their outputs.\(^3\) Unfortunately, however, his only illustration of this possibility (the blasting industry, where digging could supplant blasting) really seems a case in which the relevant choices—between alternative production techniques—should have been covered by a conventionally applied Hand standard. Admittedly, even if Posner granted that the courts did not apply the Hand standard to all possible accident-avoiding activities (either explicitly or under the rubric of a strict liability test), he could try to defend the allocative efficiency of the common law by arguing that the courts have not considered these options because they correctly believed themselves to be institutionally incapable of making the necessary judgments. I do not find this argument convincing but even those who do would have to admit that the problem just discussed makes the allocative efficiency of the common law of torts far more empirically contingent\(^3\) than

common law courts contributes to the inefficiency of monopolies. Thus, at least where nonproducers (pure research firms) are not in a position to make the relevant discoveries, the fact that an industry is a pure monopoly will reduce the probability that accident- or pollution-reducing research—that should be but has not been required under the Hand test—will in fact be undertaken. This conclusion follows from two facts: (1) Such research will tend to be undesirable from the monopolist’s perspective since it will often result in the discovery of a more expensive though less accident-prone or less polluting production technique which the monopolist would then be negligent for not employing and (2) the monopolist (unlike a competitor) will be able to prevent the discovery of this technique by not doing the research himself.

32. See Posner, supra note 17, at 71. Where the risk of accident depends on the “outputs” or research activities of plaintiffs as well as defendants, the Hand formula would have to be applied to plaintiff’s output and research activities as well as to defendant’s.

33. I should hasten to admit that I have no alternative explanation for the courts’ failure to be more even-Handed. For example, although the misfeasance-nonfeasance distinction works in relation to research, it does not work in relation to reducing unit output, changing product variant, or going out of business. Of course, this distinction seems rather dubious in any case. It would be very complicated to determine, for example, whether a particular seller’s failure to reduce accidents by reducing his unit output was allocatively inefficient and hence negligent, for such a calculation should ideally reflect the price/marginal cost ratio of the manufacturer and his product and factor-market competitors, the externalities all such firms gener-
Professor Posner usually implies.\textsuperscript{34}

In short, Posner's claim that the economist's version of the Hand formula is the working standard of the common law of torts is highly doubtful at best. The Hand formula cannot account for many cases decided under a strict liability standard, does not govern inadvertent accidents, is often not interpreted in the way that economists suppose, and is not applied to all the various choices the relevant parties could have considered.

The third objection to Posner's analysis relates to its implicit assumption that the legal system operates costlessly and without error (in relation to both issues of liability and issues of damages). The fact that all parties to an accident will have to incur costs to settle their dispute changes both the formula that will result in allocatively inefficient behavior's being held negligent and the likelihood that the legal system will give perfectly informed maximizers allocatively efficient incentives to avoid accidents. Let us begin with the formula. Since accidents create costs not only by harming their victims directly but also by inducing such victims, the tort-feasor, and the public at large to incur various real costs to litigate or settle the associated dispute, a negligence formula that is designed to give allocatively efficient incentives would have to be adjusted to reflect such dispute-settling costs: so revised, the formula would result in a tortfeasor's being held negligent if the direct cost to her of some accident-reducing decision were less than the sum of (1) the ex ante payment that would leave her potential victims as well off as they would be if this decision reduced the risk they faced (in a world in which dispute settling were costless)

\textsuperscript{34} Professor Posner used automobile/pedestrian accidents rather than manufacturing accidents as his tort law example in this symposium. Although such accidents are somewhat less suitable for my purposes, analogous points could be made in this context as well. Drivers are never held negligent for failing to drive less, for failing to take less dangerous routes (at least where the route selected is not prohibited) or for failing to drive at a safer time. Admittedly, the argument that such decisions reflect the courts' assessment of their own competence (at least relative to that of the driver or highway patrol authorities) is more persuasive in this context. However, I doubt that one could find an equally persuasive explanation for the common law courts' reluctance to find risk-prone individuals (the blind or the lame) contributorily negligent on the grounds that they should not walk at all or that they should not walk at certain times, at certain places, under certain weather conditions, or for certain purposes. And, of course, my textual discussion would apply mutatis mutandis to the common law liability of the automobile manufacturer—\textit{e.g.,} to such issues as product-design defects.
and (2) the payments that would just make the tortfeasor, her potential victims, and the public willing to accept the risk of the additional dispute-settling costs her accident-preventing decision would have obviated. Clearly, then, since the Hand formula does not reflect such dispute-settling costs, it will sometimes fail to hold a tortfeasor negligent for making allocatively inefficient decisions that increase the risk of accidents. Although this feature of the Hand formula would be allocatively inefficient if it did not discourage litigation, its tendency to deter expensive suits that would inhibit behavior that would be efficient if not legally challenged might make it efficient overall. In any case, such dispute-settling costs also imply that the common law will not give adequate accident-preventing incentives to tortfeasors who are held negligent under a revised Hand formula that does reflect such costs: thus, since the American common law will not require negligent tort defendants to pay real court costs or their victims' litigation costs—and will certainly not require them to compensate their victims for the time and effort they must personally invest in the dispute-settling process—it will not internalize all the externalities such defendants have generated even if they are held liable under a revised Hand formula. Since this feature of the common law may also discourage inefficient litigation, its overall efficiency can be determined only empirically. In fact, the cost of litigating may also undermine the incentives the common law gives prospective tort defendants to avoid decisions that would even be negligent under the unrevised Hand formula. In particular, litigation costs may produce this effect by inducing the accident's victim to forgo his claim or to settle the dispute for less than the injury he actually received: since plaintiffs will realize that the cost of litigating their dispute to a successful conclusion will be significant, they may choose to abandon their claim or to settle for a reduced sum that reflects the fact that their net gain from litigating (or threatening to litigate) will be less than the damages they would receive at the end of trial (or the settlement they could obtain). Of course, since the defendants also must incur certain expenses to litigate the dispute, the settlement may not be for less than the direct damages their accident generated. However, I doubt that settlements would normally cover all such direct damages even if there were no uncertainty about the judicial outcome, for in many types of tort suits, corporate defendants or insurance companies will be able to take advantage of economies of scale in litigation as well as of the strategic advantages repeat
ANALYSES OF ALLOCATIVE EFFICIENCY

players can obtain by developing a tough settlement reputation. Hence, where settlements take place, negligence law would not be likely to internalize all accident costs even if all common law liability and damage decisions were correct and dispute-settling costs were not real, that is, were not part of the allocative costs generated by accidents.

Once one admits that common law courts may hold some defendants who were in fact negligent not liable or that such courts may systematically underestimate the damages accidents directly generate—for example, by failing to consider the value that individuals who have been killed through tortious behavior would have placed on their own lives or more precisely by failing to make their expected damage awards reflect the sum that the potential victims of relevant accidents would have had to have been paid to leave them as well off ex ante as the defendant's accident-reducing decision would have left them by reducing the risk of their being killed—the proposition that the common law of negligence creates allocatively efficient incentives becomes even less persuasive. Indeed, the fact that courts employing a negligence standard must sometimes mistakenly conclude that defendants were not negligent strengthens the case for the allocative superiority of strict liability, since the effect of such errors will not be offset (in fact will be compounded) by decisions that mistakenly hold nonnegligent defendants liable (though it will be offset by any tendency for excessive damages to be awarded). In any case, it should be clear that one cannot assess the allocative efficiency of our current negligence system without considering both the cost of dispute settling and the possibility that courts might make erroneous liability and damage decisions.

The next two objections to Posner's analysis relate to its assumption that from the perspective of allocative efficiency the behavior of the accident participants is distorted solely by the external costs the defendant and plaintiff impose on each other by causing the accident. It is this assumption that enables him to argue (1) that accident-causers will always maximize their individual interests and (2) that the application of the Hand formula (at least if appropriately revised to take the phenomenon of risk aversion into account) will produce a situation in which the private benefits and costs any party will generate by engaging in accident-avoiding

35. See Posner, supra note 17, at 40-42.
activity will equal their allocative counterparts; that is, that the application of the Hand formula will result in all relevant parties' having allocatively appropriate incentives to engage in accident-avoiding activity.  

Thus, the fourth objection to Posner's claim focuses on his assumption that all parties to any litigation will be perfectly informed maximizers. For two reasons, I find this assumption particularly implausible in this context. First, although some accident-causing behavior is knowingly engaged in by actors who accurately perceive the risk of its causing an accident, many accidents result inadvertently from inattention or carelessness; that is, they do not reflect perfectly informed maximizing behavior (are committed by individuals who are unlikely to respond appropriately to a rational incentive scheme). Second, many of the accidents with which the tort law is concerned involve organizational disputants. Even if one assumed that each individual in the society successfully maximized his or her own interest, organizations probably would not. Thus, although I tend to think that the corporate takeover market and boards of directors appointed by institutional investors offer more protection to (major) shareholder interest than is popularly supposed, I suspect that managers may sometimes pursue their own interest at the expense of their shareholders by failing to engage in accident-avoiding activities that Hand's formula requires.  

Similarly, although hierarchical control mechanisms are improving, I suspect that production manager incentive structures often do not fully reflect the damage their departments' accidents can do to their company. In all such instances, the Hand formula will not induce the relevant parties to behave allocatively efficiently. And once one party's failure to maximize results in some positive probability that he or she will engage in negligent behavior, the Hand formula will also not provide adequate incentives for the other party. Thus an individual tortfeasor who realizes that his liability may be eliminated or reduced by his victim's contributory negli-

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36. See id. at 32-33.
37. There are at least two reasons why negligence losses may be less damaging to the responsible managers than to stockholders. First, the negligence loss may be suffered well after the relevant manager's tenure is completed—as, for example where solid chemical wastes are involved. Second, shareholders may be less likely to blame managers for tort verdicts than for higher production costs. They may conclude that the tort verdicts were not predictable (even when they were) or may choose to scapegoat the relevant governmental authorities or the legal profession (features of the external environment) rather than their own managers.
gence will often find it profitable to behave negligently under the Hand formula. So too will a joint tortfeasor who believes that there is some probability that her fellow joint tortfeasor will violate Hand's negligence standard. In both cases, the problem arises because the other party's possible negligence reduces the amount by which the first party can decrease his expected tort payments by engaging in accident-avoiding behavior below the amount by which such behavior will lower the certainty-equivalent accident costs he generates. More specifically, the other party's possible negligence will reduce the first party's expected tort payment savings by the same proportion that it reduces his expected tort payments (below the accident costs he should expect to generate). Of course, Posner could still argue either (1) that all relevant actors are perfectly informed maximizers or (2) that the courts are not institutionally capable of producing more allocatively efficient results by adjusting the common law to take such information, imperfections, and maximization failures into account. I find both these propositions dubious. Certainly, this response deserves no better than the Scotch verdict of "not proven."

But let's assume that Posner is correct on this issue: that all relevant parties do maximize their interests. Even in this case the Hand standard will not induce all relevant parties to behave in an allocatively efficient manner whenever the private cost of accident avoidance and/or the private cost of accidents (and hence the private benefits of accident avoidance) differ from their allocative counterparts. Readers of Calabresi's will be familiar with several situations in which such a divergence will arise. The private cost of the accident to the victim will be less than the allocative cost to the extent that he is covered by private or public medical and disability insurance, that is, to the extent that he will receive some payments of this kind even if he is contributorily negligent. Similarly, the private cost of the accident to the tortfeasor will be less than the allocative cost to the extent that she has private insurance or is judgment-proof. Thus, the Hand formula will fail to provide adequate incentives to those who have insurance, to the unpro-
ductive poor, and to those in a position to declare bankruptcy. This fact may have very definite implications for the allocative efficiency of the Hand formula. For example, if private and public insurance substantially undercut the allocative force of a contributory negligence rule, the elimination of that rule might increase allocative efficiency both (1) by preserving the allocative efficiency of the tortfeasor's incentives and (2) by removing an expensive, debatable issue from the tort litigation.

Unfortunately, there are many other reasons why the Hand formula may not give the relevant parties allocatively efficient incentives. In fact, all the various types of Pareto imperfections may also destroy the allocative efficiency of the Hand formula by creating a divergence between the private and allocative cost of accident avoidance—or indeed between the private and allocative benefits of accident avoidance. Let me illustrate this point by focusing in the first instance on the way in which monopolies may distort the incentives the Hand formula provides by artificially depressing or inflating the private cost of accident avoidance in a situation in which the private costs the accident will impose on the victim equal the allocative costs the accident generates. I will start with the case in which the relevant monopolies will artificially deflate the private cost of accident avoidance. In particular, the relevant monopolies will produce a situation in which the private cost of accident avoidance is less than the allocative cost of accident avoidance whenever the resources the accident-causer uses to reduce the certainty-equivalent accident costs she generates would otherwise have been employed to increase the unit output of a supracompetitive pricer. This conclusion reflects the following three relationships: (1) The private cost of such accident-avoiding

at least three reasons why insurance company intervention will not totally overcome the problems insurance poses for Posner's hypothesis. First, insurance companies are likely to be less well informed about certain accident-preventing options than their customers; that is, they are unlikely to be aware of some of the kinds of negligent behavior in which their customers may engage. Second, since insurance company inspection is likely to be more expensive than inspection by the insured party himself (inasmuch as the insured is already supervising the relevant activities for other purposes), the insurance company will probably find it profitable to undertake fewer inspections than an uninsured individual. And third, at least if the insurance industry's rates are regulated, its members taken as a group may have a longrun incentive not to prevent negligence. This perhaps surprising conclusion reflects the fact that the insurance industry as a whole will probably earn more profits in the long run if its customers cause more accidents for which they are legally responsible, since the premiums the industry will be allowed to charge to its customers will obviously increase with the damages assessed against them.
resources to the accident-causer is equal to their private value to their alternative employer—technically, their marginal revenue product in his hands (the additional revenue he could obtain by selling the extra units of his output they would enable him to produce, which equals their marginal physical product in his hands—the number of units of his output they enable him to produce—multiplied by the average amount of additional marginal revenue he obtained by selling the extra units they enabled him to produce); (2) the allocative cost of the accident-causer’s employing such resources to reduce the accident costs she generates is equal to the value to their ultimate consumers of the goods they would produce in the hands of their alternative employer—technically speaking, their marginal allocative product in their alternative employer’s hands (their marginal physical product in his hands multiplied by the average price for which he could have sold the units in question);\(^\text{40}\) and (3) where the alternative employer of the accident-avoiding resources charges a supracompetitive price (more than his marginal cost) for his output, the price for which he would sell the additional units the relevant resources would enable him to produce will exceed the marginal revenue their sale generates for him.\(^\text{41}\) Hence, the private cost an accident-causer will have to pay to bid her accident-avoiding resources away from their alternative employer will be lower than the allocative cost of her doing so whenever this alternative employer would use them to increase his unit output of a good he sells at a supracompetitive price. Accordingly, where this condition is fulfilled, the *Hand* formula might require and induce an accident-causer to make allocatively inefficient accident-avoiding expenditures, for the fact that the private cost of an accident-avoiding project is less than the private and allocative benefits the accident-cost reduction will generate is perfectly consistent with the (higher) allocative cost of the project’s exceeding its allocative benefits; that is, the fact that accident avoidance is required by the *Hand* formula is perfectly consistent with its being allocatively inefficient.

\(^{40}\) I assume that there are no externalities of consumption and that the relevant consumers are nonmonopsonistic sovereign maximizers.

\(^{41}\) If we assume that this seller cannot engage in perfect price discrimination and does not face a horizontal demand curve over the relevant range, he will be able to sell the additional units the accident-avoiding resources enable him to produce only if he lowers his price not only on these additional units but also on the units he would have produced without the resources in question. The gap between price and marginal revenue reflects the revenue the relevant seller will therefore lose on his original output when he expands his output with the resources in question.
Let us turn, then, to the case in which the relevant monopoly will artificially inflate the private cost of accident avoidance. The relevant monopoly will produce a situation in which the private cost of accident avoidance exceeds the allocative cost of accident avoidance whenever the resources the accident-causer uses to reduce the certainty-equivalent accident costs she generates would otherwise have been employed to design a new product variant, open up a new distribution outlet, or create new capacity (when speed of service and hence quality is a function of capacity) that will compete against other goods that are sold at supracompetitive prices—that is, whenever the relevant resources would have been used to make what I call a quality-or-variety-increasing (QV) investment in a somewhat “monopolistic” area of produce space. In this context, the private value of such a QV investment to the investor will equal the private cost the accident-causer must incur to bid her accident-avoiding resources away from the QV investor while the allocative value of the QV investment will equal the allocative cost of the accident-causer’s bidding her accident-avoiding resources away from the QV investor (the allocative value of the QV investment). The private value of such a QV investment to the QV investor will tend to exceed its allocative value when the new product, outlet, or capacity competes against goods that are priced supracompetitively.\(^{42}\) Hence, in these circumstances, the accident-causer will have to pay too much for her accident-avoiding resources from an allocative perspective. Accordingly, the Hand formula may fail to require her to undertake an allocatively efficient accident-avoiding project, for where the accident-avoiding resources would otherwise have been used to create a QV investment in a monopolistic area of product space,\(^{43}\) the fact that the private cost of such a project to the accident-causer exceeds its benefits is consistent with its allocative costs’ being less than its allocative benefits.

Unfortunately, an analysis of the Hand formula that takes all possible distorting influences into account would be even more complicated than the preceding discussion suggests, for so far I have assumed that monopolies and other Pareto imperfections,

\(^{42}\) This argument is too complex to delineate here. For a complete analysis, see Markovits, supra note 4, at 1012-36.

\(^{43}\) Ideally, I should also consider the possibility that the accident-avoiding resources would otherwise have been used to do research designed to reduce the private cost of producing a given product. I have omitted this possibility here because of the complexity of the necessary analysis. I am currently working on a manuscript concerned with the distortions affecting the private profitability of such cost-reducing research.
such as taxes, would not create a divergence between the allocative benefits accident-avoiding expenditures will generate and the amount by which they will reduce the certainty-equivalent accident costs of the accident's prospective victims. In fact, except where the only damage the accident inflicts is to final goods owned by consumers there is likely to be a significant divergence of this kind. For example, our previous discussion implies that accidents that destroy raw materials that a monopolistic producer would have used to produce additional units of output he will now not produce will cause him to suffer a loss (the marginal revenue product of these inputs) that is less than the allocative loss the accident generates (the marginal allocative product of these inputs in his hands). In all such cases, then, the Hand formula will not be ideally allocatively efficient unless through some remarkable coincidence the relevant imperfections distort the private cost and the private benefits of accident prevention in precisely offsetting ways.

44. Even if we follow the Hand formula in ignoring any private insurance benefits or public assistance the victim might receive, there are many reasons why such a divergence might arise. Let us focus, for example, on an accident that would cause a personal injury that (1) would prevent the victim from working for some period of time and (2) would require the victim to incur certain medical expenses. The private losses the victim will suffer on both these accounts will often differ from their allocative counterparts. For example, where the victim's work increases the net output of a monopolistic employer, his gross wage (which will reflect his marginal revenue product) will be less than his allocative product. (This conclusion is a corollary of our textual argument that the private cost of accident-preventing resources will be less than their allocative cost when they would otherwise be used to increase a monopolist's unit output.) Hence, the private benefits that accident-preventing expenditures would generate for the prospective accident victim will be less than their allocative counterparts in the situation in question. On the other hand, when the medical services the victim requires are provided by a somewhat monopolistic doctor who has to pay taxes on the margin of her income, the private cost of such services to the victim will likely exceed their allocative cost. This conclusion reflects the following three relationships: (1) the private cost of such medical services to the victim is equal to the price he pays the doctor for those services; (2) the allocative cost of such services is equal to the value of the leisure the doctor gives up in order to provide the victim with services; (3) the value of that leisure for a maximizing sovereign doctor will be equal to the additional after-tax income she can earn by providing the victim with services; and (4) this additional after-tax income will be less than the price she charges the victim (a) to the extent that she has to pay taxes on any additional income she derives and (b) to the extent that, although less likely, she has to reduce her price to other prospective patients in order to induce the victim to become her patient (where the victim is her marginal patient). (The last point is admittedly more persuasive where hospitals rather than doctors are concerned—in part because hospitals find it more difficult to price discriminate.)

45. I should add that precisely the same kind of analysis undermines the allocative efficiency of the other common law rule Posner discusses in this symposium—the common law's traditional refusal to impose any minimum standards of quality (warranties of habitability) on landlords. Posner, supra note 1, at 500. As I
Before proceeding, it may be helpful if I restate this argument in somewhat different terms. If there were no other Pareto imperfections in the system, the extended Hand formula would provide accident-causers with allocatively efficient incentives for, in such cases, only the defendant and the victim would be affected by the relevant accident-preventing activity, the private cost of such activity would equal the allocative cost, and the private benefits, the allocative benefits. However, in a Pareto-imperfect world, the welfare of other parties will also be affected by accident-preventing activity—for example, the welfare of consumers of those products whose unit outputs are reduced to free the resources used to prevent the relevant accidents. Although such third-party effects may perfectly offset each other, it would be an extraordinary coincidence if they did. Hence in a Pareto-imperfect world, the Hand formula will not be ideally allocatively efficient.

Admittedly, one could respond to this analysis in at least four different ways (some of which, I admit, have about them the smell of straw). First, one might respond empirically by denying the empirical significance of the Pareto imperfections such analyses stress or arguing that the relevant imperfections seem likely to be almost perfectly offsetting. I can see no reason to believe that such claims are true, but obviously at this point analysis fails. Second, one could argue that although the Hand formula is far from perfect, it is the allocatively best formula a court could devise. Such an argument would not have to rely solely on the institutional incapacities of the courts and the unsuitable background of judges. It could rely as well on the inability of prospective tortfeasors to comprehend and respond to a formula which, for example, required them to adjust the private costs and benefits of a possible accident-avoiding project (to reflect the fact that those costs and benefits are less than or exceed their allocative counterparts) before comparing the resulting figures with each other. In my opinion reasonable men can differ about the feasibility of courts and accident participants making the necessary calculations. I suspect that some simple adjustments to the Hand formula could increase its allocative efficiency: for example, an adjustment that required a manufacturing defe-
ANALYSES OF ALLOCATIVE EFFICIENCY

dant (1) to discount its private accident-avoiding costs where the project in question involves research (since research probably utilizes specialized resources that would otherwise be used to design a QV investment) or (2) to inflate the benefits its accident-avoiding project would be likely to generate when the accident prevented seemed likely to preclude its victim from working for some period of time. But even if one is less optimistic than I about such issues, it is clear that this argument is very different in character from the a priori argument on which Posner relies. Third, one could argue that the failure of the courts to make such second-best adjustments reflects an understandable intellectual error. This line of reasoning would lead one to predict that such adjustments will be made over time—that, for example, some defendants who would have been held liable under the Hand formula will be freed from liability because the allocative cost of their accident-preventing project exceeds its private cost. Of course, this option would not be very attractive to Posner since it would force him to admit that the common law was not currently so efficient as he now claims. Finally, Posner might revise his hypothesis; that is, he might abandon his claim that the common law is allocatively efficient for the different claim that the common law selects the rule that would be more allocatively efficient than any alternative a court could devise and enforce if the only Pareto imperfection operating in the system were the externality involved in the accident. Obviously, however, this counterfactual allocative-efficiency hypothesis is even less attractive than Posner's original version, for it is even more difficult to explain why common law judges or litigants should behave in the way that the counterfactual hypothesis predicts. Thus, regardless of whether one tries to explain judicial decisions in terms of (1) the judges' variously defined self-interests46 or (2) their "taste" for doing justice, I see no way to account for their ignoring the kind of third-party effects just described since (1) the third parties who are affected by the tort rule may be politically influential and (2) their losses would appear to be ethically relevant under the type of evaluative system Posner appears to be employing.

However, let us assume that all relevant parties are perfectly informed maximizers and that the only Pareto imperfection in the economy is the externality involved in the accident. Even under these assumptions a fifth and final objection can be made to Posner's claim that the common law's negligence rule is allocatively efficient—namely, that even in such cases it is not at all clear that

46. See discussion pp. 856-59 infra.
the negligence rule is more allocatively efficient than strict liability (combined with contributory negligence). Transaction costs aside, a strict liability standard combined with a contributory negligence defense will be at least as efficient as a negligence standard. If one assumes that the courts always apply the negligence standard accurately, a perfectly informed maximizing defendant will undertake precisely the same (allocatively efficient) accident-avoiding activities under the two standards: if an accident-avoiding project will cost less than it saves, the defendant will undertake the project in question regardless of the standard employed since he will be liable under both standards; and if an accident-avoiding project will cost more than it saves, the defendant will not undertake the project, regardless of the standard employed. Under a negligence standard, his decision could be said to reflect the fact that his failure to undertake the project will not make him liable; but in fact even if he were liable—as under a strict liability test—he would not undertake the project because its cost would exceed the damages it would obviate his having to pay. Thus, transaction costs aside, the negligence standard would be no more allocatively efficient than the strict liability standard if courts always applied the negligence standard properly. However, there is every reason to believe that in at least some cases the courts will come to the mistaken conclusion that the defendant was not negligent. Thus, even if the courts were prepared to hold defendants negligent for failing to do research with uncertain outcomes, they would undoubtedly sometimes underestimate the likely payoff of such research and therefore mistakenly conclude that the defendant was not negligent. Since defendants will therefore have to reckon with some probability of escaping liability in this way if a negligence standard is employed, a realistically applied negligence standard will fail to induce some allocatively efficient accident-avoiding activity that would have been induced by a strict liability rule. Since courts may also not discover the contributory negligence of victims, the

47. At least, the potential defendant will undertake the project unless he believes that the potential plaintiff either will be contributorily negligent or will undertake accident-avoiding behavior that eliminates the risk of the accident's occurring. As Posner astutely noted, where the cost to the plaintiff of avoiding an accident is higher than the cost to the defendant of doing so (though it is lower than the costs the accident would itself generate), the contributory negligence rule will be allocatively inefficient since it will induce plaintiff either to avoid the accident or to incur the extra transaction cost of bribing defendants to avoid the accident—regardless of whether it is combined with a negligence or a strict liability standard for defendants. See Posner, Strict Liability: A Comment, 2 J. Legal Stud. 205 (1973).
above failure of the negligence standard will be offset to the extent that it increases such victims' incentive to reduce the risk of accidents. On this account as well, then, the allocative efficiency of the negligence standard can be expressed only empirically. Hence, in my opinion, transaction costs aside, strict liability would probably be allocatively superior to a negligence standard, particularly where victims are unlikely to reduce the cost of accidents and their avoidance. Moreover it is not at all clear that transaction costs will be reduced if a negligence standard is applied rather than a strict liability standard. Admittedly, under a negligence standard fewer claims will be made and fewer payments will have to take place. However, there are at least two reasons why it is likely to be far more expensive to dispose of those claims that are made under a negligence test than it would be if the same claims were handled under a strict liability rule. First, because the parties are more likely to disagree about the probable outcome of any litigation if a negligence standard is employed (because they may disagree about the likelihood that negligence will be found), tort claims are more likely to proceed to trial—that is, are less likely to be settled—if a negligence standard is employed. Such trials are expensive not only because they consume the time of lawyers, judges, court personnel, witnesses, parties, and jurors but also because they create uncertainty and delay allocatively efficient rehabilitation by delaying compensation.48 Second, because the negligence standard introduces an additional factual issue to be tried, tort claims that go to trial are likely to be more expensive to try if a negligence standard is employed: indeed, in many cases, for example, where the plaintiff asserts a negligent failure to do research, the negligence issue is likely to be extremely expensive to try. My own guess therefore is that transaction costs are likely to be higher under a negligence standard and that strict liability is therefore more allocatively efficient than negligence.49 However, even if your suspicions are to the contrary, it should be clear that Posner has not demonstrated his conclusion that the common law of tort is allocatively efficient.

In short, there are at least six different grounds for rejecting

48. This is so both because imperfections in the capital market may preclude a victim from obtaining external financing for necessary rehabilitation services and because his uncertainty about being compensated may pose psychological obstacles to his making the necessary effort.

49. I suspect that a strict liability scheme will also reduce the transaction costs the affected parties will have to incur to insure against various accident-related risks—that is, in most situations, defendants will be the cheaper insurers.
Posner's claim that common law courts have developed the most allocatively efficient set of tort rules such institutions could employ: (1) Hand's formula does not adequately deal with the phenomenon of risk aversion; (2) contrary to Posner, the common law concept of negligence may not best be expressed by Hand's formula, which has in many cases never been applied to a number of the ways in which parties might reduce certainty-equivalent accident costs; (3) neither Hand's formula nor the negligence approach in general responds adequately to the costliness of dispute settling and the risk of judge or jury error; (4) if courts considered the possibility that some relevant actors (including organizations) might not be perfectly informed maximizers, they might be able to devise allocatively superior alternatives to the Hand formula; (5) if courts considered the way in which other Pareto imperfections (such as imperfections in competition) may distort the costs and benefits of accident avoidance from an allocative perspective, they might be able to adjust the Hand formula to increase its allocative efficiency; and (6) even if one ignored the preceding difficulties, the transaction cost of employing any negligence approach may make Hand's rule less allocatively efficient than a strict liability rule. Hence, at least insofar as the common law of torts is concerned, Posner's hypothesis begins to look very much like a theory in search of a phenomenon.

EXPLAINING AND UNDERSTANDING THE COMMON LAW:
THE ROLE OF POSNER'S ALLOCATIVE-EFFICIENCY HYPOTHESIS

Posner describes his positive economic analysis as an attempt "to understand and explain" the common law. Unfortunately, however, his allocative-efficiency hypothesis can at best be said to postdict, predict, or characterize the common law: it cannot by itself explain or help us to understand anything. In order to explain the common law, Posner must give us an account of why common law decisions conform to his hypothesis. In order to help us understand the common law, he must in addition enable us to evaluate an allocatively efficient common law according to appropriate criteria. Although at times Posner appears to believe that he can achieve his positive economic goals without undertaking this sort of analysis, much of his recent work in this area could be described

50. See Posner, supra note 9, at 287.
51. Throughout this section, I will assume contrary to my own suspicion that Posner's characterization of the common law is accurate.
as an attempt to fill in such gaps. In fact, his contribution to this symposium seems to fall precisely into this category.

One can distinguish at least three different kinds of arguments that might explain why common law decisions are or tend to become allocatively efficient. The first such argument is ingenious but doubtful. In particular, various scholars have argued that the common law will tend to become more allocatively efficient over time even if the judges do not have any tendency to make allocatively efficient decisions—or indeed, in the extreme, even if they have a tendency to reach allocatively inefficient results. Although the plot leading to this denouement varies somewhat from author to author, the coup de théâtre is normally the same: for some reason, allocatively inefficient rules tend to be litigated far more often than allocatively efficient ones. To see why this trick produces the desired result, note that the common law would eventually become allocatively efficient if judges who were not influenced at all by efficiency considerations were always called on to review inefficient rules and were never called on to review efficient ones. Although such a bifurcated litigation pattern is not required for this kind of explanation to work, such an account of the supposed tendency of the common law to become efficient will become less persuasive the more often efficient rules are litigated and the less often inefficient ones are not.

Such a bifurcated litigation pattern could emerge either because disputes are less likely to arise where efficient rules are in force or because disputes are more likely to be settled where efficient rules are in force (or more narrowly because efficient legal rules are less likely to be challenged in any litigation arising out of related disputes). Both sorts of arguments have been made in the literature. Thus, Professor Priest has argued that at least where ac-

53. See, e.g., Posner, supra note 15. His ambivalence about this issue probably reflects the influence of the Friedmanite equation of science with prediction. See M. Friedman, The Methodology of Positive Economics, in ESSAYS IN POSITIVE ECONOMICS 3, 8-16 (1953).

54. See, e.g., Priest, supra note 7; Rubin, supra note 7.

55. As I will note later, there are plausible assumptions under which the common law would tend to become efficient at only a very slow rate even if inefficient rules were always tested and efficient rules were never tested. Assume, for example, that the court could choose among a variety of rules that were more or less efficient. In this case, unless the rule prevailing in the relevant jurisdiction was the least efficient rule conceivable, there would always be some probability that the relevant court would replace the existing rule with a less efficient rule. Indeed, in such a case, the only reason that the common law would tend to become efficient if the judges’ decisions were randomly related to efficiency is that allocatively ideal rules would never be tested.
accidents are concerned more disputes are likely to arise where inefficient rules prevail since such rules are likely to increase the number of accidents that take place. However, there are at least three problems with this approach: (1) it is difficult to see why inefficient rules will tend to increase the number of disputes in other areas of the common law; (2) even in torts, the argument works only if one assumes that the law imposes insufficient rather than excessive incentives to avoid accidents; and (3) there are other “sociological” reasons for suspecting that fewer “acted-upon” legal disputes are likely to arise where inefficient rules are in force. I will therefore focus my comments on the efficiency-litigation relationship. In order to evaluate the argument that disputes in jurisdictions with efficient rules are more likely to be settled, I will first have to describe the basic structure of the economic theory of litigation-settlement choices on which it builds: although this theory has focused on the settlement of a whole dispute, it will also apply to the issue with which we are concerned, the settlement of an individual issue (the applicable legal standard) within a given litigation.

In brief, the economic theory of litigation argues that parties to a dispute will settle whenever a settlement is conceivable that would leave both materially better off than their certainty-equivalent estimate of their likely postlitigation position. Obviously,

56. Priest, supra note 7, at 65-67.
57. In order for a dispute to arise in the sense that is relevant for this hypothesis, one needs in addition to the disputable event a plaintiff who perceives this event (1) as a problem, (2) as a legal problem, and (3) as a legal problem he can do something about. In addition, such a perceptive plaintiff (4) will have to be in a position to obtain legal counsel. If one believes that the efficiency of a possible legal rule does and should count in its favor in adjudicatory contexts, inefficient rules may tend to be adopted more often where one of the parties does not have adequate legal representation. The type of party who does not have adequate legal representation may also be less likely to perceive himself to have a legal problem he can do something about and to be able to obtain legal counsel at all. If this is correct, fewer disputes may arise (in the relevant sense) where inefficient rules prevail.
59. Of course, parties may not always be able to stipulate the applicable decision standard. Thus, although disputants can normally make such agreements when they go to arbitration and can agree to factual stipulation before courts of law, they will not be able to commit judges to a particular rule of law. Thus, even if neither party challenges the existing legal doctrine in his or her brief or oral presentation, the judge may use the case to alter the applicable law. Hence, as will become relevant later on, parties who wish to litigate because they disagree about the court’s probable findings of fact may have to take a risk that the court will change the law against their joint interest.
other things being equal, the mechanical and risk costs that litigation always generates will tend to make settlement attractive to disputants; that is, will tend to make it possible for them to discover a compromise that both will find superior to the uncertain array of possible outcomes with which litigation will confront them. However, the economic theory of litigation recognizes that the other things will not always be equal—in particular, that given imperfect information either or both parties may tend to be overly optimistic.\(^6\) If they are, the plaintiff’s weighted average estimate of the damages he is likely to be awarded will exceed the defendant’s weighted average estimate of the damages likely to be assessed against her.\(^6\) The economic theory of litigation therefore predicts that settlement will appear superior to the two parties only if the litigation costs the disputants anticipate exceed any positive difference between the plaintiff’s and defendant’s weighted average estimates of the likely amount to be awarded in the actual litigation.\(^6\) For example, the theory would predict that a settlement will be reached if (1) the plaintiff’s weighted average estimate of the damages he is likely to be awarded in a litigation is $100; (2) the defendant’s weighted average estimate of the damages that are likely to be assessed against her is $60; and (3) the plaintiff and defendant respectively expect to incur $20 and $30 extra (mechanical and risk) expenses to try the case in question. In such a case the difference in the two parties’ weighted average estimates of the litigation outcome ($40) is smaller than the sum of the litigation costs they antici-

\(^6\) The theory also recognizes the relevance of other factors, such as differences in the rates at which plaintiffs and defendants discount future receipts and payments. Obviously, such rates are relevant because litigation will delay payments. Ceteris paribus, if the defendant discounts her prospective payments at a higher rate than the plaintiff discounts his receipts, the litigation will on this account be expected to save the defendant more than it will cost the plaintiff: litigation will therefore be more likely to take place where this situation prevails.

\(^6\) This estimate will reflect not only the various possible damage awards the court could make but also the probability that the court will find for defendant. Obviously, the argument can be easily revised to cover the case in which injunctive relief rather than damages is sought or granted.

\(^6\) Of course, this analysis does not consider the possibility that one or both parties might place a dollar value on having their position officially vindicated (quite independent of the material significance of such a vindicating decision for their welfare) or that one or both parties might place a negative weight on their opponents’ gains or positive weight on their opponents’ losses. Nor does it consider the possibility that the parties might not be able to discover such a mutually beneficial settlement, that litigation decisions may very well turn on their strategic importance for future disputes or other interactions, or that the actual litigation decision may have more to do with the relevant lawyers’ welfare than with the welfare of the parties themselves.
ipate incurring ($50). More pointedly, the theory would predict such a case would be settled because various settlements could make both parties materially better off than they would anticipate being ex ante if they went to trial. In particular, since the plaintiff’s certainty-equivalent gain from litigating rather than giving up would be $80 ($100 weighted average expected damages minus $20 litigation costs) while the defendant’s certainty-equivalent loss if she litigated would be $90 ($60 weighted average expected damages plus $30 litigation costs), any settlement between $80 and $90 would leave both parties materially better off.

So far, I have assumed that the only outcome of the litigation of interest to the parties is whether and how much relief the plaintiff is afforded. In some situations—for example, where one or both parties are often involved in the type of transaction, dispute, or bargaining situation in question—the litigation may also affect the parties’ welfare by establishing a precedent about the admissibility of certain kinds of evidence, by providing data on the persuasiveness of certain kinds of proof, by affecting various parties’ reputations about litigating or indeed about carrying out threats in general, or by changing the applicable rule of law. I will refer to such consequences of litigation as longrun strategic litigation outcomes as opposed to the kind of immediate relief litigation outcomes with which the theory has traditionally dealt. Obviously, the theory can easily be revised to take such longrun litigation outcomes into account: as revised, it will predict that cases will be settled whenever the sum of the parties’ total litigation costs (mechanical litigation costs plus associated risk costs) exceed the amount by which the plaintiff’s positive weighted average valuation of the litigation’s immediate and longrun outcomes exceeds the defendant’s corresponding negative valuation. Hence, for example, the theory will predict that if both the plaintiff and defendant place a positive value on the litigation’s possible longrun strategic outcome, litigation will be more likely (since the difference between plaintiff’s positive valuation and defendant’s negative valuation will be larger). The same result would obviously obtain if the plaintiff’s positive valuation of the litigation’s possible longrun strategic outcome exceeds the defendant’s negative valuation (or vice versa) since in either case the longrun consequences of litigation will increase the joint profitability to the parties.

Now that I have described the economic theory of settlement decisions, let’s examine its implications for the relative likelihood of inefficient and efficient rules’ being litigated. As we have seen, in-
efficient rules may tend to be litigated far more often than efficient rules for two different “economic” reasons: either (1) the total litigation cost of testing inefficient rules to the two litigants may tend to be lower than their counterparts for efficient rules or (2) the positive difference between the plaintiff’s (positive) and defendant’s (negative) valuations of the possible outcomes of litigation may tend to be larger where the challenged doctrine is inefficient. Research in this area has focused on this second possibility. The main argument developed by Professor Rubin\(^6^3\) appears to be quite straightforward. It assumes that one or both parties to a particular litigation are repeat players who are likely to engage in future transactions or be involved in future disputes that will be governed or affected by the substantive legal rulings judges make in their case; that is, that the parties will have a strategic longrun interest in this aspect of their litigation’s outcome. By definition, challenges that increase the efficiency of rules will produce more longrun benefits than costs while challenges that reduce the efficiency of rules will produce more longrun strategic costs than benefits. Since there is no particular reason to believe that allocatively efficient rules will be more beneficial to the third party nonlitigants they affect than allocatively inefficient rules, allocatively efficient rules will almost certainly be in the joint interest of all litigants they affect; that is, they will almost certainly not owe their efficiency to their third party effects. In addition, although individual inefficient rules may favor repeat players, they may not do so systematically. Hence, there may very well be some general tendency of allocatively inefficient rules to be litigated more often on this account. Moreover, as Professor Priest\(^6^4\) has argued, in cases in which accidents are involved, this tendency may be reinforced to the extent that inefficient rules provide inadequate incentives that result in the production of more serious accidents since the larger the stakes in a litigation the larger the absolute difference in expected litigation outcomes associated with given degrees of over-optimism about the direction of the probable verdict.

However, as clever as these economic\(^6^5\) arguments are, they

\(^6^3\). See Rubin, supra note 7, at 52-56.

\(^6^4\). See Priest, supra note 7, at 67.

\(^6^5\). Admittedly, one can also imagine noneconomic reasons for inefficient rules to be challenged more often. For example, if inefficient rules are viewed as unfair on some related grounds, a party who suffers from these rules may place an extra dollar value on his being vindicated by a trial that leads to the rejection of the inefficient rule in favor of an efficient fair one. Since the opposing party might not place an ex-
do not seem likely to establish the kind of pervasive, strong tendency toward efficiency that Posner's hypothesis would require. Thus, it is simple enough to describe a variety of situations in which efficient rules would be litigated and inefficient ones would not. For example, I can think of at least seven reasons why efficient rules may be reconsidered by the courts. First, as Professor Rubin emphasized, where the efficient common law rule does have distributional consequences, a repeat player litigant who would be better off in the long run under an inefficient rule may find it in his interest to challenge an efficient rule since the benefits such an inefficient rule could bring him may exceed the losses it would impose on a fellow disputant who was less of a repeat player, therefore had a much smaller strategic interest in the litigation, and hence would not be willing to grant a settlement adjustment equal to the strategic value of the challenge to the first party. Second, and relatedly, where two equally efficient but distributionally varied common law rules could be adopted, a party who would prefer a different efficient rule to the established efficient rule might challenge the established efficient rule despite the risk that the court might adopt a third inefficient rule that would be

tra negative dollar value on her loss in such a case (indeed, to the contrary she might not mind losing so much if she were convinced of the justice of the court's decision), this possible nonmaterial litigation gain would not be offset by a corresponding nonmaterial litigation loss. Hence, in all such cases, plaintiff's positive evaluation of the litigation's immediate outcome will tend to exceed the defendant's negative evaluation. Precisely the opposite situation may arise where an efficient rule is being litigated. Thus, if the party who loses as a result of the rejection of a fair, efficient rule in favor of an unfair, inefficient one places a negative dollar value on this result in itself (quite independent of any material loss she sustains) while the beneficiary of this turn of events places no corresponding extra positive value on this result (indeed, he may even feel somewhat guilty about it), the plaintiff's positive evaluation of the litigation's possible outcomes will tend to be smaller than the defendant's negative evaluation. In general, then, such "fairness" evaluations will tend to increase the difference between the plaintiff's positive and defendant's negative evaluations of the litigation's outcome where inefficient rules prevail and to decrease it where efficient rules prevail. Hence, if these relationships obtain, the economic theory of litigation-versus-settlement would predict that on this account inefficient rules would tend to be litigated more frequently than efficient rules. Ironically, then, noneconomic moral values may come to the rescue of an economic theory of why the common law might tend toward efficiency even if judges (unlike parties) were not "biased" towards efficiency. Admittedly, this argument is somewhat vitiated by the possibility that judges might choose to reject an inefficient rule for an even more inefficient rule, but it can survive if, roughly speaking, judges will tend to substitute more efficient rules for rules that are worse than their average alternative from an efficiency perspective while they tend to substitute less efficient rules for rules that are better than their average alternative from an efficiency perspective.

66. See Rubin, supra note 7, at 55-56.
against her interest. Third, where the efficiency of a common law rule reflected its ability to generate benefits to third-party non-litigants, it might be in the joint interest of the litigants—indeed in the long run individual interest of each—to have the efficient rule rejected in favor of a less efficient rule. Fourth, a party who would be harmed more in the long run by the establishment of an inefficient rule than he would be helped in the immediate case by its adoption might still attack the rule on the assumption that he or others would be able to secure its judicial or legislative reversal in the future. Fifth, where the efficient rule favored one party more than the other, the less favored party might threaten to attack it in order to extract a concession from the more favored party and might actually proceed to carry out her threat if the concession were not forthcoming in order to enhance the credibility of her threats in the future. Sixth, a party who would not benefit from the rejection of an efficient rule might attack it on the advice of legal counsel who would benefit if its rejection led to additional profitable litigation in the future. And seventh, parties who did not wish to challenge the existing efficient rule of law might enter into litigation (for example, in order to raise various factual issues on whose probable resolution they differed) which would provide an activist judge with an opportunity to re-analyze the applicable law.

Similarly, I can also think of at least four different reasons why repeat players might choose not to challenge an inefficient rule. First, even if both litigants' long run interests were identical (because half the time they were plaintiffs and half the time defendants), such a challenge would not be in their interest if the established rule's inefficiency reflected its third-party effects. Second, neither litigant would have an economic incentive to challenge the existing inefficient rule if it benefited the party who was more of a repeat player: thus, if the inefficient rule created more benefits to the individual litigant it helped (an insurance company, for example) than costs to the individual litigant it harmed (an individual claimant), the beneficiary would find it profitable to bribe the victim to forego his or her challenge. Third, neither party might have a longrun incentive to challenge an inefficient rule that was against both their longrun interests when compared with a more efficient rule if judges in jurisdictions with inefficient rules were equally likely to replace them with less efficient as with more efficient rules. And fourth, neither party to a dispute might have a longrun incentive to challenge an inefficient rule whose actual operation would harm both, if it were feasible and cheaper to negotiate.
around the rule or to seek corrective legislation.

Although reasonable persons may differ, this partial list persuades me that even if there is some general tendency for inefficient rules to self-destruct by generating more economic incentives for parties to challenge them this tendency is both too weak and too riddled with exceptions to serve Posner's purposes. Accordingly, I suspect that if Posner is to explain why the common law may evolve toward efficiency, he will have to focus on the incentives and behavior of judges rather than of litigants.

The two other kinds of arguments that have been used to explain the supposed allocative efficiency of the common law both do focus on common law judges; that is, both do attempt to demonstrate that such judges are likely to be "biased" toward efficiency. The first such argument relies on the material incentives of all relevant parties: according to this line of reasoning, a common law judge is likely to make allocatively efficient decisions because such decisions will benefit his career most by providing material rewards to those groups or individuals well-placed to secure his advancement. The second such argument relies on the supposed justice of allocatively efficient decisions: this line of reasoning is compatible with several different explanations of the attractiveness of allocatively efficient decisions to the common law judge. Thus, a common law judge might choose to make such allegedly just decisions either (1) because she has been socialized into this role and as an inner-directed individual has internalized the desire to do justice when performing her judicial duties or (2) because her judicial peers, her colleagues at the bar, her political superiors, or the electorate has been socialized to believe that she is obligated to make such decisions and that as a result she has to conform to such norms in order to secure their approval as well as their help in advancing her career. Although Posner has never set the issue up in precisely this way, he could be interpreted to be making the

67. Indeed, to the extent that there is some reason to believe that efficient rules will be litigated less often, this fact may actually call into question the validity of Posner's central hypothesis that the common law is becoming more efficient over time. Thus, if (1) the common law is becoming more efficient over time, and (2) efficient rules are challenged less often than inefficient ones, one would expect rule challenges to diminish over time, ceteris paribus. Although, obviously, reasonable men may differ, my own armchair judgment (as well as that of more expert colleagues) is that if anything, common law tort rules are challenged more frequently now than in the past—even controlling for changes in the number of disputes that could provide an occasion for such challenges. I would like to thank Jack Getman for pointing out this possibility to me.
above type of arguments in his contribution to this symposium. In particular, his contention that in the long run, allocatively efficient common law decisions are in the ex ante interest of everyone they affect\textsuperscript{68} could be seen as an attempt to fortify the materialist argument while his contention that allocatively efficient rules provide a desirable package of happiness and rights and are compatible with our notions of consent and autonomy\textsuperscript{69} could be viewed as an attempt to strengthen the justice argument. In what follows, I will criticize the materialist and justice explanations of the supposed efficiency tendency of common law judges as well as Posner's attempts to overcome their deficiencies.

There are at least two problems with the materialist explanation of the supposed efficiency tendency of common law judges. First, the argument is inchoate and incomplete to say the least. No one to my knowledge has ever developed a model of the career options judges can and might want to pursue. Accordingly, even if one were convinced that judges could best advance their careers by providing material benefits to those in a position to help them, it is difficult to know which individuals or groups are likely to occupy such positions. In particular, are we to suppose, for example, that the relevant judges are seeking to be (1) reelected to their current judicial positions; (2) elected to higher judicial office; (3) elected to other governmental positions; (4) reappointed to their current judicial positions; (5) appointed to higher judicial office; (6) appointed to nonjudicial office; (7) selected for a partnership in a large private corporate law firm; or (8) hired by private parties as house counsel or independent attorney (if they decide to reenter private practice on their own)? What are we to suppose about the identity of the parties who are in a position to influence such political appointments, political elections, or market contracts? For example, what is the role of the bar association in the reelection of judicial candidates? Are we to believe that the options that are relevant and the individuals who are significant for federal judges (say in the pre-	extit{Erie} period) are the same as their counterparts for state judges or English judges for that matter?

Although Posner did not make this connection himself, part of his argument in the current symposium could be interpreted as an attempt to overcome this rather striking deficiency. If as Posner argues efficient common law rules are in the ex ante longrun interest

\textsuperscript{68} Posner, supra note 1, at 492-93.
\textsuperscript{69} Id. at 494-97.
of all parties whose welfare they affect, the materialist hypothesis
would suggest that efficient decisions would advance a judge's ca-
reer regardless of which options and supporters were significant for
him or her (at least unless the party who lost the case at issue as a
result of the judge's adoption of an efficient rule was significant for
the judge's advancement). Unfortunately, however, inefficient com-
mon law rules almost always will benefit some parties—even
though market reactions to the substantive law will clearly substan-
tially influence the distributive impact of any judicial decision.
Thus, Posner is simply wrong when he argues that housing codes
or warranties of habitability will never benefit the poor tenants
they are supposedly designed to aid. 70 Although the imposition
of such warranties will undoubtedly result in rents' being increased
and some housing units' being withdrawn, it is very difficult to say
whether such programs will improve the position of the tenants of
the original substandard units (even if contrary to my own view it
is assumed that such warranties are always allocatively ineffi-
cient). 71 In fact, even where such warranties do injure the relevant
poor tenants taken as a group, 72 they probably will benefit the
better-off among the poor—who will be likely to place a higher-
than-average dollar value on the code improvement—as well as
suppliers of the goods and services required to bring the units in
question up to standard. 73 Of course, I have no basis for arguing
that these two groups would be more important for a common law
judge's advancement 74 than the groups who would be injured by
such warranties (landlords, the poorest of the poor, other buyers of
the goods and services needed to improve the housing units). But
this result certainly is conceivable: indeed, the fact that the ineffi-
cient decision must have generated a larger equivalent dollar loss
for its victims than gain for its beneficiaries provides almost no rea-
son to believe that it will tend to be less useful to the judge—even

70. Id. at 500.
71. See Markovits, supra note 45, at 1827-38.
72. Although this fact is probably not politically significant, I suspect that even
if the warranties worsen the position of the poor adults who inhabit the improved
housing, they may improve the position of their children.
73. I should note that there may be no allocatively superior or politically feasi-
ble alternative way to benefit these groups.
74. Such groups may be important both where the judge is hoping to attain
electoral support (since they may be able to give him both ballot box support and
support in the nomination process within political parties) and where he is trying to
obtain some political appointment (since their support may be important for state
governors who make the relevant appointments).
if one accepts the materialist view of judicial promotion. In fact, in at least one significant respect, the materialist view of judicial behavior is clearly inconsistent with the two hypotheses it was devised to explain: (1) the supposed allocative-efficiency tendency of common law judges and (2) the tendency of inefficient rules to be litigated more often than efficient ones. If one assumes that litigation is profitable for lawyers and that inefficient rules are litigated more often than efficient ones, lawyers would have an incentive to support the judicial promotion of judges who announce inefficient rules—an incentive that many judges would do well to consider in a materialist world given the frequent importance of bar associations in judicial election and appointment processes.

The second objection to the materialist explanation of the supposed efficiency tendency of common law judges is even more basic. In particular, the assumption that the best way for a judge to obtain the support of particular groups is to make decisions in their material interest strikes me as both too cynical and too crude. It is cynical because for this hypothesis to be different from the justice hypothesis, one must assume that allocatively efficient decisions will not always or even usually be just decisions; that is, one must assume that a judge can obtain support by making allocatively efficient decisions in dereliction of his duties. It is crude because quite often the judge will wish to obtain the support of his future employer, who may be more interested in the judge’s likely future performance than in the benefits she has received from the judge in the past. In such a situation, the fact that a judge had been derelict in his duties would hardly be likely to count in his favor. Thus, it seems likely to me that a law firm would be more disposed to hire a judge who had written persuasive opinions about the legal rights and duties of the various parties who had come before him than one known for making unjust, allocatively efficient legal decisions.

Let us turn, then, to the final reason some have advanced for the supposed allocative-efficiency tendency of the common law, namely, that judges are “biased” toward efficiency because allocatively efficient rules are just and legally correct in the sense that they enforce the rights and correlative duties of all parties be-

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75. I therefore am not assuming that the materialist view is a predecision-bribery view of judicial behavior. Of course, future employers may wish to reward judges who have benefited them well in the past in order to encourage other judges to serve their interests in the future.
fore the courts. I must admit that I would find this argument attractive if I could believe its major premise. Unfortunately, however, I am not persuaded by Professor Posner's efforts to justicize allocatively efficient rules. My reasons for rejecting Posner's arguments are close to those of Professor Dworkin. I will therefore restrict myself to outlining my objections to Posner's argument.

Although Posner has never addressed this issue directly, he appears to believe (1) that the same standard should be employed to assess the ethical attractiveness of common law decisions and social choice generally, (2) that this standard can be described as a compromise-type mix whose individual ingredients are desired in themselves; rather than as a recipe-type mix, whose ingredients are desired not in themselves but because they combine with each other to produce an end product that is valued in itself; (3) that the goods which one must trade off against each other are happiness, liberty and property rights, equality (in the sense of equality of outcomes), virtue (in particular, honesty and productivity), virtue's recognition (in the sense of rewards reflecting contribution), and individual autonomy; (4) that rules that maximize allocative efficiency will promote each of these goods to a very considerable extent; and indeed (5) that common law judges will produce the most attractive package of these individually valued "goods" if they consistently adopt the most allocatively efficient rule available to them. In what follows, I will explain why I disagree at least to some extent with each of these contentions.

It will be convenient for me to respond to Posner's first two contentions at the same time. In brief, I do not think that common law decisions and social choices in general should be evaluated according to the same standard. Although much of the discussion in this symposium appears to assume the contrary, most social choices do not affect anyone's moral or legal rights. Common law decisions do. At least in our society, a different kind of ethical analysis is required where rights are involved. Thus, although it may be en-

77. Of course, this position is perfectly compatible with various factors' being more or less important in adjudicatory settings than in legislative settings. For example, if Posner were correct in asserting the inability of common law judges to redistribute income, egalitarian values might never in practice affect the choice among alternative common law rules even though they were given the same weight in adjudicatory and legislative evaluations. I should note that some of Posner's comments in his contribution to this symposium might be read to suggest that he now believes that judges should apply different standards from those that would be appropriate for legislators.
ANALYSES OF ALLOCATIVE EFFICIENCY

tirely appropriate to evaluate general social choices by seeing whether they promote the most attractive possible combination of goals (happiness) and ideals (virtue), such an approach is not appropriate where rights are involved. Indeed, in Dworkin's terms, the distinguishing characteristic of our ethical type of society is the fact that in cases of conflict rights trump such goals or ideals. It seems to me that this distinction between rights analysis and ultimate value analysis (goal or virtue analysis) is reflected in our moral language: thus, moral recommendations that are based on the speaker's ultimate values are normally expressed in "ought" statements while moral observations that are based on the speaker's assessment of the rights of various relevant parties are normally expressed in "duty," "obligation," and "rights" terms. Such "duty," "obligation," or "rights" claims are always based on a particular subset of values—what I will call obligational values. Several types of obligational values are conceivable. For example, some societies (or groups within larger societies) might have a system of religious obligations. Since such a network of obligations will not normally control all the decisions of the parties they govern, individuals to whom such a system applies may still have many occasions to employ their own ultimate values. I believe that our own larger society is based on a system of liberal obligations—that is, obligations that derive from the basic value that equal concern and respect is owed to each individual defined as a moral agent capable of formulating and living according to his or her own life plan. It should be emphasized that the set of specific obligations that can be derived from this basic obligational value is not identical to the set of consensus moral opinions prevailing in a given society. For example, assume that Henry Aaron is visiting a friend in a hospital. As he is about to leave, a doctor approaches him and asks him to visit a child in a neighboring room: the child is in the midst of an illness crisis and the doctor indicates that a visit from his hero, Aaron, might help him pull through. I suspect that virtually all members of our society would think that Aaron ought to pay the visit in this case. But I also suspect that in a liberal society any order requiring Aaron to pay the visit would violate his rights. Thus a moral consensus in favor of a course of conduct is not a sufficient condition for its being obligatory.

78. See R. DWORKIN, supra note 12, at 90-100.
79. In fact, such a consensus is not even a necessary condition. For example, the failure of the vast majority of a liberal community to understand the implications
As I have indicated, in our liberal society, concrete obligations will arise only if they are required by our basic obligational commitment to treat all individuals with equal respect and concern. Obviously, several more specific values can be derived from this basic value. It is important to remember, however, that such derivative values are valued not for themselves but because their realization will contribute to the fulfillment of our obligation to treat each individual with the equal concern and respect due all moral agents—that is, that our basic obligation requires us to secure a recipe-type mix rather than a compromise-type mix of the various concrete values whose effectuation contributes to its fulfillment.

I should emphasize that this distinction between obligational values (and their correlative rights, duties, and obligations statements) and ultimate values (and their correlative ought statements) is more than nominal. The criticism that someone has failed to fulfill his or her obligations or has violated someone’s rights has a very different moral force from the statement that someone has acted in accordance with a set of ultimate values with which we profoundly disagree. In a liberal society, our obligation to respect other individuals entails a duty to recognize their right to formulate and pursue their own ultimate values—so long as in so doing they do not violate anyone else’s rights.80 On the other hand, we are entitled to (indeed, perhaps as an organized political community even obligated to) take actions against individuals who do not fulfill their duties or obligations (who violate someone’s rights).81

80. In some cases, particular purported “values” (which we call prejudices) may be barred by our community’s liberal obligational values. For example, when assessing a public choice—as opposed to a personal choice such as what guests to invite to dinner—an individual would not be entitled to give vent to his or her view that blacks are devils by placing a negative weight on any benefits it would generate for blacks since such a weighting system would deny blacks the equal concern and respect to which all individuals are entitled. Of course, even where such prejudices are not involved, we can criticize individuals who have acted contrary to our ultimate values—for being morally misguided (where on reflection they have rejected our values), for being morally insensitive (where they do not seem even to appreciate the force of our values), or for failing to be morally serious or concerned (where they have refused to think through or evaluate the consequences of their behavior). But where ultimate values are concerned, liberals are not entitled to require others to live according to any particular value scheme.

81. In this sense, then, a member of any community may be said to be committed to recognizing the legitimacy of its network of obligations—i.e., to recognizing that the community can sanction her for failing to fulfill such obligations without violating its own obligational standards. It seems to me that such a commit-
Of course, this distinction between ultimate and obligational values (between ought claims and rights claims) is consistent with some factors’ being relevant both for the achievement of particular socially valued goals and for the determination of whether particular rights would be controverted by a proposed action. Thus, I do not deny that the effect of all or certain kinds of decisions on allocative efficiency may be relevant to an assessment of their conformity with various parties’ rights as well as to an assessment of their ability to promote the (utilitarian) social goal of maximizing happiness. The question is: when are allocative-efficiency considerations relevant for rights determination and how do they relate to the other ingredients that form the recipe-type mix we call individual rights.

In short, it seems to me that Posner’s list of goals and ideals is ill-suited for his purposes: although such a list could be used as a basis for ought statements, it is not an appropriate basis for the assessment of common law or any other type of rights claims.

But what if we take Posner’s purported list of American consensus values as a set of ultimate values and goals relevant for the evaluation of social choices that do not affect anyone’s rights? As I have already suggested, ultimate value lists of this kind cannot be dismissed as being wrong in any meaningful sense—though from certain value perspectives, they may be wrong-headed or insensitive. Although Posner has not told me enough about the relative weights assigned to the individual values in his list to enable me to make any real assessment, I suspect that I would prefer a more egalitarian system (in the equal outcome sense) on utilitarian grounds. But I would have to admit that others would be perfectly entitled to use such a list to evaluate social choices that did not affect anyone’s rights.

What of Posner’s various claims about the ability of allocatively efficient rules to secure the various ethically desirable “goods”

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82. I should note that the assertion that utilitarianism would require policies to be adopted that produced a very large, very poor population reflects a somewhat dubious assumption that such impoverished lives generate some net positive pleasure for those who live them.

83. Posner, supra note 1, at 487.
he lists? Although I cannot comment here in detail on all these claims, I would like to offer a few observations on each. First, it should be emphasized that, as Posner now admits and I argued several years ago, allocatively efficient rules will not always maximize utility or happiness. This result reflects two facts: (1) the losers from an allocatively efficient decision may have lost sufficiently more utility from the average equivalent dollar they lost than the winners gained from the average equivalent dollar they won to outweigh the fact that the winners' equivalent dollar gains exceeded the losers' equivalent dollar losses, and (2) it might not be economically and/or politically feasible to overcome the policy's undesirable redistributive impact (from a utilitarian perspective). However, it is equally important to emphasize that in many cases allocatively efficient rules will maximize utility since there will often be little reason to believe that the marginal utility of money is lower for a policy's beneficiaries than for its victims (regardless of whether they are identified through a comparison with the status quo or through a comparison with the most attractive alternative policy that could be adopted). The general utilitarian attractiveness of allocatively efficient rules should therefore not be underestimated.

Posner is probably correct in arguing that in general allocative efficiency would speak against slavery. The problem with slavery from the perspective of allocative efficiency is that the slave's rewards are unlikely to vary with his allocative product. Hence, from an allocative-efficiency perspective, the slave may work insufficiently hard or may fail to reveal or develop skills whose use would increase his allocative product by more than they would decrease his own equivalent dollar welfare (by decreasing his own job satisfaction). Alternatively, the slaveowner may misallocate resources by requiring the slave to work more hours than was allocatively efficient; that is, to work additional hours despite the fact that the

84. Id. at 491.
85. See Markovits, supra note 4, at 983-90. Posner also now recognizes that in our worse-than-second-best-world one cannot even predict the allocative efficiency of a particular policy without establishing its effect on the distribution of income.
86. Posner, supra note 1, at 500-02.
87. The amount of hours, the intensity of the work, and the nature of the work that is allocatively efficient for the slave will be affected by his wealth. Thus, a slave who is kept at the survival level might be willing to do more work of a more difficult type more intensely if he is compensated for any increase in his productivity, while the same individual would not choose to work as hard if he is better off even if his dollar rewards reflect the way in which his allocative product varies with his efforts.
slave would have been willing to surrender more material goods for extra leisure than he could produce with the required additional units of labor. However, all these inefficiencies are empirically contingent. They all depend on the slaveowner’s not being perfectly informed. Thus, if the slaveowner knew what the slave could produce and what it would cost the slave to labor in different ways, she could order the slave to develop allocatively efficient skills, to work allocatively efficient amounts, and to work with an allocatively efficient degree of intensity. What is more, she could provide the slave with adequate incentives for compliance either by offering appropriate marginal or incremental rewards for good behavior or by imposing appropriate penalties for noncompliant behavior. In fact, the slaveowner would not even have to be omniscient to make this system work. Thus, if the slaveowner only knew the amount by which the slave’s productivity would rise if he worked more skillfully, more intensely, or longer, she could run an efficient semidecentralized system by instituting an appropriate scheme of marginal rewards or penalties and allowing the slave to make his own choices (based on the cost to him of his alternative work options). Such a system would operate in much the same way as a free capitalist system though the total rewards the slave received would probably be lower than under capitalism (only his marginal incentives would be the same).

Admittedly, however, the relevant slaveowners are not likely to be knowledgeable or skilled enough to make slavery allocatively efficient. Still, that fact does not make Posner’s case, for the practical alternative to slavery is not likely to be allocatively efficient either. Thus, the real world inevitably contains several counterparts to the allocatively inefficient incentives we have just discussed. For example, capitalist employers who cannot force workers to stay with the company for life and cannot preclude trained employees from bargaining for increased wages that reflect their higher productivity may not have allocatively efficient incentives to train their employees; similarly, workers whose wage differentials are reduced when unions are organized along company rather than trade lines may not have efficient incentives to develop their skills; workers may also be denied allocatively efficient incentives to work hard by union opposition to piece-rate compensation or by social sanctions imposed by fellow workers who do not want the work norm to be

Thus, it might be allocatively inefficient for the better-off slave to work harder while it would be allocatively efficient for the impoverished slave to do so.
raised; and finally, workers may be denied allocatively efficient incentives to develop skills, work hard, and work long by taxation on the margin of income.

Posner may respond that most of these problems with capitalism reflect slaverylike limitations on the individual's ability to contract. However, one should note that many of them do not reflect solely state-created obstacles. Thus, even if the state allowed individuals to bind themselves to work industriously for a particular company for life at a wage rate that did not reflect any future training they received from the company, the enforcement of such a contract would be hindered by the difficulty of determining the damages the company would sustain if the individual ceased working for it or worked less intensely than he or she could as well as by the difficulty of collecting on any judgment levied against the worker. Similarly, the state is also not responsible for the social sanctions workers may impose on an unusually productive colleague: although in theory the state could make such social sanctions actionable, the practical difficulties of proving the illicit motivation would probably undermine any such attempt—even if there were no other grounds for the rejection of such a proposal. Nor can an allocatively efficient government avoid the kind of marginal taxation that will always distort the relevant kinds of worker incentives.

Obviously, I do not believe that slavery is more efficient than modern or efficient capitalism. However, it is important to note that the superiority of self-ownership is empirically contingent, for this fact contributes to the substantial likelihood that the enslavement of some individuals might well improve resource allocation. This result would be most likely where the individual in question is not a perfectly informed maximizer. There are many people who—from the perspective of allocative efficiency—need some taking in hand. Both they and their society might be better off in some sense if they were confronted with a more disciplined regime. I would be pleased if a good woman (or man) whom they chose as a companion provided them with the necessary framework. But even if I could trust the state to develop and employ the necessary tests to identify the relevant individuals, I would not support their being forced to perform tasks that in one sense would leave them as well as their society better off. Posner may protest that my reaction really reflects my distrust of the state—my belief that the state would not in fact use slavery in a way that increased allocative efficiency. However, I would attribute my reaction to the
fact that such a program would rob the relevant individuals of their right to choose and execute their own life plans—their right to make a mess of their lives from their own as well as from an allocative-efficiency perspective.  

Posner also claims that in providing allocative efficiency, one will promote various virtues such as keeping promises and being industrious. Unfortunately, all of these claims need to be qualified in various ways. As Posner would be the first to admit, allocative efficiency would at best support keeping promises if the promise is interpreted to commit the individual either to do the promised act or to pay any resulting damages. Similarly, allocative efficiency will promote industriousness at best by making individuals' dollar wealth vary at the margin with their productivity. Thus, the fact that a person dislikes work will count against the allocative efficiency of his laboring. Indeed, since as we shall see, allocative efficiency may require far more transfers of income than Posner supposes, its pursuit may require taxes on the margin of income that preclude the provision of even such incentives to industriousness. Moreover, as Posner himself recognizes, since allocative efficiency may very well support allowing wealth to be inherited, it may lead to an initial distribution of wealth that makes it allocatively efficient as well as personally advantageous for many individuals to indulge their slothfulness.

With respect to egalitarianism, Posner now admits—as I argued some time ago—that allocative efficiency may require some egalitarian transfers of income. However, he believes that only two arguments support such transfers: the argument that some such redistributions may reduce the amount of misallocation caused by crime and its prevention and the argument that some may satisfy various individuals' economic desires for social justice. Moreover, Posner regards both these arguments as mere qualifications to the general principle that allocative efficiency will be reduced by government—"coerced"—transfers of income. In fact, however, several other arguments also suggest that egalitarian redistributions may be supported on allocative-efficiency grounds. Most important, redis-

88. Obviously, various qualifications would have to be made where the individual in question would be likely to inflict positive harm on others.
90. Id. at 126.
91. See id. at 131.
92. See Markovits, supra note 4, at 977-83.
tributions to the poor may very well increase allocative efficiency by reducing the extent to which we under-invest (from an allocative-efficiency perspective) in the children of the poor and perhaps in poor adults themselves. Egalitarian redistributions may also improve resource allocation by reducing the extent to which the poor choose to engage in various noncriminal kinds of misallocative behavior—such as living in disease- and fire-spreading tenements and driving polluting, breakdown-prone cars. Hence, I believe that the pursuit of allocative efficiency is far more compatible with equal-outcome egalitarianism—and hence with utilitarianism—than Posner seems to suppose.

However, I am far less persuaded than Posner that the pursuit of allocative efficiency is compatible with the other, “just-desert” sort of distributional value that may be implicit in many of his comments. Although Posner has never made explicit statements of this kind, at times he does seem to be implying that more productive people deserve to be paid according to “what they produce” because even if they are paid on this basis consumers will obtain more surplus from such people’s efforts than from the efforts of less productive members of society. In other words, at times Posner seems to be arguing that all people ought to be paid something like the same proportion of the allocative value of their output. Moreover, Posner also seems to believe that an allocatively efficient system will produce a distribution of income that more or less satisfies this distributional value. Unfortunately, as Posner is now beginning to realize, this value statement is crucially ambiguous and the various empirical claims I have (perhaps inaccurately) attributed to him are almost certainly wrong. Even if their attribution to Posner is unjustified, enough people seem to hold views of this kind to make it worthwhile for me to comment on them.

The ambiguity in all such claims arises because of the difference between the marginal allocative product of the last person to do a certain type of work and the average allocative product of all

94. See id. at 123, 129 n.80. Admittedly, Posner has never been quite so precise. In fact, I suspect that he might want to adjust the relevant proportions to reflect the relative pleasantness of different types of labor.

95. See Posner, supra note 1, at 496 n.25 (partially correcting his previous statements, in Posner, supra note 15, at 123, 129 n.80).

96. For example, the same problems arise in relation to the Main Street view that people ought to be paid according to what they produce.

97. I will define the classes of labor to contain individuals with a given degree of skill and industriousness. In other words, I will assume that all persons performing a certain type of work are equally productive.
persons doing this type of work. The ambiguity is important because in general there is not likely to be much of a correlation between the ratio of the marginal allocative products of two types of jobs and the ratio of their average allocative products. For example, I would not be at all surprised to discover that the average allocative product of garbage collectors was higher than that of doctors, though the marginal allocative product of the last doctor is undoubtedly higher than its counterpart for the last garbage collector.

As I have just indicated, Posner seems to be making two empirical claims in this connection: (1) that people who produce more generate more consumer surplus, and (2) that an allocatively efficient system will pay people more or less the same proportion of what they produce. When investigating these claims, it is useful to distinguish two groups of individuals: (1) normal individuals who belong to a group of equally productive workers performing similar tasks and (2) unique individuals who make special contributions. Although the distinction between the marginal and average allocative product of a particular type of labor makes sense for normal individuals, these concepts do not apply to unique individuals—who by definition are the only members of their group. Let me begin then by analyzing Posner’s claims as they apply to normal individuals. For such individuals, the cogency of both Posner’s consumer-surplus claim and his proportionate-payment claim depends primarily on whether Posner is identifying productivity with marginal or average allocative products. If Posner means to identify each individual’s production with the marginal allocative product of the last person to perform his or her type of work, the consumer-surplus claim will be false though the proportionate-payment claim will be correct—at least if we ignore the Pareto imperfections that will inevitably remain in the most effi-

98. Let us assume that there are two types of labor (1 and 2), which are used to produce two different goods—respectively $X$ and $Y$. Let $MPP$ and $APP$ stand for marginal and average physical product of labor respectively; $MLV$ and $ALV$ stand for marginal and average allocative value of some good respectively; and $MLP$ and $ALP$ stand for marginal and average allocative product respectively: $MLP = MPP(MLV)$ and $ALP = APP(ALV)$. In general, (1) $MPP_1/MPP_2 \neq APP_1/APP_2$ (since roughly speaking the $MPP$ of successive units of different types of labor will often decline at different rates); (2) $MLV_1/MLV_2 \neq ALV_1/ALV_2$ (since roughly speaking the $MLV$ of successive units of different goods will often decline at different rates); and therefore $(MPP_1)(MLV_1)/(MPP_2)(MLV_2) = MLP_1/MLP_2 \neq (APP_1)(ALV_1)/(APP_2)(ALV_2) = ALP_1/ALP_2$ (by multiplying equations (1) and (2) together). I should note that the same ambiguity arises in connection with the value “people ought to be paid according to what they produce.”
cient economy we could establish. In particular, these conclusions follow from the fact that in a Pareto-optimal economy each individual will be paid the value of the marginal allocative product of the last person to perform his or her type of labor, for this relationship implies that no one’s efforts will generate any consumer surplus; that is, that consumer surplus will not rise with “productivity,” that everyone will be paid the same proportion of his or her “allocative product,” namely, one hundred per cent. However, if Posner intends to identify production with average allocative product, both the consumer-surplus and the proportionate-payment claims are probably false. Thus, as I have already noted, since the ratio of the marginal to the average allocative product of labor is likely to vary substantially from labor-type to labor-type, different labor-types will not be paid the same proportion of their (average allocative) “product” in a Pareto-optimal world. Similarly, since many workers who are more productive in the average allocative product sense will do work whose marginal allocative product is atypically close to its average allocative product, there is very little reason to believe that “consumer surplus” (in the special sense of average allocative product minus wage paid) will be highly correlated with either average or marginal allocative product in a Pareto-optimal world.

Let us turn then to the position of unique individuals. In particular, I will now analyze whether the consumer-surplus and proportionate-payment claims are likely to be satisfied first within the group of such individuals and then between this group and all other “normal” workers. First, within the group, is there likely to be a good correlation between the allocative product of such individuals and the consumer surplus they generate? I sincerely doubt it. In particular, the relationship between the allocative value of someone’s output—or labor in this case—and the revenue he or she obtains by selling it depends on a large number of factors which are likely to vary considerably from case to case.\footnote{For a discussion of a related topic which analyzes the relevant factors, see Markovits, \textit{Tie-ins, Leverage, and the Law}, 76 \textit{Yale L.J.} 1397, 1462-66 (1967).} Hence, even within the set of unique individuals I doubt that there is much of a correlation between productivity and consumer surplus. In fact, where the efforts of such unique individuals are involved, this correlation is probably even smaller than normal because the operation of any type of patent system is likely to result in some individuals’ being overcompensated and others’ being undercompensated. Posner fails to realize this fact because he believes
that the allocative product of the patent creator is equal to the
allocative value his or her discovery would have if no one else
would have discovered it.\footnote{100} In fact, however, the allocative value
of anyone's discovery is equal to the allocative value of the discov-
er'y's being available when he or she discovered it rather than at
the later time at which someone else would have made the same
discovery. Thus, rather than systematically undercompensating the
discoverer, as Posner supposes,\footnote{101} our present patent system's
17-year monopoly (and quite conceivably any such system we could
device) will overcompensate some such unique individuals and
undercompensate others. The correlation between surplus and pro-
ductivity is therefore likely to be particularly low where such
unique individuals are involved. Obviously, the same arguments
suggest that all such individuals are unlikely to be paid the same
proportion of their productivity. Moreover, even if the consumer-
surplus and proportionate-payment claims were satisfied within the
set of unique individuals, it would certainly not hold as between
this set and the set of all normal individuals, regardless of whether
their product were measured according to the average or marginal
allocative value of different types of work.

Finally, in his contribution to this symposium, Posner argues
that the allocative-efficiency criterion is also consistent with our
principles of individual autonomy and consent.\footnote{102} My own reaction
to this contention is identical to Dworkin's. In my opinion, the arg-
ument is totally spurious: "the idea of consent does no work at all
in the theory and the appeal to autonomy is therefore a facade."\footnote{103}
In brief, Posner errs in this connection by confusing counterfactual
consent with unexpressed, tacit, or implied actual consent. I must
say that Posner is at least consistent in this confusion: precisely the
same error led him to reject my distinction between natural
oligopolistic pricing (in which no actual anticompetitive threat or
promise is involved) and tacitly contrived oligopolistic pricing (in
which the anticompetitive threat or promise is communicated
nonverbally through pricing behavior).\footnote{104}

In short, Posner's discussion of the extent to which allocatively
efficient rules will promote various goals and ideals contains many

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\begin{itemize}
\item \footnote{100} Posner, supra note 15, at 129 n.80.
\item \footnote{101} See id.
\item \footnote{102} Posner, supra note 1, at 494-96.
\item \footnote{103} Dworkin, supra note 76, at 584.
\item \footnote{104} See Markovits, Oligopolistic Pricing, the Sherman Act, and Economic Wel-
\end{itemize}
errors (though admittedly not all favor his case for the desirability of allocatively efficient decisions). However, even if his analysis of these relationships were adequate and justice could be described as a combination of the goals and ideals he lists, his current efforts would not justicize allocatively efficient rules. For this purpose, Posner must indicate the relative importance of his various goals and ideals and explain why departures from allocative efficiency could not promote one or more of them sufficiently to justicize such allocatively inefficient decisions. Obviously, one cannot rule out such possibilities by demonstrating that allocatively efficient rules will promote these goals to a greater extent than might have been expected. Accordingly, if Posner's purpose in discussing the ability of allocatively efficient rules to promote various goals and ideals was to explain why judges and their critics might develop a "taste" for such rules, his efforts are misconceived. Thus, Posner's attempt to justicize allocatively efficient rules fails for three different reasons: first, and foremost, Posner is wrong in assuming that the ability of a given rule to protect the rights and enforce the duties of the parties it affects depends on the extent to which its adoption will promote some compromise-type mix of goals and ideals; second, Posner has not analyzed the extent to which departures from efficiency would promote the various goals and ideals that he believes are constituents of justice; and third, Posner's analysis of the ability of allocatively efficient rules to promote these goals and ideals suggests on balance that he overestimates their compatibility with allocative efficiency and hence underestimates the extent to which departures from allocative efficiency may promote the combination of goals and ideals he identifies with justice.

* * *

This section has tried to demonstrate the inadequacy of Posner's attempt to use economic analysis to explain why the common law has evolved toward efficiency and to characterize the moral status of an allocatively efficient common law. As we have seen, neither the individual interests of litigants, nor the material interests of judges, nor the "taste" judges and their critics may have for seeing that justice is done seems likely to account for the supposed allocative efficiency of the common law. Posner's failure to justicize allocatively efficient rules also implies that he has failed to help us understand the common law (as he sees it) in the sense of enabling us to evaluate it according to appropriate criteria.
The Limitations of Economic Analysis: Some A Priori Speculations

Professor Posner has often argued that the only way to determine the limits of economics’ applicability to common law analysis is “to apply economics to hitherto unexplored areas of the legal system.” In other words, Posner has often argued that “the limitations of economics cannot be determined a priori.” In fact, however, I believe that one can articulate a number of theoretical limitations on the applicability of economics to legal analysis. In this section, I will briefly and tentatively discuss a number of interrelated deficiencies that economics has from a legal perspective.

The Inability to Distinguish “Prejudices” from Other “Tastes”

Economics cannot distinguish between prejudices and other tastes. For the purpose of economic analysis, the fact that a person places a dollar value on a particular policy is all that counts: no attention is paid to whether his valuation reflects a prejudice or a morally acceptable taste. However, the fact that the preference which led to some party’s being disadvantaged reflected the preference-holder’s prejudice can be crucial when analyzing constitutional or indeed even common law rights such as rights of travelers at inns and places of public accommodation. In my opinion, the central role this distinction plays in our moral discourse reflects our basic commitment to respecting all individuals as moral agents capable of formulating and acting upon their own life plans. Since economics is insensitive to the prejudice-taste distinction, it cannot provide an algorithm for legal analysis where this distinction is concerned.

The Inability to Deal with (1) the Right of an Individual to Choose His or Her Own Life Plan and (2) the Related Distinction Between Entitlement “Interests” (“Concerns”) and Other Sorts of “Interests” (“Concerns”)

In moral discourse, we distinguish at least three different senses of the words “interest” and “concern.” First, an individual

105. Posner, supra note 9, at 297.
106. Id.
107. Indeed, even if the relevant prejudices are not sufficiently widespread and crucial to render unconstitutional a law that prejudiced individuals supported, the fact that some of the gains the law generated reflected its beneficiaries’ prejudices might affect one’s estimate of the overall desirability of the law by changing the weight placed on the average equivalent dollar gained by its beneficiaries.
(or the public) is said to have a “psychological” interest in something—as in the expression “X interests me”—if he has a proclivity to pay attention to it. Second, an individual or the public is said to have a material welfare interest in something—as in the expression “X affects my interests or concerns me”—if it causes him to sustain a material gain or loss. Third, and finally, a person (the public) is said to have an entitlement interest in something as in the expressions—“I have an interest in X,” “X is my concern,” or “X is none of your concern”—if he is in a position to make claims as of right in relation to it. At least in our culture, psychological and material interests are not sufficient conditions for entitlement interests; that is, the fact that a particular event will interest someone psychologically or will affect his material interests does not guarantee, indeed may not even count toward, his having an entitlement interest in relation to it. In many cases, the reason that an act that affects someone’s psychological and material welfare interests may still be “none of his (entitlement) concern” is that the act in question constitutes a fundamental life choice of the actor. For example, an individual’s choice to invite a guru to live with him in his own home may both offend others in his environment psychologically and injure them materially by lowering property values. However, I do not think these psychological and material interests give them any rights in relation to the choice in question. For precisely the same reasons, I do not think that the public could justify intervening in this kind of choice by asserting that the presence of the guru misallocated resources in this particular rationalist environment. Of course, Posner might respond that this feature of our moral environment reflects the fact that such public interventions will normally be misallocative and that problems of controlling discretion, the information costs of making individualized decisions, and the relative inability of such decisions to inform and deter undesired acts require the adoption of formal rules. I am simply not satisfied with this explanation—any more than

108. I should hasten to add that the courts have not always paid enough attention to this distinction. Thus, at one time, the Supreme Court came close to saying that the fact that every industry “affects the public interest” in the welfare sense logically implies that it is “affected with a public interest” in the entitlement sense. See Munn v. Illinois, 94 U.S. 113, 130 (1876). Similarly, courts have sometimes argued that the fact that the public is psychologically interested in some subject matter gives them a right to know about it (an entitlement interest in information relating to the subject in question). See, e.g., Sidis v. F-R Pub. Corp., 113 F.2d 806 (2d Cir.), cert. denied, 311 U.S. 711 (1940).
I am with the allocative-efficiency explanation of our rule against slavery.  

The following hypothetical case may persuade some readers of the forcefulness of my point. What would you think of a state law that offered to pay all sannyasins (followers of a guru) $1000 if they stopped attending the guru’s discourses, wearing orange, and observing their other religious practices? Do you think that such a law could be justified on the ground that each person who engaged in the behavior in question caused more than $1000 in offense, that is, made those who are offended by the practices more than $1000 worse off? If not, I suspect that your objection reflects a belief that the government cannot cater to some of its citizens’ prejudices without showing disrespect for the fundamental life choices of those against whom such intolerance is directed; that is, it cannot do so without violating its noneconomic-based obligation to manifest respect for each individual as a moral agent capable of formulating and acting upon his or her own life plan. It is revealing to contrast such a law with allocatively efficient legislation that has the effect of inducing individuals to give up particular lifestyles but whose efficiency does not depend on its satisfying the “tastes” of those who dislike such life choices. Think, for example, of the

109. See text accompanying notes 86-88 supra. One might also try to rationalize such prohibitions of public intervention with allocative-efficiency analysis by arguing that unpopular personal life choices generate external benefits and are in fact a type of public good. For example, one could argue that such unpopular public choices change the “taste” of various parties in allocatively efficient ways: for example, such choices may help those who dislike them grow accustomed to the presence of gurus and thereby reduce the amount of external costs the next ashram generates; such choices may also encourage others to think seriously about their own life plans and thereby help them to lead more fulfilling lives. However, as I suspect Posner would be the first to admit, once such considerations are incorporated into economic analysis, the important part of the analysis will no longer be economic in any meaningful sense.

110. Or if you prefer what would you think of a state law that offered to pay $1000 to any Hassidim who shaved, stopped wearing a talis, and stopped putting on tefillin?

111. See note 109 supra.

112. I believe that a law that paid practicing homosexuals not to engage in such activities could be subjected to precisely the same attack. I realize, of course, that there are laws against homosexuality. However, I do not believe that the supposed justification for such laws has anything to do with the psychological or material interests of the public. Instead, I believe that their supposed justification is religious—a “justification” I do not believe is admissible in the American constitutional regime. Let me hasten to add that obviously I do recognize the difficulties in my brief treatment of this and the other subjects I will cover in this section. Each of the topics
government's offering a very high salary to anyone who is willing to take a seven-day-a-week job in a remote outpost (where the arrangement's allocative efficiency reflects the high cost of housing and feeding the additional staff that would be required if employees worked six days a week). Although this policy might induce some "religious" individuals to forsake their faith, it does not seem to me to violate the government's obligation to respect each individual's life choice.\footnote{113}

The Inability of Economics to Deal with Liberty and Its Constraint in the Way that is Relevant for Moral Discourse

The economic conception of liberty is a conception of liberty as license. According to this conception, an individual's liberty is reduced (his or her opportunity set is diminished) if he or she cannot articulate his or her political beliefs, but it is also reduced if he or she cannot defame others (or drive on the left-hand side of the street). Taken in this sense, reductions in an individual's opportunity set (liberties) differ only to the extent that the individual would place a higher dollar value on some such reductions than on others.

Although some moral philosophers have employed this concept of liberty as license, I agree with Dworkin that so construed the concept of liberty can play no significant role in moral, political, or legal debate. In order to be useful, a very different concept of liberty must be employed—a concept that is in fact implicit in most constructive discussions of government restrictions on individual choice—what Dworkin calls the concept of liberty as independence.\footnote{114} This concept of liberty as independence focuses on a particular subset of the opportunities available to the individual,\footnote{115} namely, those that relate to his formulating and carrying out a personal life plan.\footnote{116} Thus, the economic approach to liberty generates to which I allude deserves far more detailed discussion, which I hope my brief comments will provoke.

\footnote{113} I am indebted to Professor Dworkin for pointing out the illuminating character of this kind of example.


\footnote{115} \textit{Id.} at 262, 270-71.

\footnote{116} The particular opportunities that belong to this subset may vary among cultures as well as over time within a given culture. For example, in cultures in which people identify more with their professional role, restrictions on the ability of an individual to practice a given profession will be more likely to raise issues of liberty as independence. The West German and American approaches to such issues might be fruitfully explored in this light. \textit{Compare} Pharmacy Case, 7 BVerGE 377 (1958) (West German case holding unconstitutional series of Upper Bavarian laws
the misleading conclusion that issues of liberty—properly so-called—are raised every time the government places a restriction on some individual’s opportunity set—for example, by forbidding him to drive on the lefthand side of the road. The economic approach to liberty also leads to the incorrect measurement of the value of particular liberties. Thus, in moral discourse, the value of liberties—properly so-called—is not measured by the number of dollars for which the individual in question would be willing to forego the relevant options: from a moral perspective, the fact that some individuals are willing to sell their souls does not convert such sales into ordinary market transactions. This may be why many of us would find morally offensive government offers to pay sannyasins, Hassidim, or homosexuals who “reform.” If I am correct in this, economics clearly will not be able to deal with cases which involve liberty as independence.

Economics also is limited in its ability to differentiate between budget and governmental restrictions in the opportunity sets available to particular actors. In particular, economics can distinguish between budget and governmental constraints on the ability of an individual to make certain choices only to the extent that these types of constraints are not equally allocatively efficient. Admittedly, in an otherwise Pareto-optimal world, budget constraints that reflect the individual’s financial limitations would not be allocatively suspect while government constraints that involve direct government prohibitions would be presumptively inefficient. However, I doubt that this distinction accounts for our divergent moral reactions to these two types of constraints.

For example, consider a Moslem who wishes to make a pilgrimage to Mecca. Such an individual may be unable to make the trip either because he cannot afford to do so—a budget constraint—or because the state has forbidden travel to Saudi Arabia—a government constraint. Let us compare the economic and moral analysis of these two constraints. We can start with the budget constraint. Assume that in general pilgrimages to Mecca generate a great deal of vicarious pleasure and satisfaction to other believers—particularly since pilgrims tend to return with relics and

and decisions regulating conditions under which individual could open new pharmacy) with Board of Regents v. Roth, 408 U.S. 564, 571-73 (1972) (nonretention of untenured university teacher, without stigma foreclosing other employment, was not deprivation of liberty or of “property interest” protected by procedural due process). (The concept of liberty as independence may also enable one to distinguish various economic “liberty” issues from civil liberties issues.)
stories which they show and tell to friends. Although these external benefits may very well make it allocatively efficient for many individuals to make pilgrimages that are not in their own narrowly defined self-interest, this fact does not create a right for them to travel. Such externalities might lead us to conclude that it is desirable for the government to subsidize such trips but clearly their presence does not give the pilgrims a right to the subsidy. In fact, as I will argue in the next section, I doubt that the fundamental right of individuals to formulate and act upon their life plans requires such government subsidies even in relatively prosperous societies. Thus, the analysis of allocative efficiency will not provide a useful algorithm for moral and legal analysis in such cases.

What of the case in which the prospective pilgrims are prevented from traveling by a governmental constraint? Assume that the government has prohibited such pilgrimages because many citizens feel hostile towards Arab culture and religion, in other words, are offended by it. It is quite conceivable that in this situation, the governmental constraint would be allocatively efficient. However, I doubt very much that in the above context such a prohibition could be reconciled with our notions of liberty as independence. In fact, I suspect that such a governmental constraint would violate the Moslem's liberty as independence even if it were not a response to hostility but simply reflected the government's desire to improve the balance of payments or to reduce the wealth of the Saudis by hindering their tourist trade because many citizens were upset by the fact of Arab wealth.

Although, obviously, these examples deserve far more detailed treatment, they do suggest to me that the contribution that economics can make to legal analysis is severely limited by the insensitivity of economics to the concept of liberty as independence and the inability of economics to distinguish between budget and governmental constraints on an individual's opportunity set.

The Inability of Economics to Deal with the Interests of the Unborn

As Posner admits,117 economics provides no basis for determining whether the welfare of the unborn should count. In fact, when Posner discusses various birth-control programs, he implicitly assumes that the welfare of such potential individuals does not count; that is, he focuses exclusively on the effects of additional

population on the equivalent dollar welfare of those who would in any case be born. It seems to me that in many such cases one cannot ignore the possible rights of those whose birth is at stake. The most obvious recent cases of this kind in American law are the various abortion cases. Clearly, if the rights of the fetus must be considered in such cases, economics will not be able to help at a crucial stage of the necessary analysis.

Admittedly, some analysts such as Judith Jarvis Thomson have argued\textsuperscript{118} that the issue of fetus rights need not be addressed in the abortion cases, that even if the fetus does have a right to life it would not have the right to require its mother to carry it to term. However, as I will argue in the Appendix,\textsuperscript{119} Thomson's analysis is inapposite and her conclusion is incorrect: if (and when) the fetus has a right to life, it has a right not to be killed by its mother's aborting her pregnancy—at least where the mother can carry the fetus to term without incurring any substantial risk to herself. Hence, the issue of the fetus's right-bearing capacity is crucial in the abortion cases. Moreover, the abortion issue does not provide the only common law or constitutional cases in which the right-holding capacity of possible parties is crucial. For example, this issue may critically affect the following possible constitutional issue: Do future generations of citizens or residents have a right to a minimum real income or to a minimum percentage of the present generation's real income? Unfortunately, economics can no more resolve this issue of right-bearing capacity than it can resolve the issue of fetus rights. In general, then, whenever a case raises the issue of the rights of the unborn or unconceived, economics will not by itself be able to resolve the dispute in question.

\textbf{The Inability of Economics to Evaluate Choices That Cannot Be Evaluated Through Voluntary Market Transactions}

As I have already indicated,\textsuperscript{120} there are many situations in which contrary to the economist's normal assumption voluntary market transactions will not reveal allocative values. Economics is

\begin{itemize}
\item \textsuperscript{118} See Thomson, \textit{A Defense of Abortion}, 1 PHILOSOPHY & PUB. AFF. 47 (1971). In fact, Thomson is a bit ambiguous on this point. For an explanation of why I think my textual attribution is justified, see note 139 infra.
\item \textsuperscript{119} I have placed this discussion in an Appendix because of its length. Nevertheless, I do recommend it to the reader's attention not only because of the importance of the abortion issue but also because it may help to clarify the kind of noneconomic argumentation which I think typifies legal and moral analysis.
\item \textsuperscript{120} See note 13 supra and accompanying text.
\end{itemize}
most likely to be deficient in this respect where voluntary transactions are inclined to be self-definitional or where market transactions change the character of the good, service, or relationship at stake. I have already shown that in all such cases an economics that relies on market prices is likely to undervalue the allocative efficiency of various government activities. This insensitivity of traditional economic data also underlies its inability even to contribute to the assessment of arguments that the government has an obligation to provide individuals with certain services because such a duty is implied by the requirement that the government treat all individuals with respect.

* * *

In this section, I have tried to suggest some a priori grounds for doubting the ability of economics to account for or predict common law or fundamental fairness-type constitutional rights. Ultimately, I suspect, many of the deficiencies of economics I have listed can be traced back to the insensitivity of economics to the fundamental right of individuals to be treated with respect due to moral agents who have the capacity to formulate and live according to their own life plans. Since economics cannot reflect the moral significance of our taking our lives seriously, it also fails in the end to take our most fundamental rights seriously.

**Taking Lives Seriously: A Summary of the Approach and a Few of Its Implications**

Now that I have explained why I doubt the ability of economics to account for common law or fundamental fairness-type constitutional rights, I would like to elaborate on my own approach to legal analysis (which closely resembles Dworkin’s) and to examine a few of its implications for two of the issues with which Dworkin and Posner have been most concerned—(1) the distribution of income and (2) losses generated by accidents.

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121. I have not discussed the inability of economics to deal with the misfeasance-nonfeasance distinction both in general and in the context of the contemporary interpretation of the fourteenth amendment. This omission reflects my conclusion that this distinction cannot really bear scrutiny even in the constitutional context. (In brief, I believe that both textual arguments, focusing on the text of the ninth and tenth amendments, and structural arguments suggest that the state does have a positive duty to protect individual rights—for example, by prohibiting murder.)
Moral Evaluation: A Summary of My Approach and Comparison with the Method of Positive Science

As I have already suggested, it seems to me that we engage in two different kinds of moral evaluation. Where claims of legal or moral right, duty, or obligation are involved, we employ obligational values which entitle us to criticize individuals despite the fact that they can rationalize their offending acts with their own ultimate values. In our liberal society, the most basic obligational value is respect for the capacity of each individual to formulate and act according to his or her own life plan.

However, most moral debates do not involve claims of right, obligation, or duty, or their correlative obligational values. Instead, they involve “ought” claims and their various correlative ultimate values. Where “ought” claims are being made, we are entitled to follow our own lights: to choose among a variety of competing values such as utilitarianism, egalitarianism (in the equal outcome sense), and numerous varieties of “earned-desert” or historic (as opposed to endproduct) values. Although some of us may hold ultimate values that act as constraints on the pursuit of our other objectives, most individuals’ ultimate values do not relate to their overall evaluations in this way. Thus, as I have already suggested, the ultimate values of most individuals will function appropriately if they are used to generate relative average weights for the average equivalent dollar the relevant policy gives its beneficiaries and removes from its victims respectively. Much of the discussion in this symposium and many of the debates to which various authors have referred have failed to recognize this crucial distinction. Thus, many value debates about the distribution of income assume that any such issue must involve claims as of right. I think that it is important to emphasize that this is not the case.

Of course, I do realize that my statement of what I take to be our fundamental obligational value is vague and abstract in the extreme. In order to make this value concrete, I would employ the method of reflective equilibrium—that is, I would try to rationalize my conception of this value with our society’s various legal and moral precedents. Naturally, though, in some instances a particu-

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122. Endproduct values are concerned only with the shape of the income distribution and not with who occupies what place in the distribution. Historic values are concerned solely with the relationship between each individual’s history and his or her place in the distribution of income.
larly attractive conception might lead me to reject a precedent as incorrect rather than vice versa.

Before proceeding to apply my approach to various income distribution and tort law cases, it may be helpful to compare the reflective-equilibrium method I have proposed with traditional scientific method. Posner appears to believe that one can test hypotheses about rights through normal scientific methods. Thus, at one point he argues that the issue of whether “common law judges have really been guided by noneconomic rights concepts rather than or in addition to implicit economic concepts in making rules and decisions . . . poses a straightforward empirical question in the positive analysis of law.” In fact, however, the method of reflective equilibrium is quite different from “official” scientific method. For example, although in positive science one is not supposed to change the facts to make them fit the theory, such a maneuver is an essential part of the reflective-equilibrium approach. If a particularly attractive moral or legal theory is inconsistent with a number of moral or legal decisions, one may be perfectly entitled to respond to this dilemma by reconsidering these precedents, that is, by deciding that they were in fact mistaken. Thus, the method that I think one should employ when analyzing common law rights and fundamental fairness-type constitutional rights differs significantly from normal scientific analysis.

A Brief Look at Some Implications

The Distribution of Income: My Approach and Some Comments on the Usefulness of Economics.—As I have already noted, I would distinguish sharply between what I think our society is obligated to do in relation to the distribution of income and what I personally believe our society ought to do in relation to this issue. In particular, I believe that our society’s fundamental commitment to respect each individual as a moral agent capable of formulating and acting on his or her own life plan places us under an obligation to give all members of our society the absolute and perhaps the relative material welfare that is necessary to enable them to take their lives seriously. In other words I believe that a society as af-

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124. Admittedly, in practice, scientists may tend to dismiss as mistaken factual results that conflict with existing theory. However, this sociological observation is consistent with the normative claim of the text.
fluent as ours has an obligation to provide its adult members and a fortiori its children with a significant minimum real material income. Indeed, I believe that the states and perhaps even the federal government have a constitutional obligation to provide such support.\textsuperscript{125} I should emphasize, however, that this commitment does not entail the government’s removing any budget constraint that might preclude someone’s choosing a particular life plan: the individual right is the right to be in position to take one’s life seriously—not the right to be able to pursue a specific life plan.

Clearly, then, if I am correct, our obligational values do not commit us to a particular distribution of income. An infinite number of distributions would be consistent with the minimum real income constraint to which we are committed. Which of these permissible distributions one prefers, that is, what set of weights one attaches to various parties’ equivalent dollar gains and losses, will depend both on one’s ultimate values—does one think that each person’s productive potential belongs to the individual in question or to the state—and on one’s assumptions about certain related “factual” issues—for example, to what extent are individuals “responsible for” or capable of affecting their productivity.

Although I do not believe that economics can lead us to the liberal obligational value that underlies our society’s distributional commitments, and I see no reason to believe that our ultimate values will be satisfied by policies that maximize allocative efficiency, there can be no doubt that economics can make a substantial contribution to the clarification of such ultimate values and their policy implications. Thus, as we saw, the economist can help us realize: (1) that the value “people ought to be paid according to what they produce” is highly ambiguous; (2) that the most probable referent of this value is the average allocative product of each individual rather than the marginal allocative product of the last person to do his or her type of work; (3) that even a Pareto-optimal economy (which will pay people according to their marginal allocative products) will not pay people according to what they produce in the most apposite average-allocative-product sense; and (4) that our ac-

\textsuperscript{125} Obviously, I am well aware of the arguments that can be made against this position. Although my argument on this issue is basically structural in character, textual support can be obtained from the ninth amendment, the tenth amendment, portions of the fourteenth amendment, and least persuasively from the republican-form-of-government clause.
tual economy (with all its Pareto imperfections) will not even pay people according to their marginal allocative products.\textsuperscript{126}

The distributional value I have just discussed clearly derives from the premise that each person is the owner of his or her own productive potential. Economics can also help to clarify another value to which Dworkin refers—people ought to pay the true costs of all their choices\textsuperscript{127}—which may very well reflect the opposite premise—that an individual’s productive potential belongs to the state. Thus, economics can show that although this value is compatible with a person’s being paid his or her marginal allocative product, it does not require that he or she be paid on this basis: this value’s effectuation simply requires that each individual’s income (whatever the starting base) be reduced to the extent that the individual chooses to produce less than he or she was capable of producing.\textsuperscript{128}

Finally, as I noted above, economics can demonstrate that the distribution of income that would result from the operation of a real-world market economy would not pay people anything like their marginal allocative products and consequently would not make people pay for the cost of their decisions.

Thus, economics can both clarify particular ultimate distributional values and give us some sense of the extent to which they are likely to be effectuated by various real-world economies. Moreover, economics can also help us predict whether a particular change is likely to improve the distribution of income from any particular ultimate-value perspective. Unfortunately, this question may be very difficult to resolve in a world that must always remain somewhat distributionally imperfect, for the general theory of second best applies as much to such distributional issues as it does to the allocative-efficiency questions with which it has traditionally been associated.\textsuperscript{129} Thus, in this context the general theory implies

\textsuperscript{126} See pp. 869-71 supra.

\textsuperscript{127} Dworkin, supra note 76, at 567.

\textsuperscript{128} I should perhaps note that although the type of regime I have just described might be associated with a very different distribution of income from the distribution that would be produced by a Pareto-optimal economy, it would not necessarily violate the distributional constraint that I believe is imposed by our obligational values. Of course, this conclusion assumes that one can respect each individual’s capacity for moral choice without giving him or her credit for his or her own productivity—that such an approach is consistent with the “factual premises” that lie behind the fundamental obligational value I have described.

\textsuperscript{129} According to the general theory of the second best, given any set of condi-
that if one cannot remove all factors that distort the distributional income from a distributional-value perspective, there is no general reason to assume that a policy that removes or reduces one such distorting factor will improve the distribution of income from a distributional-value perspective. Roughly speaking, this conclusion reflects the fact that in general the distortion one is in a position to remove will be as likely to offset as to compound the net impact of the economy's various ineradicable distributional distortions. Obviously, this result has profound consequences for the distributional evaluation of particular policies. For example, assume that a particular tax provision would distort the distribution of income from someone's ultimate distributional-value perspective if no other such distortions were present in the system; that is, assume that in such circumstances this provision would result in various individuals' actual incomes differing from the aftertax income some system of values suggests they should have. Assume in addition (1) that the difference between each individual's actual and value-preferred incomes can be expressed as the sum of the distortion this provision introduced (the eliminatable distortion—ED) and the net distortions caused by all other distributional imperfections (the remaining distortions—RD); (2) that the distortion that ED would introduce in any individual's income is always smaller \(^1\) than the net distortion in his or her income that would exist in its absence; and (3) that the distortion the relevant provision would create was randomly related to the other net distortions just described. In such a case—which I suspect is not at all atypical—the removal of the tax provision in question would not have any tendency to reduce the average difference between actual and value-preferred incomes. This conclusion would totally \(^1\) undercut the

\(^1\) tions whose fulfillment guarantees the achievement of an optimum, if one or more of these conditions cannot be fulfilled, there is no general reason to assume that a situation in which more of the remaining conditions are fulfilled will be superior to one in which fewer of the remaining conditions are fulfilled.

130. To the extent that the absolute value of ED exceeds the absolute value of RD in individual cases, the elimination of ED will reduce the average total distortion even if ED and RD are randomly related. For an explanation, see Markovits, supra note 4, at 1049-52.

131. I assume that the evaluator cares only about the net result: that he does not place a value on the relevant individual's receiving separate benefits for her good points and separate penalties for her bad points (that he would not value a provision that created such deserved benefits or costs if it did not bring the taxpayer's actual income closer to the overall preferred level). Admittedly, some evaluators will want each individual to understand that her (and everyone else's) ultimate income has been adjusted to reflect her merits and demerits. However, I presume that even
distributional case for removing the provision in question if the unfairness associated with any given distribution depended solely on the average total distortion. I should note, however, that a distributional case for intervening in such circumstances could still be made if the evaluator believed that the distributional unfairness associated with any individual’s not receiving her value-preferred income increased more than proportionately with the absolute difference between her value-preferred and actual income, for the removal of the provision I have described would decrease this difference for individuals for whom the original distortion was higher while increasing it by an identical amount for individuals for whom the original distortion was lower.1

A numerical illustration may help to illustrate this point. Assume a society with four individuals—I, II, III, and IV. Assume in addition that (1) the total distortion, $TD$, affecting these individuals’ incomes can be represented as the sum of the eliminatable distortion $ED$ (for example, the distortion introduced by a particular tax provision that could be removed) and the remaining distortions $RD$ (that may have been caused by a number of other tax provisions, Pareto imperfections, features of the universe—for example, distribution of abilities—which from the relevant value perspective would individually distort the distribution of income and which one is not in a position to remove); (2) for any individual, $RD$ is always absolutely larger than $ED$—for example, that $ED$ is always $\pm 4$ while absolute $RD$ is never less than 50; and (3) $RD$ and $ED$ are randomly related to each other—roughly speaking, that (a) half the time they have the same sign ($RD$ compounds $ED$—the total distortion is larger than either $RD$ or $ED$) and half the time they have the opposite sign ($RD$ offsets $ED$) and (b) $RD$ has the same magni-

such evaluators would be satisfied, for example, if the individual realized that the income supervisor had failed to remove an imperfection or provision that disadvantaged her without cause because another feature of the legal or economic environment resulted in her getting an equal amount of income that she did not deserve. In other words, I assume that such evaluators would be satisfied if each individual were aware that her income was being adjusted to reflect her merits even if the adjustment were not executed through a series of separate decisions that dealt individually with each relevant feature of her case.

132. Thus the removal of the relevant provision would increase this difference for those underpaid individuals the provision helped—for whom the provision generated distortions that offset the net effect of the other distributional imperfections in the system; similarly, the removal of the relevant provision would decrease this difference for those underpaid individuals the provision harmed—for whom the provision generated distortions that compounded the net effect of the other factors that distorted their incomes from the relevant value perspective.
ANALYSES OF ALLOCATIVE EFFICIENCY

In the compounding and offsetting cases (that is, the mean and variance of the distribution of the compounding $RD$ are the same as their counterparts for the offsetting $RD$ distribution). More specifically, assume that (1) $ED$ and $RD$ for $I$ ($ED_I$ and $RD_I$) are $+4$ and $+$96 respectively, so that $I$'s income in the original situation is $100 too high ($TD = +$100); (2) $ED_{II}$ and $RD_{II}$ are $-4$ and $+$54 respectively, so that $TD_{II} = +$50; (3) that $ED_{III}$ and $RD_{III}$ are $-4$ and $-54$, so that $TD_{III} = -$58; and (4) $ED_{IV}$ and $RD_{IV}$ are $+4$ and $-$96, so that $TD_{IV} = -$92. Obviously, in such a case, the elimination of $ED$ will reduce $TD_I$ from $+$100 to $+$96; increase $TD_{II}$ from $+$50 to $+$54; reduce the absolute value of $TD_{III}$ by changing $TD_{III}$ from $-$58 to $-$54; and increase the absolute value of $TD_{IV}$ by changing $TD_{IV}$ from $-$92 to $-$96. It will therefore leave the average absolute $TD$ unchanged at $75$: the original average absolute $TD$ equalled $(100+50+58+92)/4 = 75$ and the post-elimination average absolute $TD$ equalled $(96+54+54+96)/4 = 75$. Hence, if the evaluator measured the total maldistribution by the average $TD$, he would be distributionally indifferent to the elimination of $ED$ in the case I have just described. However, if the evaluator believed that the distributional unfairness associated with any given distortion in an individual's income ($TD$) increased more than proportionately with that distortion, the elimination of $ED$ would improve the distribution of income from his perspective. Assume, for example, that the evaluator believed that such unfairness equalled the square of $TD$—that the total unfairness associated with any distribution of $TD$s should be measured by the average squared $TD$ (the variance of this distribution). In this case, the elimination of $ED$ in our example would actually reduce the unfairness of the distribution since $100^2 + 92^2 > 2(96)^2$ and $50^2 + 58^2 > 2(54)^2$.133

Let me summarize my conclusions about the contribution economic analysis can make to our understanding of our distributional values and their policy implications. In my opinion, economic analysis can account for neither our basic obligational distributional value nor any of the various combinations of ultimate values we employ when assessing the distribution of income. However, economics can clarify particular distributional values and can help us to derive their policy implications. In fact, economics can perform this latter function not only by helping us to predict the actual dis-

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133. To see why this result holds, note that $2^2 + 4^2 = 4 + 16 = 20 > 2(3)^2 = 18.$
tributive impact of particular policies (who wins and who loses) but also by helping us to determine whether policies with a known distributive impact will reduce the overall amount of distributional unfairness (by some value standard) in a world that will still be distributionally imperfect.

Tort Law: Some Preliminary Observations.—Although I cannot present anything like a coherent analysis of the implications of our obligational values for tort law, I would like to make a few comments on three related issues: (1) the reason why allocatively inefficient behavior (or negligent behavior that is also allocatively inefficient) may offend our basic obligation value; (2) the reason why injurious behavior that is not negligent or allocatively inefficient may also violate this value; and (3) the reason why the state may be able to pass statutes that override common law rights without violating the norms associated with the rule forbidding the state to deprive people of "property" without just compensation.

First, negligent behavior may be inconsistent with the respect we owe others because the negligent individual has failed to treat his neighbor as himself. Admittedly, the gains and losses associated with negligence are measured in dollar units while the Love-thy-Neighbor aphorism to which I have just referred might very well focus more on utils. However, a mediating principle might account for this difference: in particular, it may be that as individuals we are not in general morally responsible for each other's condition of poverty. If not, the fact that a particular tort victim is poor and therefore suffers an atypically large util loss from a given dollar injury might not affect the faultiness of the alleged tortfeasor's behavior (though we may still want to count similar peculiarities of the victim—for example, the fact that he or she has an eggshell head—when determining the damages a tortfeasor who has been at

134. No other positive economic information would be required for distribu-
tional analysis, if absent the policy in question, the system would contain no distribu-
tive distortions.

135. I should note in this connection that the type of rights-based theory Dworkin has developed may be extremely valuable even if it does not generate any clear conclusions for common law judges. See generally R. DWORKIN, supra note 15. Dworkin's theory may provide a useful service by helping to reinforce our commit-
ment to the right of each individual to be respected as a moral agent capable of formulating and acting on his or her own life plan by enabling us to see that the behavior of some of our most basic social institutions (courts) may be reconciled with such a system of obligations. Indeed, even if Dworkin's theory is evaluated solely in terms of its ability to provide judges with operational instructions, I would reject Posner's conclusion that the theory was "perfunctory" and "unpromising." Posner, supra note 9, at 294.
fault must pay). Admittedly, the connection between the Love-thy-Neighbor rule and the fundamental obligational value I have been proposing is quite tenuous. Let me finish this point with a question: is the Love-thy-Neighbor rule an obligational value for individual behavior while the respect-for-individuals value is its counterpart for the state?

Second, it is entirely possible that a person may fail to show others the respect that is their due by not compensating them for injuries they have sustained as a result of his or her behavior—that is, it is possible that the crucial issue is not the wrongness of the act but the wrongness of the failure to compensate. Now an economist might suggest that a rule that required nonnegligent "tortfeasors" to compensate their victims would result in the victims' injuring "innocent" tortfeasors just as the opposite rule would result in the tortfeasors' injuring "innocent" victims. But this suggestion does not seem to me to be entirely satisfactory. On one level, I suspect that my reaction reflects the fact that in ordinary language such a tortfeasor and not his or her victim would be said to have "caused" the accident. However, on another more basic level, I suspect that my reaction reflects the principle that it would be wrong for someone not to pay compensation to a party he or she has injured by engaging in profitable behavior that increased the risk of such injury. Such a principle would imply that most nonnegligent (adventent) tortfeasors should compensate their victims, for in most such cases the defendant has profited from behavior that increased the risk to others while the plaintiffs could not have reduced the risk of some accident's occurring by altering their behavior. I should note, however, that where the injury is small and the transaction cost of collecting compensation is substantial because, for example, the necessary proof is costly, the principle of respect for others might militate against the relevant victims' claims, for as we have seen it violates the Love-thy-Neighbor rule to impose major costs on someone else in order to obtain a small gain for oneself. Let me emphasize that I am making these suggestions to provoke rather than obviate further discussion. Once more, I readily admit that the connection between the values I

136. Remember that, in the cases we are now exploring, a requirement that the defendant compensate the victim would not be likely to improve resource allocation by inducing the defendant to change his or her behavior since by hypothesis the original behavior was allocatively efficient. Hence, where transaction costs are high (because proof is expensive), the victim will gain far less from successfully pursuing a claim than the tortfeasor will lose.
have just articulated and the fundamental obligational value I proposed earlier is far too tenuous for me to be satisfied with my treatment of this subject.

Third, and finally, I would like to address one issue that some of you might find a bit bizarre: assuming that our obligational values do commit us to a particular set of tort rules, how can the state pass statutes that conflict with these rules without doing something analogous to depriving individuals of their property without just compensation? I can think of at least three responses to this question though admittedly at least two succeed only by assuming the issue away: (1) if we ignore separation-of-powers issues, which may not in any case be relevant when state institutions are involved, the legislature might be justified in rejecting the common law rule if it believed that the courts had incorrectly applied the relevant obligational values, for in such a case the legislature would be purporting to enforce rather than override the rights and obligations of the relevant parties; (2) the legislature could reject a correct common law rule without depriving anyone of his rights (a) by opting for a legislative solution that did not worsen the position of any common law parties,\textsuperscript{137} (b) by taxing, fining, or permitting novel class actions against defendants who were not required by the common law to compensate their victims because the high ratio of conventional common law transaction costs to compensation made it unreasonable for the victims to demand payments (even though the defendants were not inherently entitled to commit the acts or avoid the associated costs), or (c) by taxing or fining a defendant who would be absolved by the common law despite the fact that he had no right to commit the relevant acts on the ground of the victim's fault; and (3) the legislature might be justified in worsening the position of common law rightholders if its intervention changed the amount of information in their actual or constructive possession. For example, both moral analysis and common law analysis usually proceed on the assumption that the parties in question are as well-informed about the relevant facts as most people in their position; since individuals usually are not perfectly informed, this normal information assumption may signifi-

\textsuperscript{137} Since the question facing a legislature—who from among the whole population should bear the relevant loss?—is different from the question facing a court—should the tortfeasor or the victim bear the relevant loss?—it should not be surprising if the two institutions arrived at different answers. Thus, a legislature that was considering a tort law problem might decide that the government should fully compensate all accident victims or all victims of accidents for which no one was at fault.
ANALYSES OF ALLOCATIVE EFFICIENCY

Significantly affect judgments about their liability. Take a case in which a manufacturer fails to adopt a safer, more allocatively efficient production process whose efficiency reflects the fact that its extra allocative cost is less than its extra private cost to the manufacturer. A common law court might very well be justified in refusing to hold such a manufacturer liable under a fault standard, that is, in refusing to conclude that such a manufacturer had failed to exercise due care. However, despite this fact, a legislature might be justified in requiring manufacturers to undertake a second-best analysis and engage in all risk-reducing activities that are allocatively efficient; in other words, justified in instructing courts to base their fault determinations on estimates of the allocative rather than the private cost of accident prevention where the two amounts would produce different conclusions. One might rationalize this conclusion by arguing that the legislature’s intervention changed the amount of specific allocative-cost information available to the defendants or put them on notice that their failure to undertake a second-best analysis would be negligent.138

Obviously, far more work needs to be done on an obligational (rights-based) approach to tort law. As I have already noted, such work is important not only because it may provide guidelines to common law judges but also because it may confirm our commitment to our society’s obligational values by demonstrating that our legal institutions do reflect our societal commitment to taking rights seriously.

CONCLUSION

It should by now be apparent that I am not enthusiastic about much of the work that has been done on the hypothesis that economic analysis provides an accurate algorithm for common law and fundamental fairness-type constitutional analysis. In my opinion (1) the evidence for this hypothesis is dubious at best; (2) many studies that have purported to test the hypothesis or account for its supposed accuracy contain crucial economic and philosophical errors; (3) the models such studies employed are often inchoate and sometimes chaotic; and (4) the models in question contain assumptions that are often implicit and frequently implausible. More important, I think there are substantial a priori grounds for doubting the cen-

138. In fact, the state may even have an obligational responsibility to protect certain interests that an individual would be entitled to violate in the absence of legislation. In other words, since the state has more information and is better able to do research, our obligational values may impose different obligations on the state on the one hand and on individual members of the society on the other.
tral hypothesis itself: legal and moral analyses often turn on one or more distinctions that economics does not and cannot recognize, that is, on aspects of our moral and psychic reality that economics cannot reflect in any meaningful way. In fact, it seems to me that the methods of positive science are simply ill-adapted to solving legal and moral problems. Of course, economics can make an enormous contribution to the analysis of moral and legal questions by helping us to clarify our obligational and ultimate values and to determine their implications for particular decisions. However, it is essential to realize that economics cannot answer such questions by itself.

APPENDIX: THE FETUS' RIGHT TO LIFE AND THE ABORTION CASES

In a well-known article, Judith Jarvis Thomson appears to be arguing that one need not address the issue of the fetus' "right to life" in the abortion area because even if the fetus did have such a right, it would not have the right to require its mother to carry it to term.\(^{139}\) In order to demonstrate her point, Thomson conjured up the image of a concert violinist with a rare blood type who was dying of kidney malfunction. Thomson asks us to assume that fans of the violinist kidnap a woman with the same blood type and attach her to a machine that enables her to supply the violinist with blood while her kidneys clear the violinist's poisoned blood. Thomson assumes that this process involves no long-term risk to the woman and that after nine months the violinist's kidney will have healed sufficiently to enable him to function satisfactorily without her. Thomson then asks whether the violinist who obviously in some abstract sense does have a right to life is entitled to this woman's continued help. In the end, Thomson concludes that the fact that the violinist has no such entitlement implies that even if the fetus does have a right to life it is not entitled to life support from its mother.\(^{140}\)

\(^{139}\) See Thomson, supra note 118. On the one hand, Thomson claims that she is "arguing only that having a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body." Id. at 56. Similarly at times she appears to be willing to admit the possibility that there may be "some cases in which the unborn person has a right to the use of its mother's body," id. at 59 (emphasis in original), i.e., has to "right to demand" such use. Id. at 61. On the other hand, although she asserts that "we must not fall below" a standard of minimum decency and admits that a woman who requests a seventh-month abortion to avoid the nuisance of postponing a trip abroad is "positively indecent," id. at 65-66, she elsewhere makes clear that individuals may have no obligation to behave decently (that those who would benefit from minimally decent behavior do not have a right to such treatment). Thus, she argues, id. at 59-60, that although it would be morally indecent not to save someone's life by spending a riskless hour attached to a machine that allowed your kidneys to cleanse his blood, he would have no right to demand your helping him in this way. Taken all together, then, I do think that Thomson's argument implies that the fetus would never have a rights claim against its mother to carry it to term even if it had a right to life.

\(^{140}\) Id. at 55-56.
In essence Thomson’s argument can be expressed in the following way: (1) a decision to unplug oneself from a blood transfer machine is a decision not to render aid (is a decision to make a harmful omission rather than to commit a harmful act); (2) the kidnapped woman has no positive duty to aid the violinist; therefore (3) the kidnapped woman is entitled to unplug herself from the blood transfer machine; (4) a decision to have an abortion is analogous to a decision to unplug oneself from a blood transfer machine: both are harmful omissions rather than harmful acts; (5) the pregnant woman resembles the kidnapped woman: neither has a duty to render positive assistance; therefore (6) the pregnant woman is entitled to have an abortion.

In this appendix, I will try to show that, even if one grants Thomson’s first three premises, premise four, premise five, and the conclusion of her argument are incorrect, her analogy is inapposite, and the conclusion to which it apparently leads is wrong.

Before proceeding, however, it may be useful for me to explain the significance of the distinction which underlies Thomson’s analysis: the distinction between positive acts and omissions. In general, the common law is far more likely to hold someone liable for committing a positive act that harms another than for failing to render assistance to someone who suffers harm as a result: indeed, except in discrete exceptional circumstances, the common law (unlike the civil law of many jurisdictions) does not impose a general duty to render aid. Moreover, as some of the examples that follow may suggest, this distinction between positive acts and omissions may also play a role both in ultimate-value analysis and in nonlegal obligational analysis. I should emphasize at the outset that although, as we shall see, this act-omission distinction may partially reflect both utilitarian values and nonutilitarian values of autonomy, I doubt that it can be fully accounted for in these terms. Personally, I am far too much of a consequentialist to be satisfied with much of the analysis this distinction has spawned in terms of my own ultimate values. In fact, I also suspect that too much weight is currently given to the distinction in both legal and nonlegal obligational analyses. Nevertheless, when discussing Thomson’s position, I will assume the viability of the act-omission distinction ad arguendo.

Thomson’s violinist example is supposed to present a case of a person who must choose between rendering aid and failing to render aid. Although one might question Thomson’s assumption that unplugging oneself from the machine is not a positive act from the perspective of the act-omission distinction,141 let’s assume that Thomson is correct in her characterization of this event. However, Thomson’s fourth premise—that a woman who has decided to have an abortion has merely refused to render aid—is clearly incorrect for many types of abortions and is arguably incorrect for all types of abortions. Thus, several abortion methods such as curetage, vacuum aspiration (suction), and the administration of a saline solution do involve direct acts against the fetus—that is, do injure the fetus directly and not just indirectly by disconnecting it from the preg-

141. See id. at 49; note 143 infra.
nant woman's supplies. (It is important to note that many pregnant women would prefer to abort early pregnancies by using curetage and suction methods. Hence if as I will suggest below it would be unreasonable for a pregnant woman to injure a fetus that had a right to life by using these methods, the issue of the fetus' right to life would on this account alone be crucial in many abortion cases.) Moreover, although the remaining abortion methods (hysterotomy and the administration of prostoglandins) do not directly injure the fetus, courts would almost certainly characterize them as positive acts of disengagement that are equivalent to positive harmful acts: once the pregnant woman has taken the fetus into her lifeboat, the attempt to push it back into the water is unlikely to be considered to be a refusal to render aid. Obviously then, since unlike the abortion case, Thomson's example does not involve a positive harmful act or an act of affirmative disengagement, (1) it is not analogous to the abortion case, and (2) one's conclusions about Thomson's case (premise three) do not have any bearing on the abortion situation. I should add that although I am uncomfortable with this distinction, I do not regard it as an analytic artifact—that is, it does seem to fit with one's intuitions about such matters. To see why, ask yourself whether your reaction to Thomson's hypothetical would be different if the woman in her example could extricate herself from the violinist only by performing lethal surgery on him (which would be unnecessary after nine months when his old body part was shed).

Thomson's analysis of her own example is also based on the premise that the woman in her case has no positive duty to aid the violinist. In fact, as we shall see, she has carefully constructed her hypothetical to ensure that this premise is justified. Unfortunately, in so doing, she has undercut her example's relevance for the abortion situation. In what follows, I will first argue that Thomson's hypothetical is inapposite because the two most obvious reasons for arguing that a pregnant woman may have a positive duty to aid the fetus she is carrying do not apply at all to the

142. "Hysterotomy" is a surgical procedure in which an incision is made into the abdomen and the fetus is removed manually. Prostaglandins are drugs that induce labor without directly harming the fetus. My analysis of this issue has been substantially improved by a number of conversations with my colleague John Robertson, who I hasten to add continues to disagree with much of what I say about the abortion issue.

143. For example, although one would have no general duty to drag someone into a lifeboat, one would be liable for unreasonably tossing him or her back in the water.

144. Admittedly, there is some debate about whether unplugging a machine constitutes a positive act of disengagement (for example, in cases in which life-support machines are used to sustain the bodily functions of individuals who have suffered brain death). I suspect, however, that the courts would not consider the act of unplugging oneself from a machine that is separately connected to someone else a positive act of disengagement: the act in Thomson's example resembles more closely the act of letting go of a rope one has been using to tow someone to shore (an act that first-year torts teachers always assume does not constitute a positive act of disengagement).
woman in her example. Then, I will analyze the act-omission distinction to see whether these two and a number of other less obvious differences between the position of a pregnant woman on the one hand and of Thomson’s woman on the other imply that the former may have a positive duty to aid the fetus despite the fact that the latter has no such obligation to the violinist.

Thomson’s example lacks two features which may critically differentiate the position of her woman from the position of a pregnant woman: Thomson’s woman has no status relationship to the violinist and is in no way responsible for the position in which he finds himself. In our culture, such status relationships and responsibility are the two most common reasons for a person’s having a positive duty to render aid or give support. Now, of course, it is far from clear that a pregnant woman has such an obligating status relationship or connection with the fetus. However, it is also not clear that she does not. For example, even if the woman did not assume her status voluntarily (by intentionally conceiving the fetus) or negligently (by failing to take reasonable precautions to reduce the risk of pregnancy), this fact would not be dispositive: children may have obligations to support their parents (or parents their children) despite the fact that they did not voluntarily or negligently enter into that status relationship. Nor can we distinguish the case of the child by pointing to the fact that the child has received benefits from the parents. At least, the irrelevance of this consideration is suggested by the fact that a woman living at a time in which abortion was unlawful had an obligation to protect and nurture her newborn infant. Admittedly, the status relationship of a pregnant woman to her fetus may well be sui generis but examples that do not contain any such status relationships cannot be dispositive.

The position of Thomson’s woman is also distinguishable from that of a pregnant woman in that the latter is a cause in fact and may be “at fault” in relation to the fetus’ predicament. I realize, of course, that the fetus’ predicament is different from that of the normal victim involved in such arguments: the pregnant mother is a but-for cause of the fetus’ existence and not just of its having been put at risk. However, if one concludes that this point is not decisive, the pregnant woman’s position may be distinguishable from that of the woman in Thomson’s example on this “causation” point as well. Indeed, it may not even be necessary for the pregnant woman to be “at fault” for this difference to be significant: although it is often difficult to distinguish such cases from situations in which the positive duty to help reflects the relevant parties’ status relationship, there do seem to be situations in which the mere fact that one

145. One might also take the case of a rape victim who was not able to receive medical help for an abortion during the period that this solution would have been practicable. Although such an individual would clearly deserve our sympathy, she would have a duty to support her newborn child. Moreover, I doubt that the state would have an obligation to relieve her of this duty by running orphanages, subsidizing adoptions or foster care, etc. (any more than the state would have a constitutional obligation to compensate an individual who was paralyzed by an assault by a mugger).
party was a but-for cause of the other's injury or illness creates such an affirmative obligation to render assistance. Thus, it is at least arguable that the duty to aid someone involved in a traffic accident may be imposed on another party to the accident even if the latter was not at fault; employers may have a duty to render assistance to employees who have become ill or have been injured on the job; businessmen may have a duty to help customers (or children of customers) who are injured on their premises; hosts may have similar duties in relation to their guests; occupiers of land may have a duty to warn licensees or invitees of the presence of hidden dangerous conditions and presumably to render assistance to innocent parties who have been injured by such conditions; and occupiers of attractive nuisances may have a duty to prevent injuries to trespassing children and to help any such children who are injured. Thus, one can cite many situations in which a duty to offer reasonable aid appears to arise from the mere fact that one party though not at fault was a but-for cause of another party's injury or illness. In any case, in some situations, the pregnant woman may have been "at fault"—for example, by engaging in voluntary sexual intercourse without taking any birth-control precautions with or without the intention of becoming pregnant (that is, by becoming pregnant willfully or advertently) or perhaps even by walking alone across Central Park in the middle of the night ignorantly or unthinkingly (that is, by becoming pregnant negligently though inadvertently).

Thomson tries to counter this objection to her example by arguing that the fact that the pregnant woman is in some sense a but-for cause of the fetus' predicament would not create a duty on her part to aid the fetus. In particular, Thomson tries to establish this result by analogizing the pregnant woman to a person who has facilitated the illegal entry of a burglar by leaving her windows open. However, the fact that such a person would be entitled to order the burglar to leave has no relevance to the abortion situation: the fetus is innocent and, unlike the burglar, his position is not controlled by the principle, "a man shall not profit from his own wrong." Although the relevance of such comparisons is obviously questionable, except in the case of rape a more apt analogy would be the

147. See, e.g., L.S. Ayres & Co. v. Hicks, 220 Ind. 86, 40 N.E.2d 334 (1942).
148. See, e.g., Carlisle v. J. Weingarten, Inc., 137 Tex. 220, 152 S.W.2d 1073 (1941). It is difficult to determine whether this case—and L.S. Ayres & Co.—are status or but-for cause cases.
149. See, e.g., Wood v. Camp, 284 So. 2d 691 (Fla. 1973). Admittedly, this case may be a status rather than a but-for cause example.
150. For a recent discussion of the relevant cases, see Special Project, Texas Tort Law, 57 Tex. L. Rev. 381, 411-21 (1979).
151. Although I anticipate that this possibility will offend some, negligent behavior that leads to the damage of a third party cannot always be excused on the ground that the risk that made the behavior negligent arises from the possible illegal behavior of another. Thus, one may be held liable for injuries caused by joyriders if one leaves one's keys in the car in a dangerous neighborhood.
situations of a property occupier in relation to an invitee (or child of an invitee). Indeed, even where the pregnancy is the result of rape, a fetus in the second or third month probably might be properly analogized to a licensee. As I have already suggested, in all such cases, the property owner has some duties that cut against Thomson's conclusions.

Admittedly, none of these examples is directly on point and several may be explained on grounds that may distinguish such cases from many pregnancies. As is often the case, it may not be possible to find the best analogies in reported cases. If pressed for an analogy to the woman who has become pregnant willfully or advertently by consciously ignoring a substantial risk, I would choose the position of a host who has invited someone to visit on a remote property (or in the case of the advertent but not willful pregnancy, a host who has invited someone knowing and accepting the fact that the invitee might bring along another guest). It seems clear to me that unless special circumstances arise, such a host could not disinvite her guest (or his friend) if she knew that he could not survive once he was abandoned outside her property. Alternatively, one might analogize the pregnant woman to a hiker who invites an unskilled, ignorant companion to go on a hike or who allows such a person to follow her on a hike without commenting on the riskiness of the venture or her intolerance of inept laggards. Once more, it seems clear that the hiker who has invited her companion is not entitled to abandon him in a position in which he cannot survive. In fact, I believe that the hiker who acquiesces in such a person's accompanying her without verbally committing herself in any way would have a moral and legal obligation to secure her companion's safety even at the cost of considerable inconvenience to herself.

Thus, it seems to me that the only way that Thomson may be able to meet this objection to her hypothetical is to emphasize that the pregnant woman is a but-for cause of the fetus' existence and not just of its predicament. I admit that I do not know myself what to make of this distinction. However, it should be clear that Thomson's example cannot illuminate this distinction's possible significance.

In short, for two basic reasons, the conclusion that Thomson's woman has no positive duty to aid the violinist does not imply that a pregnant woman has no similar duty toward her fetus. In order to determine whether the pregnant woman has a positive duty to her fetus, it is necessary to examine (1) the reasons that the common law (or perhaps our nonlegal obligational structure) generally does not impose such a duty, (2) the factors that account for the common law's imposing such a duty in exceptional cases, and (3) the extent to which those factors are present in the case of a pregnant woman (and absent in the case of Thomson's woman). In what follows, I will attempt to analyze these issues in an admittedly very preliminary way.153

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153. The discussion that follows borrows substantially from my colleague Bill Powers' book review. Powers, Book Review, 57 Tex. L. Rev. 523 (1979) (reviewing M. Shapo, The Duty to Act (1977)). I have also profited from discussing these issues both with Bill and with John Robertson.
One can analyze the "no-general-duty-to-aid" rule both from the perspective of allocative efficiency and from the perspective of individual autonomy. From the perspective of allocative efficiency, one could make five arguments to support the general absence of a duty to render reasonable aid even if one defined "reasonable" to mean "allocatively efficient":

1. In most cases, parties who need help that would be allocatively efficient will be able to purchase such help from its potential supplier;
2. In imposing a duty to render reasonable aid (in making parties liable for negligent omissions), a court will increase the extent to which parties misallocate resources by putting themselves in a position in which they require aid—at least to the extent that the courts do not develop a contributory negligence defense or order those in need of aid to pay a fine equal to the cost of their being helped;
3. In imposing a duty to offer reasonable aid without offering the helper a payment equal to the average value of the aid to its recipients, a court will deter some potentially efficient helpers from making investments that inter alia reduce the marginal cost of their helping or increase their ability to help;
4. In imposing a duty to render reasonable aid, the courts will put themselves in a position in which they and the affected parties will have to expend resources to determine (a) whether it would have been efficient for a particular defendant to render aid and perhaps (b) the size of any payments the plaintiff should make and the defendant should receive; and
5. In imposing a duty to aid without offering full compensation, the courts may create a situation in which government officials have an opportunity to pursue other illegitimate (and perhaps inefficient) goals by prosecuting innocent parties or by holding liable a special subset of the group of possible efficient rescuers. Thus, it is at least arguable that a refusal to require individuals to render allocatively efficient aid can be rationalized with the goal of increasing allocative efficiency.

In fact, however, I suspect that notions of individual autonomy have more to do with our approach to such issues than the goal of increasing allocative efficiency.

154. Even if the rescuer need not invest to develop or maintain his capacity to rescue, compensation should be set at the level of average benefits rather than of the actual benefits generated in the individual case. Thus, since a risk-averse potential rescuer would discount his average expected compensation under an actual benefit standard to reflect the possibility that his rescue effort might prove less than typically beneficial, the actual benefit rule would provide him with too low an incentive both to make the rescue and to invest in his rescuing capacities.

155. Unfortunately, the court may not be able to overcome this problem without creating an equally serious misallocation. Thus, if the courts do allow rescuers to recover an amount that exceeds their marginal costs in order to preserve their incentive to develop or maintain their capacity to render assistance, they may provide parties with incentives to render unnecessary aid, for it will often be difficult for the courts to conclude that a rescue was in fact inefficient or should have appeared inefficient to the rescuer—i.e., the courts may have an inevitable tendency to reward inefficient rescuers, given the difficulty rescued parties may have in proving that they could have saved themselves and should have been perceived as capable of saving themselves (of proving what would have happened or should have seemed likely to happen if help had not been forthcoming).
allocative efficiency. Thus, even when there is a duty to render reasonable aid, "reasonable" is not defined to mean "allocatively efficient." For example, no one is required to perform a rescue when there would be a significant probability of his or her suffering grievous bodily harm or death even if the rescue attempt would reduce much more the probability that the party in need of aid would suffer such injury or death. More generally, it should be apparent that one way of accounting for our apparent reluctance to impose a positive duty to render aid is the autonomy-related notion that each person is the owner of his own productive potential—that no individual should be a "slave" to another's needs (that each person is entitled to pursue his own goals so long as his existence and active behavior does not reduce the ability of others to pursue their life plans).

We have now explained why the refusal to impose a duty to aid may be compatible with the utilitarian-related goal of increasing allocative efficiency as well as with the autonomy-related notion that each person is the owner of his or her own productive capacity. Given this background, we can (1) analyze the factors that would make such a duty compatible with these values in particular cases and (2) assess the appositeness of Thomson's violinist analogy from this perspective—that is, determine whether the case for imposing such a positive duty to render aid is the same for Thomson's woman and a pregnant woman. The imposition of a duty to aid will be more justifiable from an allocative-efficiency (utilitarian) perspective, the greater the extent to which the following five conditions are fulfilled: (1) one cannot rely on private market transactions to prevent allocatively inefficient refusals to render aid voluntarily; (2) one cannot rely on the courts to order compensation that would provide allocatively efficient incentives for efficient aid that is supplied; (3) the recognition of a duty to provide aid would not tend to promote allocative inefficiency by reducing the incentives for the party in need of aid to avoid getting into such dangerous positions or (where relevant) by giving third parties an incentive to behave in an inefficient manner; (4) the duty-to-aid rule would be cheap to administer in the sense that it would not be difficult to determine whether particular cases fell within its ambit; and (5) the rule in question would not give government officials the opportunity to engage in corruption by creating situations that subject people to the force of the rule or by applying the rule for other reasons to a subset of the individuals whose positions it covered. Clearly, in all these respects, the case for imposing a duty to aid in Thomson's example is weaker than its counterpart for the case of a pregnant woman. In particular, the allocative-efficiency case for imposing a duty to aid on a pregnant woman is stronger than its counterpart for Thomson's woman for the following five reasons: (1) unlike Thomson's violinist (whose need was not described as urgent), the fetus in the pregnancy case cannot engage in a market transaction with its mother: for the violinist such a transaction

156. Admittedly, the cases that suggest this conclusion might also be "emergency" cases, in which the courts were evincing their disinclination to hold people liable for "negligent" decisions made under stressful conditions.
would tend to insure both that the blood-cleansing was allocatively efficient and that the person selected to perform that function was the most efficient person for the job; (2) similarly, unlike the violinist (whom a court could order to compensate Thomson’s woman) the fetus could not be ordered to give meaningful compensation to its mother: even if a guardian ad litem were appointed and authorized to negotiate on the fetus’ behalf and commit the fetus to making future payments to its mother, the mother would probably not be benefited by such an intrafamilial transfer (if she kept the child, and perhaps even if she did not); (3) the recognition of a duty to aid the violinist, by inducing the violinist to take inefficient care of his kidneys and by inducing fans (relatives, friends) to help their idols (relatives, friends) by kidnapping innocent parties to make them aid their heroes (loved ones), would probably misallocate resources more than the recognition of a duty to aid the fetus would misallocate resources by inducing men who wanted to father children to impregnate suitable women: note that unlike the violinist the fetus would not be influenced by such a rule and the mother would be influenced in a way that is probably allocatively efficient; (4) it is easier to contain the abortion case than the blood-changing case—that is, it would be cheaper to determine whether a particular case was covered by the no-abortion rule than to decide whether a given set of facts that resembled Thomson’s example produced a duty to aid; and (5) since only one person is in a position to supply the needed service to the fetus while several may have been in a position to aid the violinist, the abortion rule would present less of an opportunity to government officials to pursue illegitimate and perhaps inherently allocatively inefficient goals by applying the duty-to-aid rule to a particular subset of those in a position to help. Again, I doubt that the act-omission distinction derives from the utilitarian goal of increasing allocative efficiency, but if or to the extent that it does, a strong case can be made for refusing to impose a duty to aid on Thomson’s woman while requiring a pregnant woman to supply vital services to the fetus she is carrying.

The same conclusion would also apply if as I suspect the act-omission distinction has more to do with the value of individual autonomy. It should be clear that this value is not incompatible in all circumstances with the imposition of a positive duty to aid. For example, the state could certainly enforce promises to render aid without violating the value of autonomy since its failure to do so would prevent someone from furthering his own purposes by committing himself to perform various acts if particular conditions were fulfilled. In fact, it might also be consonant with some notions of autonomy for the government to attach duties to render aid to certain (voluntary) status relationships since the presence of officially recognized status relationships may very well broaden the options available to each individual: this conclusion reflects not only the fact that it is time-consuming to craft relationships out of whole cloth but also the fact that such individualized relationships are different on that account from socially recognized or institutionalized relationships. Indeed, notions of autonomy may also be compatible with holding individuals responsible for minimizing the losses generated by the harm they innocently though ac-
ANALYSES OF ALLOCATIVE EFFICIENCY

tively caused, particularly if most persons wish to be perceived as standing ready to render aid to anyone whom they have harmed (no matter how innocently or without profit to themselves). Clearly, the value of individual autonomy has never been construed to imply that an individual is entitled to pursue his or her own goals through negligent or willfully faulty methods that actively harm others. Moreover, even when notions of autonomy are inconsistent with the imposition of a duty to act, they may be consistent with some doctrine of involuntary waiver—for example, with a requirement that an individual take some specific step to avoid the imposition of a positive duty to aid. Such a requirement would seem to be particularly compatible with the value of individual autonomy when the individual’s failure to perform the act in question creates a situation in which reasonable persons could differ about whether for other reasons a duty to aid could be imposed without violating notions of autonomy. Certainly, even if the value of autonomy is inconsistent with such a waiver doctrine, it is likely to be compromised less by such a doctrine than by the imposition of an unavoidable duty to aid.

Once more, as we have already seen, all of these possibilities that are relevant make the case for imposing a duty to aid on a pregnant woman stronger than its counterpart for the woman in Thomson’s example. Thus, unlike Thomson’s woman, the pregnant woman (1) may have promised someone (for example, the father) to carry the baby to term (in which case the fetus would be a third-party beneficiary of the promise); (2) does have a special status relationship to the party in need of aid (a relationship that may have been voluntarily assumed); (3) is a but-for cause of the fetus’ predicament (admittedly of its existence as well); (4) may have been “at fault” in relation to its predicament; and (5) may have waived any right to abort she had by not having an abortion at an early stage of the pregnancy before these status and but-for claims obtained any real force (or before the fetus became a person). Thus, even if as I believe the act-omission distinction derives from the value of individual autonomy, one might in some circumstances be justified in concluding that a pregnant woman had a duty to aid her fetus despite the fact that Thomson’s woman had no such duty to the violinist in question.

In short, Thomson’s example is simply not well-suited for her purposes. Many sorts of abortions are not analogous to unplugging oneself from a blood transfer machine and many pregnant women are in a very different position from the women in Thomson’s example. Since, then, many abortion techniques involve harmful acts and not omissions and many pregnant women arguably do have a positive duty to aid the fetus they are carrying, Thomson’s examples have very little bearing on the abortion situation. Indeed, as we have seen, Thomson’s example does not even raise much less illuminate many of the most crucial issues in the abortion area.

However, even if one assumed that some methods of abortion actually killed the fetus, that some pregnant women did have a duty to aid the fetus they were carrying, and that a fetus was the kind of entity that could have a right not to be killed as well as a right to positive assistance, one might still be able to conclude that all abortions were permissi-
ble. In particular, such a conclusion would be justified even on these assumptions if (1) the active killing of the fetus were a justifiable homicide (for example, a killing in self-defense) and (2) carrying a fetus to term were too burdensome a task to be required of someone subjected to a duty to provide reasonable aid (which is the only duty that is ever imposed).157

Let me begin then by analyzing the contention that aborting the fetus through a method that actively killed it would be a justifiable homicide. I believe that the following example suggests that it would not. Assume that a woman who is still lactating is caught in an early blizzard while hiking in Alaska. She finds refuge in a cabin that is not her own, which is also inhabited by a woman and her newborn infant. The cabin is well-stocked with food—enough to get the two adults through the long winter ahead. But there is no baby food, and it is clear that the infant will die if the lactating lady does not nurse her. The infant’s mother (who is not lactating) tells the lactating lady that she will force her to nurse and help care for the infant. Let us assume that the mother is sufficiently stronger than the lactating lady to carry out this threat: if the lactating lady does not agree to nurse the baby, the mother will tie her up at feeding times without causing her any significant harm or pain. Would the lactating lady be justified in killing or doing bodily harm to the mother in such a case? Would any attempt by her to do so be criminally punishable? Although we might debate this issue, I suspect that the lactating lady would be criminally responsible for killing the mother in this case despite the fact that, unlike the fetus in the pregnancy case, the mother in this case has criminally assaulted the “defendant”: since the lactating lady was under no threat of serious bodily harm herself, she could not justify killing another to free herself from the inconvenience and physical and psychological cost of nursing and caring for the infant. But these costs are arguably not significantly less than those of carrying a fetus to term in a normal pregnancy (at least if one (1) measures the latter by comparing, for example, the medical risk of giving birth with that of having a fifth-month abortion or the psychological cost of giving up a baby for adoption with the similar cost of having such an abortion and (2) recognizes that being forced to nurse a baby against one’s will may very well create a painful ambivalence and that nursing itself can give rise to an attachment that would be painful when the relationship was severed in the spring). It seems to me, then, that the example of the lactating lady does suggest that actively harmful abortions could not be considered to be justifiable homicides.

157. I should note that Thomson’s hypothetical is arguably misleading on this account as well. Thus, Thomson implies that the woman in her example would have to remain attached to the blood transfer machine for nine months to help the violinist. Although reasonable persons might differ on this issue, such a nine-month confinement (presumably in bed) strikes me as imposing more burdens than at least some (late pregnancy) abortions would eliminate—viz., the physical and psychological difference between securing a fifth-month abortion and carrying the fetus to term in a normal pregnancy.
Our analysis of the burden in that case also suggests that an obligation to carry a baby to term might be imposed by a duty to offer reasonable aid. Admittedly, the lesson of the lactating lady may not apply to the duty-to-aid case: there may be a difference between (1) the amount of costs you would have to be able to show you would escape by killing another to justify your homicide and (2) the amount of costs you would have to be able to show you could escape by not helping another you were obligated to help in order to demonstrate that it was not unreasonable for you to refuse to give such aid. However, it is not clear that more costs would be required in the former situation than in the latter. On the one hand, it might be more difficult to justify an active killing than a passive refusal to aid someone you were obligated to help. On the other hand, the victim in the homicide case will normally be at fault (unless, for example, he is insane) while the victim in the aid case will normally be innocent (indeed, the person seeking to escape the cost of rendering assistance may very well be at fault). In any case, it seems clear to me that in many situations in which we do impose duties to aid, the burden imposed is far more onerous than the burden of carrying an unwanted child to term. Think, for example, of the burden to many parents of caring for a severely handicapped child.

In short, I do not think that abortions that actively kill the fetus can be excused as justifiable homicides. Nor do I think that abortions that remove the fetus from the mother's life-support system can be justified on the grounds that reasonable aid does not encompass carrying the fetus to term in a normal pregnancy. It therefore seems to me that some abortions could not be justified if the fetus were the kind of entity that had a right not to be killed or a right to receive positive aid in particular circumstances. Hence, in many abortion cases the characterization of the fetus' general moral status would turn out to be crucial.

As I have already suggested, economics cannot tell us whether or at what point a fetus becomes such a right-bearing entity. Admittedly, I do not have any simple noneconomic answers to such questions. If pressed, I would probably say that the fetus is entitled to protection when it possesses the neurological equipment necessary for having a sense of self as a continuing moral agent capable of developing and executing a life plan. But even if this admittedly tentative approach proves inadequate, I have no doubt that such issues will often have to be addressed and that economics has precious little to say about them. Hence, I am not surprised that economics cannot provide the answer to all nonlegislative legal disputes.