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STARTING POINTS IN ECONOMIC ANALYSIS OF LAW

C. Edwin Baker*

The application of most economic or efficiency criteria requires assumptions concerning the starting points or "givens" of the analysis. For example, as normally used, the Pareto-superior criterion identifies changes that make someone better off without making anyone worse off. To identify any change and, even more obviously, to identify an improvement requires a "given" state of affairs or some starting point with which to contrast the new Pareto-superior position. Likewise, economists often try to identify—and sometimes advocate—legal rules whose effect on the allocation of resources is value maximizing or wealth maximizing. The wealth-maximization criterion, unlike Pareto superiority, seems capable of ranking a set of alternatives. It asks how much wealth each alternative produces and, thereby, appears to avoid the need to identify any one alternative as a starting point. Nevertheless, although the wealth-maximization criterion does not depend on starting points in the same way that the Pareto-superior criterion does, it still relies on a set of givens. First, since wealth maximization requires all changes in which the gainers gain more than the losers lose, one needs a measurement standard to compare gains and losses. The standard usually employed is how much the losers and gainers would pay to avoid the loss or receive the gain. The obvious dependence of this willingness-to-pay criterion on people's wealth and their preferences makes the distribution of wealth and the content of preferences crucial givens for the wealth-maximization criterion. Second, before one can normatively employ the wealth-maximization criterion, one must show that wealth, as contrasted to utility for example, is a proper measure of value; or, at least, one must show that

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1. One can interpret the wealth-maximizing criterion, often called the Kaldor-Hicks test, as a version of the value-maximizing concept that gives a particular interpretation of value; that is, rather than measure a thing's value by, for example, its utility, the wealth-maximizing criterion measures value by a person's willingness to pay.
wealth is something that society, whatever its other concerns, should seek to increase.

In the first section of this critique I will consider how several of the contributions to the symposium reached insights and encountered difficulties in their treatment of starting-point issues. In the second section I will offer a few further reflections concerning appropriate starting points.

STARTING POINTS

Converting Wealth Maximization into Pareto Superiority

A frequent objection to using a wealth-maximization criterion in determining the assignment of rights is that its use entails certain characteristic biases, in particular, a bias against the poor.\(^2\) Both in this symposium\(^3\) and in an earlier paper on law-and-economics,\(^4\) Professor Coleman, himself a critic of many aspects of the law-and-economics methodology, argues that by requiring the party who is assigned the right to compensate the “losing” party, one would convert the legal assignment into a benefit for everyone, thereby changing what would otherwise be a mere wealth-maximizing assignment into a Pareto-superior assignment.\(^5\) Coleman’s argument is mistaken. While it is a relatively minor point in Coleman’s article, the argument corresponds to a mistaken assertion repeated by economists from Palo Alto to Cambridge to Coral Gables—that requiring these payments eliminates any possible “bias” of the wealth-maximization criterion. Coleman’s argument, thus, merits careful examination. This examination shows, I believe, the economists stumbling due to a lack of clarity about starting points. In particular, they stumble because they fail to distinguish the issue of determining who should possess a presently legally unallocated right or who does possess a right, which are the issues that courts typically face, from the separate problem of justifying a change from a fully specified status quo.

Coleman applies Posner’s wealth-maximization approach to the

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5. Coleman, supra note 4, at 245-46; Coleman, supra note 3, at 521-23.
traditional question of whether the law should give the rancher the right to raise cows without liability for the damage the cows do to the farmer's corn. He describes four situations: S₁, "the situation in which one cow is ranched"⁶ or "in which no entitlements [in respect to raising the second cow] have as yet been conferred";⁷ S₂, "in which the state assigns to the farmer an entitlement to prohibit the second cow";⁸ S₃, "in which the state assigns to the rancher an entitlement to raise the second cow";⁹ and S₄, "in which the rancher purchases the right to raise the second cow from the farmer."¹⁰ Use of the wealth-maximization criterion for making assignments, Coleman says, requires a direct assignment of the right to the rancher if, in a world of no transaction costs, the farmer would sell the right to the rancher if originally it had been assigned to the farmer. He notes, however, that either the direct or indirect way of getting the right into the hands of the rancher (S₃ or S₄) would be wealth-maximizing or Kaldor-Hicks efficient, at least if one ignores transaction costs. But Coleman argues that only an original assignment to the farmer, and not an assignment to the rancher, would be Pareto superior to S₁.¹¹ Thus, one could only reach a wealth-maximizing result by Pareto-superior steps, that is, by steps that do not make anyone worse off, if one first assigned the right to the farmer and then required the rancher to compensate the farmer for the right. In other words, although both S₃ and S₄ are wealth maximizing, only S₄ is Pareto superior to S₁. As a general matter, only by requiring compensation can one achieve a wealth-maximizing result that is also Pareto superior.

Unfortunately, this analysis breaks down. The basic problem is that if the original assignment of the right to the rancher makes the farmer worse off than in S₁, the original assignment of the right to the farmer would make the rancher worse off. More generally, Coleman misunderstands the point of using wealth maximization as an assignment rule. Moreover, he arguably smuggles crucial elements of his conclusion into an unarticulated vision of the initial situation.

Situation S₁—the time before the assignment of the entitlement in respect to raising the cow—needs further elaboration be-

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6. Coleman, supra note 4, at 229.
7. Id. at 244.
8. Id. at 229.
9. Id.
10. Id.
11. Id. at 230.
fore one can evaluate the argument that $S_4$ yields a benefit for everyone or that it eliminates the bias against the poor. Consider three possible interpretations of $S_1$. First, one can treat an entitlement as the exclusive right to make a legally enforceable decision, in this case, about raising the second cow. Then, one could interpret the situation in which no entitlement had been conferred to imply that both the farmer and the rancher are free to use self-help to realize their preferences respecting the second cow. Second, $S_1$ might be a clumsy way of saying that, at this point, both the farmer and the rancher have some chance of being assigned the right or that both have plausible, competing legal claims on which the court has not yet ruled. Third, $S_1$ might refer to a time when the state, the collective—which I will assume uses its resources to benefit its members—possesses the right to make decisions about raising cows and damaging corn.

Although my criticisms of Coleman would apply to any of these three interpretations of $S_1$, the second interpretation is most consistent with the point of Posner's wealth-maximizing rule and is the context in which a court could most plausibly make use of it. The court's problem is to determine which of various plausible claimants should be awarded the right (on the view that courts "legislate") or should be recognized as having a valid claim to the right (on the view that courts recognize rights, possibly using Posner's assignment rule as a fundamental principle of law). This interpretation treats $S_1$ as a time when both the farmer and the rancher claim the entitlement under their respective theories of justice and history. Given this interpretation of $S_1$, assigning the right to the farmer (or assigning it to the rancher, but requiring the rancher to pay compensation to the farmer) is not, contrary to Coleman, Pareto superior to $S_1$. The assignment to the farmer clearly makes the rancher worse off than she was under $S_1$, where she had at least a plausible claim that the right should be hers. Even more emphatically, from the perspective of her claim that she possesses the entitlement under appropriate principles of law—possibly including the wealth-maximization principle—she is clearly made worse off. Likewise, assigning the right to the farmer makes the rancher worse off than she would have been under the first interpretation of $S_1$ where she was free to use self-help or under the third interpretation where, as a member of the public, she

received some benefit from the state's holding the right. Of course, for parallel reasons, the farmer is made worse off if the rancher receives the assignment. Thus, compared to the basepoint of $S_1$, neither assignment is Pareto superior.

Unless he can invoke some noneconomic normative considerations, Coleman's proposed solution—to require the rancher to compensate the farmer—seems particularly perverse; this solution virtually reverses the assignment recommended by the wealth-maximization rule. Assume that the farmer can use the entitlement to increase the net obtained from farming by $100 (that being the value of the corn that the straying cow would otherwise destroy; it does not subtract the $105 loss due to reduced cattle production), while the rancher could use the entitlement to increase the net obtained from ranching by $105 (that being the gain from raising the second cow without, however, counting the loss of $100 worth of corn). Under this assumption the rancher is able to make the most productive use of the entitlement. One might expect that society would reward the rancher for being the most productive employer of societal resources. Instead, Coleman's approach would grant at least $100 of the $105 gain produced by introducing the second cow to the farmer and give at most only $5 to the rancher. This effectively converts the loser under the wealth-maximization criterion into the winner and the winner into the loser.\(^\text{13}\)

The presence of three mutually exclusive claimants of the right exacerbates the incoherence of trying to use compensation to make Pareto-superior initial assignments. If the rancher values the right at $105, the farmer at $100, and the environmentalist at $95, the rancher could not compensate both the farmer and the environmentalist so that they would both be as well off as if they had received the right. This, of course, merely illustrates that the criterion of Pareto superiority is not at home in the context of making initial assignments. Coleman asks why "Posner's assignment rule does not require that the losing bidders be compensated[?]"\(^\text{14}\) The short answer is that it is an assignment or distribution rule, not a reassignment or redistribution\(^\text{15}\) rule, and that requiring com-

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\(^{13}\) One might complain that granting the right to the rancher takes from the farmer $100 worth of the labor put into growing corn. On this reasoning, however, the converse rule would either force the rancher to use her labor and land in less productive ways or require her to give the farmer $100 that she had received for her labor. The two situations are parallel.

\(^{14}\) Coleman, supra note 4, at 242.

\(^{15}\) Id.
Compensatory would in effect turn the winner into a loser.

Given the assumption that a negligence system in contrast to a strict liability, accident-compensation system maximizes wealth, Posner argues that the negligence system would be in (almost) everyone's interest from the perspective of a time prior to the occurrence of an accident.\(^{16}\) The negligence system reduces the sum of accident costs and driving costs. This reduced cost or savings can be treated as an ex ante compensation of the victim as contrasted to the ex post compensation the victim would receive under a strict liability system.

In analyzing Posner's argument, Coleman repeats the mistake of his earlier article. He concludes that, on Posner's assumptions, the negligence system is Kaldor-Hicks efficient (wealth maximizing). He presumably means that the "winners" do not compensate the losers and, therefore, negligence is not Pareto superior, and that, in contrast, the strict liability system is Pareto superior.\(^{17}\) This is nonsense. Coleman's mistake becomes apparent once one tries to describe the starting point to which either negligence or strict liability could be Pareto superior. From the perspective of when the choice between these two rules was in doubt, strict liability makes the non-negligent driver worse off, and negligence arguably\(^{18}\) makes the potential victim worse off.

Coleman might postulate a point of "no government intervention" as his starting point. He equates wealth maximization with government intervention. He contrasts this to the libertarian approach which he says excludes intervention.\(^{19}\) He also says that for intervention to be Pareto superior and, therefore, justifiable on utilitarian grounds, the losers must be compensated. I have argued elsewhere that the notion of no government intervention is absurd. The law, that is, the government, recognizes some set of rights, and this recognition constitutes a collective judgment, an interven-

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18. If the potential victims receive enough of the cost saving—which is assumed to result from the negligence rule—to more than pay for insurance that provides coverage for being a victim of nonnegligent accidents, then both drivers and victims may be better off under the negligence rule than under the strict liability rule. In this case, Coleman's conclusion that the strict liability system is Pareto superior is totally off the mark. See pp. 945-46 infra.

Nevertheless, letting the loss lie and the parties act as they choose—that is, giving the "victim" no right against the driver—seems close to the idea of no government intervention. If one adopts this interpretation of no government intervention as a natural or otherwise appropriate starting point, either the introduction of a negligence or a strict liability system makes the driver, as a driver, worse off—and the driver is worst off under strict liability. This leaves Coleman's analysis with two problems. First, contrary to his analysis, strict liability does not seem to be a Pareto-superior alternative: The driver would be better off under a negligence system and best off with no intervention, allowing the loss to lie. Second, Coleman claims that everyone would be made better off by requiring the winner to compensate the loser for the government intervention that introduces the wealth-maximizing alternative, here, the negligence system. The loser is the potential victim when negligence is contrasted with strict liability. And the loser is the driver when negligence is contrasted with "no intervention." Does Coleman expect the potential victims to pay the drivers?

Alternatively, one might argue that negligence is Pareto superior either to no government intervention or to a strict liability starting point. First, one must evaluate the choice of rules not at the time of the accident, but before the accident's occurrence. One must also recognize that drivers will sometimes be victims, either when they are pedestrians or nonnegligent drivers hit by negligent drivers. Then, given the assumption that both Posner and Coleman accept for purposes of the analysis, that the negligence system is wealth maximizing, the negligence system arguably would be Pareto superior to the no liability system from the perspective of drivers as well as nondrivers. This follows if the expected "cost" of the negligence rule to the driver (for example, the cost of insurance) is less than the predicted cost of those accidents, in which the "driver" would be a victim, that the negligence rule prevents. And the negligence system would be Pareto superior to strict liability for potential victims as well as for drivers if the victims were to benefit sufficiently from the negligence rule because they are also drivers or because they gain from the reduced cost of others' driv-

ing (for example, as consumers of goods moved by trucks or as bus passengers). In sum, Coleman appears to have it in reverse. Strict liability is not Pareto superior to no intervention—but negligence arguably is. In any event, the issue one would expect a court or other legal institution to face is not whether strict liability or negligence is Pareto superior to some starting point; rather, the issue is how initially to choose one or the other liability system or some other approach, thereby creating a status quo. And for this problem, Posner at least suggests an answer—choose the wealth-maximizing alternative.

Despite Coleman's mistaken belief that one can convert initial assignments made on a wealth-maximizing (Kaldor-Hicks) basis into Pareto-superior moves by compensating the losers, he does reach an important and correct conclusion: Economic recommendations must be postponed "[u]ntil we know something about the rights and deserts of individuals affected by alternative courses of conduct."21 In fact, economic analysis necessarily depends on noneconomic starting points. A possibly unconscious reliance on such noneconomic assumptions may explain why Coleman would treat strict liability and not negligence as Pareto superior. Normatively, one can easily conclude that one "owns" one's own body; arguably, this implies that one has a right not to have one's body injured by another. This implied right, however, cannot be strong enough to justify prohibiting all behavior that might lead to accidents. Even potential victims would not want such a strong right since they would also want to engage in, and benefit from others engaging in, potentially accident-causing behavior. Thus, everyone would be better off if the rules permitted some accident-causing behavior and only required compensation to the victims. Strict liability, therefore, is Pareto superior to absolute protection of bodily integrity. This intuitive argument, however, is inadequate. Even though everyone would benefit from the introduction of strict liability, everyone would also benefit, and, Posner argues, all or most people would benefit more, by introducing negligence. This suggests that negligence might be the better choice—and wealth maximization the best criterion—for making assignments. Nevertheless, since strict liability may be better than negligence for some inveterate pedestrians even antecedently, neither is Pareto superior to the other. Therefore, one still has to adopt a standpoint that favors some over others from which to make assign-

ments or choose assignment criteria. This takes us back to Coleman’s conclusion and to the theme of this comment: Starting points are crucial, and policy use of economic criteria, unless one can describe and defend appropriate starting points, is often indeterminate and incoherent.

Coleman’s claim is that a wealth-maximizing rule is Pareto superior only if compensation is paid. This makes sense only if one assumes a starting point from which a person is made worse off by a wealth-maximizing change that does not include compensation. As noted, one cannot assume such a starting point if the problem is defining initial assignments or is the typical judicial problem of defining or establishing the content of the law. In addition, the failure to recognize that the compensation claim implies a particular starting point can easily cause one to fail to justify the implied starting point. This failure creates the danger that one will merely accept the need for compensation. Compensation may seem fair if it appears to be the only approach that improves the situation without making anyone worse off. Coleman avoids this trap. He uses the monopolist example to show that it is unclear whether one should always choose the Pareto-superior alternative. Nevertheless, the intuitive fairness of making everyone better off whenever possible is liable to tilt the analysis in the hands of a less sensitive theorist. This makes troublesome Coleman’s initial claim that breaking up the monopolist is wealth maximizing, but only Pareto superior if the consumers compensate the monopolist—a conclusion which follows only if he chooses a particular starting point. Pareto superiority requires compensation if one treats the existing monopolies as the norm against which to measure change. However, compensation violates Pareto superiority if one treats the existing antitrust laws as the norm. Obviously, Coleman’s implicit assumption concerning the appropriate starting point needed some explanation.

The danger of undefended assumptions concerning proper starting points and the consequent misuse of the Pareto-superiority criterion increases if one adopts the view, common among those in power, that “once one advocates a change in the existing order the question of the justification for doing so arises.” Of course, among some elements of society, primarily among the disadvan-

22. Id.
23. Id.
24. Id. at 549.
taged and powerless, the opposite question, the justification for maintaining the existing order, may seem most problematic. Nevertheless, this danger of a hidden conservatism in one's undisclosed status quo assumptions may be overdrawn. Most of the symposium contributors—Coleman, given his demand for "a prior non-efficiency-based theory of rights and moral deserts," Calabresi, given his treatment of economic analysis as a mere instrument, as well as Dworkin, Kennedy, and Michelman—recognize that the existing order is not necessarily an acceptable one and emphasize that economic analysis is not sufficient by itself to guide us as we move from the present.

**Posner and Wealth Maximization**

Posner's article in this symposium continues his search for an adequate philosophical basis for his brand of economic policy analysis. In the first edition of *Economic Analysis of Law*, Posner equated economic theory with Bentham's utilitarianism, thereby strongly implying that he basically considered himself a utilitarian. By the time the second edition was published, Posner was disavowing Bentham's pleasure principle; he no longer equated Bentham's utilitarianism with economic theory but merely noted that at times Bentham adopted the economic viewpoint. In addition to various standard philosophical objections to utility theory, one senses that Posner is dissatisfied with utilitarianism because it is more egalitarian than his market-oriented methodology. Posner believes that the more egalitarian redistribution required by utilitarianism is inconsistent "with any of the major ethical systems." Moreover, he objects to utilitarianism as well as Rawls' principles of justice because they "open the door to the claims of the unproductive."

Posner argues that the wealth-maximization principle avoids

25. *Id.* at 547.
28. *Id.* § 7.1, at 163 n.3.
31. I think it is clear, and will assume in this critique, that what Posner means by wealth maximization is any result that would pass under the Kaldor-Hicks criterion—in other words, any result where those who benefit gain more than enough to compensate those who would have benefited by an alternative result. Despite its fundamental importance to his analysis, Posner's loose use of the concept of wealth and wealth maximization has confused many readers. First, as described
the "defects" of utilitarianism. Nevertheless, many find nothing intrinsically valuable about wealth, and, therefore, Posner's wealth-maximization standard has seemed normatively ungrounded. In this symposium, Posner argues that one can defend wealth maximization as based on consent and respect for individual autonomy.\(^3\) Posner's use of consent is misleading. At best, he can claim that, at some particular point in time, it would be in the interest of a person with certain information to accept the wealth-maximizing rule. And, as Coleman and Dworkin point out, this use of hypothetical consent does not have the same normative significance as real consent.\(^3\) Moreover, any autonomy justification for wealth maximization seems circular. As Posner notes, he cannot rely directly on the notion of autonomy. Because the principle of autonomy requires respect for individual liberty, that is, the individual's realm of decisionmaking authority, the principle depends on a prior, in-

above, wealth is used as a standard for measuring the "value" of the preferences realized in the society—and a preference counts to the extent it is backed up by money. Posner, \textit{supra} note 12, at 119. One can contrast wealth with the other possible measures of the value of realized preferences that Posner rejects—for example, the utility of the realization or the amount of time a person would be willing to spend in jail in order to realize a preference. Posner rejects the use of these alternative measures. \textit{Id.} at 120-21. At some points, however, rather than treating wealth as a measure of preferences, Posner treats it as one among various possible objects of preferences. \textit{Id.} at 122. This usage involves an entirely different concept—a concept that does not fit into Posner's general methodology. Second, when Posner says "[w]ealth is the value in dollars or dollar equivalents . . . of everything in society," \textit{id.} at 119, he must mean value to the person who possesses the thing. One could obviously make a trade that neither affects the price of the goods involved nor affects how much either party values possessing the object of the trade. Only if one treats wealth as the "realized value" of things or activities— including consumption activities that decrease the valued objects in the world—that is, the value to the person holding it, can one assert, as Posner consistently does, that voluntary trades (assuming no third party effects) always increase wealth. \textit{Id.} at 120, 130. Nevertheless, some readers apparently read Posner to be concerned only with a "market price times quantity" measure that was suggested by his definition, an interpretation that not only does Posner clearly reject, but one that leads to absurd results. \textit{See} Coleman, \textit{supra} note 3, at 523-26. Finally, although I do not think Posner ever distinguishes wealth maximization from the Kaldor-Hicks criterion and, sometimes, equates the two, Posner, \textit{supra} note 16, at 495, at times he apparently treats them as distinct approaches even when both lead to the same result. \textit{Id.} at 491. This lack of clarity has led some, I think incorrectly, to treat the two as separate concepts. \textit{See}, e.g., Coleman, \textit{supra}, at 512.


dependent determination of what a person is and what rights a person has. Therefore, respect for autonomy cannot be used to define these boundaries that should not be violated without consent. Posner provides a solution by using the wealth-maximization principle to make these boundary determinations; thus, for Posner, wealth maximization defines autonomy rather than derives from it. This solution, however, shows that the concept of autonomy by itself is too undefined a concept from which to justify the wealth-maximization principle. Posner apparently recognizes this problem and therefore limits his claim to the proposition that wealth maximization is consistent with or highly congenial to individual autonomy.

Initially, one might guess that the Pareto-superiority criterion, since it requires that the choice make no one worse off, is the policy criterion most consistent with an emphasis on consent or autonomy. A Pareto-superior change should not be objectionable to anyone, and, therefore, consent to consistent implementation of Pareto-superior alternatives would appear to be in everyone’s interest. The problem is, as my discussion of Coleman’s article emphasized, that Pareto superiority will seldom serve as a ranking device. As normally used, the concept applies to an evaluation of a proposed change from an initial starting point. Unless a given choice is best for all people, that is, no one would prefer any other rule—in which case one would hardly worry about asking an economist for advice—one cannot claim that a choice is Pareto superior without initially describing the starting point from which it makes some better off without harming anyone. To use Posner’s examples, one suspects that the inveterate pedestrian would not prefer a negligence system nor would the potential slave owner prefer a nonslaveholding system to all other legal orders.

To the extent that it directly ranks alternatives, Posner’s wealth-maximization criterion appears to avoid the indeterminacy of Pareto superiority and its dependence on starting points. The wealth-maximization criterion allows one to compare alternatives—without assuming either to be the starting point—by asking

35. Id. at 489-90, 494.
36. That is, one does not need to describe a specific starting point if a particular alternative would be Pareto superior to any starting point. Rawls suggests that, given the possibility of a first person dictatorship, this will never be the case. Therefore, he approaches the choice problem by attempting to describe an ethically defensible starting point. J. RAWLS, A THEORY OF JUSTICE (1971).
37. See Posner, supra note 16, at 496.
whether those who prefer a particular choice gain enough to be able to compensate those who would prefer a different alternative and still have some left over. If they could, the economist who uses wealth maximization as a policy guide can recommend that choice even though it is not Pareto superior to the other. This capacity to rank alternatives appears to allow wealth maximization to generate rather than rely on starting points. That is, one can use wealth maximization to choose initial assignments. For example, if, under Alternative I, A would receive 5 units of wealth and B would receive 10 (total of 15), while under Alternative II, A would receive 14 and B would receive 8 (total of 22), wealth maximization requires the choice of Alternative II, although neither is Pareto superior to the other.

I will ignore the obvious problems that this move to a wealth-maximization criterion creates for an argument based on consent, even “hypothetical consent.”38 Another problem is more important for the purposes of this comment’s focus on starting points. Although Posner clearly treats wealth maximization as capable of generating initial assignments,39 he correctly recognizes that in this context “the very concept of wealth maximization becomes problematic.”40 Nevertheless, he apparently still finds it usable. After considering the possibility that wealth maximization might justify slavery (or, even more likely, make the wealth of the slave society and the nonslave society incomparable since the prices and costs of various valued rights would differ under each regime),41 Posner apparently concludes that this indeterminacy is more a “theoretical possibility” than an actual problem.42 On examination, neither his conclusion nor his example is persuasive.

Posner argues that an initial assignment of self-ownership of one’s labor will remain, and, as long as market transactions are possible, an initial slave system will change into a system of self-ownership. He thereby reaches the determinate conclusion that the self-ownership assignment is wealth maximizing. Posner makes the reasonable hypothesis that normally people will work more productively (at least during the time that they work) if they can market their own labor than if someone else owns their labor. Thus, he presents two situations: First, if initially given ownership

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38. See Coleman, supra note 3, at 547-48; Dworkin, supra note 33, at 574-79.
41. Id. at 501-02.
42. Id. at 502.
of her labor, \( A \) would earn 100 in market income and 50 in nonmarket income. Second, if initially \( A \) is a slave of \( B \), \( B \) would force \( A \) to spend all her time working; \( A \) would then earn 110 in market income all of which would go to \( B \). From the perspective of this slave society in which \( A \) has no wealth, the value of the leisure to \( A \)—for example, the value of the amount of leisure \( A \) would receive in the first society—would be 0 since \( A \) cannot pay. Thus, from the perspective of the prices generated by each initial assignment, that initial assignment appears stable and wealth maximizing. Posner, however, shows that this conclusion need not follow. He notes that if \( A \) owns her labor, she can convert some of her 50 units of “leisure income” into market income. For example, \( A \) might be able to make 120 market income and still have 10 leisure income left even though she prefers 100 market and 50 leisure. Given this possibility, \( A \) could offer to buy her freedom from \( B \) for more than the 110 that \( B \) gets from her slavery; thus, it turns out that under either alternative, the wealth-maximizing result is for \( A \) to own her labor. Posner concludes, therefore, that the wealth-maximizing criterion requires \( A \) to receive the initial assignment of ownership of her own labor. The only necessary assumption is the reasonable hypothesis that \( A \) would work harder to gain her freedom than \( B \) could make her work as a slave.

Posner’s analysis overlooks a variety of reasons why \( B \) might not sell \( A \) her freedom if \( A \) were initially a slave. The most obvious possibility is that \( A \)’s slavery and the slave culture generally give \( B \) a sense of domination or superiority or allows \( B \) a style of life that \( B \) has learned to enjoy. In payment for the loss of these aspects of \( A \)’s slavery, \( B \), already rich from taking the 110 that \( A \) earns, might demand an extra 50 in addition to the 110 payment for the loss of \( A \)’s market income. But since \( A \) could not pay this 160 total, she would remain a slave. Of course, if \( B \) did not initially have this 110 earned by \( A \) and had not learned to enjoy the patterns of a slave culture, \( B \) would be too poor and might lack the preferences to consider paying 50 for the “joys” of being a slave owner or 160 for these joys plus the income from \( B \)’s slave labor. Once these quite plausible assumptions are added, it becomes clear that the wealth criterion is unable to pick between alternative initial assignments; that often, absent nonmarket action (e.g., legislation, rebellion, slave runaways), whichever assignment one starts with will be sta-
ble and appear wealth maximizing. Of course, no one but Posner should be troubled by this result. Surely, our reason for rejecting slavery as an acceptable starting point for ethical or policy purposes (whatever slavery’s historical role) is not dependent on slavery’s failure to be wealth maximizing.

Any use of wealth maximization presupposes both prior normative judgments in order to make it determinate, for example, those necessary to define starting points, and possibly related normative judgments in order to justify its use. I have emphasized here Posner’s failure to defend or define starting points and other commentators have emphasized his related failure to provide a normative grounding. These failures leave one unable to know why or how to apply the wealth criterion. First, Posner does not describe or defend those normative principles—for example the normative argument that respect for persons rules out slavery—without which his wealth-maximization criterion is indeterminate. Second, normative concepts, such as those upon which a determinate application of the wealth-maximization criterion depends, are also necessary to justify its use. Nevertheless, despite some attempts, Posner has not been able to connect his approach to the sometimes important normative concepts of consent and autonomy. For example, he has never presented a convincing case that wealth maximization would be in the hypothetical interest of all groups. Moreover, Posner’s method of merely finding or asserting consistencies between his market-based concept of wealth (or value) and various appealing moral principles will always prove inadequate. For example, he claims that “[w]ealth maximization . . . has the property of giving [some] weight both to preferences . . . and to consent.” Nevertheless, this observation does not show that wealth maximization gives an appropriate weight to these two qualities. And without knowing the force of these normative concerns or how to give them content, their apparent connection with wealth maximization does not help alleviate its inherent indeterminacy. In sum, Posner’s inability to identify normatively appropriate starting points leaves him unable to demonstrate that his wealth-maximization, market-based criterion is either appealing or workable.

44. In addition to articles in this symposium, e.g., Coleman, supra note 3, at 526-40, see Kronman, supra note 2.
45. Posner, supra note 16, at 496.
Calabresi, Dworkin, and the Relationship of Wealth Maximization and Equality to Justice

The notion of the trade-off between wealth and equality has become a popular theme. Thus, not surprisingly, Calabresi's evident concern about both "wealth equality" and wealth maximization stimulated Dworkin to consider how one should think about the two and their relation to each other. Dworkin claims that neither increases in wealth nor equality are desirable in themselves. Instead, the proper amount of each results as a consequence of policies that a deep theory of equality independently requires. In contrast, he fears that Calabresi treats both wealth-equality and increases in wealth as independently important—that is, if not themselves valuable, at least as related to or ingredients of something valuable.

Calabresi could accept what I think is Dworkin's primary claim without damage to his position. Dworkin argues that a theory of justice might specify how the state should act. This specification, although it would have consequences for both wealth and equality, might not make increasing either wealth or equality a matter of direct concern or even a plausible operational substitute for a more abstract concern. Calabresi could reasonably note that Dworkin did not describe or defend a theory of justice and did not show that an adequate theory of justice would necessarily treat increasing equality and wealth as irrelevant. Moreover, since most discussions of justice or the needs of society treat both as relevant,

47. Dworkin, supra note 33.
48. Id. at 570-72.
49. Some points in the exchange between Calabresi and Dworkin are hard to follow. For example, Dworkin wonders whether his earlier representation of Calabresi as wanting a trade-off between justice and wealth is not exactly the position Calabresi presently advocates. Id. at 563-65. Calabresi properly objects that since a concern for justice is the source of the concern for both equality and increases in wealth, society should not trade off justice for efficiency (or wealth) even though society can appropriately make trade-offs between wealth and equality. Calabresi, supra note 46, at 557-58. Dworkin also objects to this trade-off. I am left wondering whether Dworkin clearly distinguishes it from the first type of trade-off that Calabresi clearly rejects. Dworkin, supra note 33, at 570-72.
50. Dworkin, supra note 33, at 570-72. One is reminded of how Marx emphasized that the key concern is not the actual distribution of wealth but rather the forces and relations of production. In contrast, Rawls appears to disagree with Dworkin. Rawls' "difference principle" mandates a choice of basic institutions that maximize wealth (that is, are efficient) within the constraint that they also must generate a distribution that makes the worst off as well off as possible.
until Dworkin presents a persuasive version of his yet undeveloped theory of justice, one should excuse the economist for exploring and analyzing the relation between wealth and equality and for recommending policies that treat increasing both as important but make explicit trade-offs between them.

Dworkin, possibly expecting this response, argues that Calabresi will change his mind once he realizes it commits him to "teleological utilitarianism"—the view that "pleasure . . . is good in itself . . . quite apart from its distribution."51 Most modern theorists reject "teleological utilitarianism" in contrast to average utilitarianism or what Dworkin calls "egalitarian utilitarianism"—the view that "goods should be distributed so as to produce the highest average utility over some stipulated population, because only a distribution of that sort treats people as equals."52 Teleological utilitarianism leads to a number of undesirable policies such as increasing population as long as the increased population produces greater total happiness (although lower average happiness).

Dworkin's argument, however, is totally unpersuasive. Dworkin describes Calabresi as a partial utilitarian since Calabresi apparently treats aggregate welfare, that is, increasing wealth, as part of the good. Dworkin claims that this part of Calabresi's theory must be of the teleological rather than the egalitarian type since Dworkin believes that an egalitarian utilitarian "cannot coherently offer to compromise highest average welfare over a given population in the name of simple wealth or welfare equality."53 That is, while an egalitarian utilitarian cannot compromise average utility and equality, Calabresi would do so. Dworkin's claim simply does not follow. First, one would be at least a partial egalitarian utilitarian if one believes that society ought to treat satisfying people's desires as a matter of concern and thus generally try to increase average welfare. In addition, one can be concerned with the equality of the distribution for any of a number of reasons. For example, one can be concerned with "wealth equality" because one concludes that increased equality improves the chances that everyone's minimal wants will be satisfied or because increased equality reduces the chances of unjust domination of some by others or be-

51. Dworkin, supra note 33, at 571.
52. Id. Although I agree that the "because" portion of Dworkin's statement describes the best and maybe the only justification for "egalitarian utilitarianism," not everyone who subscribes to promoting the highest average utility will be ready to grant that as the reason.
53. Id. at 572.
cause it increases the chances of desirable social relations or because it is a prerequisite of "real" democracy or because it is relevant to some other concern related to one's theory of justice or of "deep equality." In other words, even if Calabresi is a (partial) egalitarian utilitarian, his two concerns are not inconsistent—in fact, the same "deep theory" might mandate having both these concerns and mandate the appropriate compromise between them. Of course, an egalitarian utilitarian might view maximizing average utility as a complete elaboration of the notion of treating people as equals. In this case, as Dworkin argues, the egalitarian utilitarian could not coherently compromise the highest average welfare in the name of a deeper theory of equality since a deeper theory cannot demand other than treating people as equals. Nevertheless, there is no reason that a "partial utilitarian" like Calabresi need conclude that maximizing average welfare completely or adequately describes what treating people as equals means.

At this point Calabresi seems to have the best of the discussion. My only quarrel with his remarks is, I believe, merely a matter of clarity. Although I would have liked to hear more, Calabresi devotes the initial section of his article to showing that economic analysis is dependent on starting points—for example, people's initial wealth. And he later claims that the lawyer-economist who moves beyond talking of "wealth maximization simpliciter" must make assumptions about distribution. Calabresi also stresses the need to study the relationship between "the instruments," efficiency and distribution, and "the goal," justice. Nevertheless, in claiming that the economist need not focus directly on the goal or in suggesting that the economist can usefully limit herself to "defining and analyzing pretty good instruments leading toward the just society" or in suggesting the possibility of apparent conflicts between the goals and the economist's recommended instruments, Calabresi sounds as if he accepts the possi-
ility of separating the means and the ends. These statements appear to treat the economist's focus on increasing wealth and on the equality of the distribution as theoretically separable from a dependence on the philosopher's rationale for and description of the proper analytic starting points. Calabresi appears to see a technical aspect of these instrumental efficiency and distributive questions that is analytically independent of one's philosophical or normative standpoint. Calabresi's remarks suggest that the economist can polish effective instruments, that is, the economist can determine what amounts to a more egalitarian distribution or an increase in wealth, without coming to grips with the normative issues treated by philosophy. This would be, for example, the type of reasoning that allowed Posner to say that even Marxist economists agree that free markets maximize a society's wealth. In contrast, the Marxist may not agree in part because she would disagree with Posner's method of defining wealth—the meaning of wealth itself being a normative issue, a fact that should be obvious given that, as both Posner and Calabresi apparently recognize, often the economist cannot compare the wealth of different societies or orders. The technical issue, what regime produces the most wealth or the most equality, is not independent of the normative or philosophical issues.

If, despite considerable evidence to the contrary, Calabresi does analytically separate the technical and normative questions, he would be wrong for the reasons Dworkin persistently pursues. The economist's analysis is indeterminate and unenlightening until it adopts appropriate "givens" and takes guidance on the basis of principles that can only be defended and elaborated on the basis of normative theory. In other words, there is no conceptual way to separate the instruments and the ends; even the notion of what counts as wealth and equality, which Calabresi treats as instruments, raises ethical or political questions requiring ethical and political answers.

The Efficiency of Private Property and Free Contract

For one who feels that law-and-economics writing keeps saying the same things over and over without making any conceptual

62. See Dworkin, supra note 33, at 570-72. Dworkin shows how the decision concerning the time in which people's preferences will control is a crucial, normative-laden, starting-point issue.
progress, the article by Professors Kennedy and Michelman will be pleasantly refreshing. They explore the efficiency of a private property, free contract system (PPFC) by systematically contrasting it to radically different forms of nondirective orders—for example, a state of nature (SON) where everyone is privileged to attempt any action she wants or a system of “forced sharing for needs” (FSN) where the “have nots” have a right to take from the “haves.” In fact, one is tempted to view their discussion as a major attack on the conservative, private property, market-oriented law-and-economics school. They refute what may seem to be the ten major arguments asserting the virtues of private property and free contract. They demonstrate that efficiency—or more specifically efficiency combined only with the weak normative judgment that the law should try to make people better off and with the plausible factual judgment that people are generally rational maximizers of satisfactions—does not provide a general justification of private property or free contract. As if this demonstration did not sufficiently undermine conservative law-and-economics thinking, they

63. Kennedy & Michelman, supra note 20.

64. A nondirective order is one where all events are a direct result of individual decisions; it can be contrasted to an order where collective decisions or decisions of the state “regulate” some outcomes.

Despite the breadth of the alternative modes of entitlements Kennedy and Michelman examine, other modes may be prominent in a just social order. Despite the suggestion that “no one today doubts that [Hohfeld’s] list of [eight jural relations] is both an exhaustive and an elementary vocabulary for modes of entitlement,” Kennedy & Michelman, supra note 20, at 757 (emphasis in original), Hohfeld’s vocabulary improperly restricts analysis to individualistic structures. (Kennedy and Michelman’s focus on the SON, PPFC, and world owned in common or WOC may reflect the fact that these are individualistic alternatives clearly suggested by the Hohfeldian vocabulary.) Each of Hohfeld’s categories describes some authority that a single individual can have vis-à-vis some object or activity. An entitlement that may be crucial to an ethical defense of legal obligation is an individual entitlement to participate as an equal in collective determinations about the content of other entitlements and about the uses of various resources. One could, using Hohfeldian terms, describe this political entitlement as a right and a privilege respecting one’s own vote. Nevertheless, this language obscures the relation of the individual to the decision concerning the resource use or the choice of entitlements. The Hohfeldian categories all involve some individual authority to make a determinate decision about some activity; in contrast, with a political entitlement, the authority included in the individual entitlement involves the opportunity to participate in rather than make the determinate decision. This opportunity is, in respect to the subject of the collective decision, neither a right, a privilege, a power, nor an immunity. Of course, Kennedy and Michelman recognize the possibility of such an “entitlement” (although they may use a different language to describe it). In fact, its existence may be a major point of their article, as suggested by their conclusion that an efficient nondirective order cannot exist and that regulation is necessary. Id. at 769-70.
then reach what may appear to be a major critical conclusion: "[T]here is—can be—no such thing as an efficient nondirective order"—that is, "regulation" is necessary.\(^6\)

When closely examined, however, their conclusions are much less startling. First, most law-and-economics theorists accept, in fact, rely, upon Kennedy and Michelman's primary claim that empirical circumstances determine the merits of private property rules. Second, some of their specific critiques seem incomplete or fail to take on the stronger versions of the economist's arguments. Third, their conclusion that there can be no efficient nondirected order, and that regulation is necessary, must be read in context and in relation to what they mean by regulation. This conclusion merely means that the social order will and should include a variety of forms of individual entitlements, for example, a mixture of private property and state of nature rules. And the content of these entitlements will necessarily result from collective choice, whether manifested in custom or conscious political decisions, rather than from natural rules independent of empirical facts. To the economist their conclusion should be mundane and obvious.\(^6\) The object of the economist's analysis is precisely to determine which form of entitlement is desirable under different conditions. What Kennedy and Michelman did not demonstrate was the need for the regulatory or bureaucratic administrative state; they did not show the need to regulate private conduct except by the choice of entitlement forms.

Despite these limitations, their analysis clearly demonstrates the importance of starting points, the theme of this comment. They show that efficiency will not require the choice of a particular legal rule without relying, at a minimum, on a good deal of specific factual information.\(^6\) More importantly, they implicitly show that efficiency still leads nowhere until one makes further value judgments, until one relies on a background of normative theory.

The apparently central claim of Kennedy and Michelman's article—that economic arguments for private property and free contract do not succeed in the abstract but depend on particular facts—is an implicit premise of most serious law-and-economics

\(^6\) Id. at 769.

\(^6\) Note, however, that there is room for considerable disagreement both concerning the way society should reach these collective decisions and, to the extent the method involves conscious decisionmaking, concerning the appropriate criteria for choice.

\(^6\) E.g., Kennedy & Michelman, supra note 20, at 714, 733-34.
practitioners. James Buchanan opens his book, *The Limits of Liberty*, by drawing attention to the "ubiquitousness of orderly anarchy." And when it works, he views this anarchy, which equates to Kennedy and Michelman's state of nature rather than to private property, as ideal and its contraction as an "unmitigated 'bad'." Harold Demsetz, in his classic article, "Toward a Theory of Property Rights," explores the empirical conditions under which specific property rights become preferable (more efficient) to a state of nature organization. Sometimes Posner apparently argues against private property. Although Kennedy and Michelman treat negligence rules as pockets of a state of nature system in contrast to the private property quality of strict liability rules, Posner persistently finds factual circumstances that he thinks make negligence more efficient than and, therefore, preferable to strict liability in much of the accident field. In Calabresi's sensitive analysis of various methods of minimizing the sum of the costs of accidents and of accident prevention—only some of which fit into the private property, free contract model—he emphasizes the dependence of policy conclusions on one's informed guesses concerning various empirical issues. In general, law-and-economics tries to describe the consequences, in particular, the efficiency, of various legal responses to variable empirical factors—factors such as people's preferences, technology, the existence of transaction costs, and the effect of one's behavior on others.

Often Kennedy and Michelman's objections to the abstract arguments for private property and free contract merely emphasize the relevance of the same factors that the economists treat as crucial. Thus, among the postulated arguments for private property and free contract is that theft is inefficient and that properly attuned damage remedies discourage inefficient breaches of contract. Following Coase, Kennedy and Michelman note that, although the PPFC and SON regimes would produce different wealth distribu-

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69. Id. at 2, 5.
71. Any reader of law-and-economics literature must note its consistent tendency to favor private property, free contract legal responses. Moreover, the writers often unpersuasively argue for their conclusions by using abstract arguments and often ignore empirical and normative considerations that would undermine their conclusions. As a response to this literature, Kennedy and Michelman's points are well taken. At other points, their argument seems more directed at a particular group of usually conservative natural law theorists.
tions, if there are no transaction costs (or, as a practical matter, if transaction costs are low), one would not expect inefficient thefts or contract breaches in a SON. The economist would agree with this abstract point, but would then take the next step and ask under what circumstances would one factually expect transaction costs to be lower in one system than in the other.

In response to the claim that PPFC is important because it increases certainty, Kennedy and Michelman point out that, depending on the factual situation and on people's preferences, people might prefer the alternative certainties of the State of Nature or of the Forced Sharing of Needs regime. People might prefer the SON certainty that no sidewalk owner can get state aid to prevent people from walking on the sidewalk to the certainty that comes from private ownership of the sidewalk. Likewise, people might prefer the FSN certainty that, if the community has the needed resources, one will be able to obtain necessities to the certainty that one is secure to the extent of one's own property possessions. As Kennedy and Michelman show, the preferred type of certainty will depend on the factors the economists treat as crucial. It will depend on how people's specific preferences lead them to act under alternative systems of constraints, that is, under alternative legal regimes, and, given these preferences, on how one values the resulting social order. I would expect the economist's prediction to agree with Kennedy and Michelman's conclusion that the preferred system will combine elements of state of nature, forced sharing, and private property forms of organization along with their respective certainties.

The above points merely illustrate the economist's concerns. More generally, they typically try to identify those situations where one's choice of activity has effects that are important to others, thus suggesting that there might be a reason to move away from a state of nature in respect to that activity. Then, they attempt to predict the costs and benefits of various alternative legal rules. Often the crucial consideration will be the incentive that a rule provides to the individual decisionmaker to take into account the effect of her own act on others. And often, but not always, the economist will conclude that some particular form of private ownership combined with free contract options are the most effective means of accomplishing this "internalization."

72. Kennedy & Michelman, supra note 20, at 720-22, 739-44.
73. Id. at 732-26, 744.
The economists do make at least one general claim on the basis of the weak factual assumption that Michelman and Kennedy grant them—that people tend to be rational maximizers of their satisfactions. Given this assumption, the economists argue that the more completely the costs and benefits of a decision are brought to bear on the decisionmaker, the more successfully will the decision maximize the excess of gains over losses. The economist recommends private property when, in contrast to other regimes, it effectively accomplishes this task of internalizing the costs or benefits of the decision. In effect, the economist claims that in these situations private property places the correct incentives on people, that is, it provides people with the information and motivation to make wealth-maximizing decisions. Kennedy and Michelman critique a closely related claim—that the absence of private property “distorts” incentives. It could be informative to see if their critique undermines this general claim of the law-and-economics approach.

The critique follows a simple chain of reasoning: (1) There is no “natural” structure of incentives or of trade-offs between leisure and various kinds of work; this follows (2) because the incentives or trade-offs result from the relationship between people’s preferences, the distribution of resources, and the legal order—for example, SON, various possible private property regimes, or a system that allows a temporary taking of necessities as a response to disaster; and (3) because there is no natural type of legal order or any reason to expect that everyone would prefer one legal order to all others. (If there were such a “Pareto-superior” legal order one might treat it as the norm or as a “natural” order.) (4) Therefore, since there is no natural norm and since distortion implies an undistorted norm as the contrast, the absence of private property cannot “distort” incentives.74

Again, this critique misses the point. First, although some theorists apparently hold out the hope that one can describe a natural order of entitlements, the obviously conventional basis of property rules, the conventional nature of people’s understanding of when a person owns something and what the ownership implies, makes the notion of a natural set of rules somewhat silly. In any event, the economist’s concern has not been to describe a set of natural incentives, but has been to determine what rules would lead the decisionmaker to take into account and properly weigh the negative and positive effects of a decision. Conceptually, one can break

74. Id. at 729-39, 747-48.
this down into two parts: an empirical question, whether the rules incline the decisionmaker to take the effects into account, and an obviously normative question, whether the rules incline the decisionmaker to give the effects a proper weight. Before the economist can claim that a particular set of private property, free contract rules promotes proper incentives, she must and usually does reach two subsidiary conclusions. For one, she must conclude, usually because of the rule’s effectiveness in reducing transaction costs, that these rules will induce people to take account of the effects of their decisions. In addition, since this presumably leads the decisionmaker to evaluate these effects in terms of the amount people would pay to have or to avoid these effects, she must conclude that value based on willingness to pay (that is, taking the distribution of wealth as a given) provides the appropriate weighting. In this analysis, the notion of a “natural order” should not play any role in the economist’s concern with incentives.

Second, the economist’s arguments that the legal order should bring the effects of a decision properly to bear on the decisionmaker suggests her response to the “distortion” point. Distortion does imply a notion of an undistorted alternative just as the notion of coercion implies a background of rights or norms that the coercive behavior violates. The efficiency-oriented economist, however, does not assume an undistorted, natural reality. Instead, she proposes a norm with which to evaluate alternative incentives systems. The norm is, of course, that a decisionmaker should take into account and properly weigh the effects, the costs and benefits, of any action. Deviations from this norm are distortions. If people’s willingness to pay for various effects determines the proper weighting, given the economist’s market definition of wealth, incentives to increase wealth are the same as incentives properly to weigh effects. In other words, rules recommended by the wealth-maximization criterion are precisely those rules that would lead rational maximizers to take into account and properly evaluate the ef-

75. This second conclusion is the point Posner recognizes when he concludes that wealth maximization, but not welfare or utility maximization, logically leads to market or market-imitating rules. Posner, supra note 12, at 119-38. Several of Kennedy and Michelman’s criticisms emphasize that this form of weighting may be objectionable. See, e.g., Kennedy & Michelman, supra note 20, at 720-22, 747-48, 762.

76. One’s assumptions about the content of this normative background are implicit in one’s perception of attempted influence being either coercion or induce-
fects of their actions. In contrast, nonwealth-maximizing rules cause distortion.

Given that economists do not argue that private property always will be the most effective way to reduce transaction costs and to generate properly weighted incentives, a critique seems reduced, first, to arguing that a particular proposed property rule is less effective than some alternative legal rule in effectively (cheaply) bringing the effects of a choice to bear on the chooser; or, second, to arguing that the economist's proposed weighting of the effects is improper; or, third, to objecting to the notion that the legal order should encourage people to take all the effects of their action into account. Given the considerable impact of various legal rules and practices on social relations, the opportunities for the first type of criticism abound. This criticism is often invoked to justify pollution control or zoning regulation. Or private property rules might be less effective than others in bringing the effect of hierarchical control on worker satisfaction to bear on capital owners or corporate decisionmakers. And, of course, implicit in this type of criticism are difficult empirical questions: What will be the effect of various legal practices on people's interactions and on their values?

Rules that promote market relations or wealth-maximizing rules designed to imitate the results of a "costless" market lead to correct incentives or results only if willingness to pay, with its implicit reliance on existing preferences and the existing distribution of wealth, provides an appropriate criterion for valuing or weighting effects of an action. This dependence suggests the second type of objections. One can properly criticize the efficiency or incentive aspects of the economist's property and contract rule proposals if the existing distribution of wealth is objectionable. Alternatively, one can criticize them if in the particular context some other weighting criterion—such as that obtained by using a utility measure or an egalitarian political process or a set of objective values or the interests of a particular social or economic class—is more ethically defensible than willingness to pay as a standard with which to value or weight effects. These criticisms might, for example, emphasize how the economist's market weightings favor the rich more than do many alternative weighting criteria; or they could emphasize how this market-based method of valuing effects embodies people's existing preferences which are distorted by existing structures of domination and the historical legacy of past
forms; or how it gives weight to ethically objectionable preferences. Moreover, as noted earlier, the market-based valuation may be indeterminate when the appropriate legal rule and, therefore, the appropriate distribution of wealth (or the relevant preference) is at issue.

I am not aware of much development in the legal literature of the third type of criticism—the view that in some circumstances society should not employ legal rules to create incentives for taking account of all the significant effects of one's decision. One might make this type of argument, however, if one concluded that in some contexts people have a right to ignore, if they choose, some or all of the effects of their action on others. For example, maybe a person's decision concerning religious practices should not be subject to market calculations; the religious practice should not be prohibited in order to maximize wealth and, possibly, even one's decision to take into account others' reactions to the practice should be independent of pecuniary concerns. Or since any efficiency-oriented legal regime would implicitly embody some particular conclusion about the appropriate way to value effects—for example, by a political or utilitarian or willingness-to-pay or willingness-to-put-in-time criterion—one might make this third type of objection if one concluded that society should encourage the individual actor to decide for herself how the effects of her decision on others should influence her decision rather than have society try to generate a "correct" level of external monetary incentives. This conclusion might follow, for example, if society's choice of standards would inevitably reflect the existing preferences of all people under circumstances where progressive change requires the opportunity to break out of the constraints of the perspectives of the existing order. In these circumstances, encouraging the decisionmaker to view herself as responsible for evaluating the effects of her actions on others may best promote progressive change. By not providing legal or market inducements to internalize the effects of one's action, each individual actor's own evaluation of her responsibilities would control her decision.

77. See p. 953 supra.
THE NEED FOR AND POSSIBILITIES OF A BETTER APPROACH

Positive Analysis

The thrust of this critique has been to emphasize the dependence of economic analysis on starting points or givens and to note the problems that the analysis lapses into when it tries to avoid or ignore this dependence. The argument has been that the efficiency criteria are inadequate, are indeterminate, in positivist terms, until the analyst identifies the starting points. More importantly, this starting point problem is fundamental in the legal context because the givens or starting points are typically the subject of the legal dispute. Thus, one is frequently unable to apply efficiency criteria to resolve a legal issue because the application of such criteria presupposes the resolution. Moreover, economic analysis is inadequate for policy purposes until the analyst justifies the starting points. Below, I will briefly note the possibility that adequate justifications of starting points are inherently unavailable. For now, the point is that the dependence of economic analysis on starting points makes the analysis logically dependent on prior resolutions of normative questions. That is, one must necessarily integrate economic analysis with normative theory.

Posner claims that “the positive economic theory has the cardinal virtue of being the only positive theory of the common law that is in contention at this time.”\(^8\) Since his claim seems directly contrary to the theme of this comment—that without integration with some other normative or historical theory, the efficiency-oriented economic theory does not have adequate content even to be a positivist theory of law—I will note how Posner’s claim is misleading and contrast his economic analysis with a positivist theory that does have adequate content.

An adequate positivist theory must have some predictive capacity.\(^8\) Posner tries to exhibit his economic theory’s predictive power by looking at the historical development of common law principles and showing that they are, as the positivist economic theory would predict, “efficient.” The problem is that one observes this efficiency from the perspective of the present in which the rules at issue have partly defined the “given.” In contrast, from the


\(^8\) This paragraph summarizes an argument developed in Baker, Posner’s Privacy Mystery and the Failure of Economic Analysis of Law, 12 GA. L. REV. 475 (1978).
perspective of when the common law judge "chose" or discovered these rules, the given from which they now seem efficient had not been created. The point of this comment has been that, from the judge's perspective, the efficiency or wealth-maximizing criterion is indeterminate—any of several proposed rules may create givens from which the chosen rule would then appear efficient. In fact, the normal, predictable effect of the choice of a particular rule is to create a distribution and generate preferences that increase the likelihood that the chosen rule will be efficient. Thus, the present efficiency of the rule does not show that the judge could have used efficiency criteria to choose the rule. To the extent that either choice will in retrospect appear efficient, the economic theory does not have explanatory power; thus, it is not even in contention as a positivist theory of the common law.

In contrast to the efficiency analysis, a simplistic class analysis could provide adequate content for a positive theory. This analysis would predict that: (1) The common law rules will be efficient in the Pareto-optimal sense—even "exploitative capitalists" would have no interest in making the poor worse off unless their action made them better off. (2) The rules will favor wealth distributions beneficial to the rich. As to this point, one remembers that any use of market-based, willingness-to-pay criteria, as compared to other measures of value, is likely to lead to value-maximizing legal rules that favor the already wealthy. Posner's early refinement of the willingness-to-pay criterion, using "offer prices" rather than "asking prices," merely intensifies this bias toward choosing allocations that favor the rich. In any respect, if either of two rules would be Pareto optimal or if a wealth-maximization criterion cannot choose between the rules, this class theory predicts that the law will select the one that distributes the most to the rich. (3) The rules chosen will encourage the development of preferences and desires consistent with capitalist control and with expanded capitalist production.

These predictions fill the very holes left open by Posner's economic analysis. The efficiency analysis was indeterminate because it depended on assuming a particular distribution and set of preferences under circumstances where the appropriate distribution and preferences were at issue. Indeed, the rule chosen would establish some of the facts on which the choice, according to the efficiency

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82. I do not suggest that anyone, particularly any sophisticated Marxist, would offer an analysis as simplistic and reductionist as the one described here.
83. Baker, supra note 2; Bebchuk, supra note 2, at 679-81.
analysis, was dependent. This alternative class analysis predicts that those with power to choose the rules will, when possible, choose as their givens or starting points those preferences and distributions that further ruling class interests. Thus, this analysis, unlike the bare efficiency or wealth-maximizing criterion, has sufficient content to specify starting points and, therefore, to make predictions concerning which legal rules will result under various empirical circumstances.

I am not proposing to test this theory against common law history. In fact, although at times I sense that this class-reductionist theory would provide explanations for many developments that mere economic analysis cannot explain, I would hypothesize a different view of the legal order. This view treats law as a realm of political struggle, of value conflict, and of ethical development and realization.\(^8\) If this view is right, no reductionist theory would be adequate. Moreover, if, as I assume, certain values—particularly notions of liberty and equality—are central to our society's self-perception and ethical thinking, one might predict that these values will influence legal and social developments. And this view need not be a purely idealist hypothesis. A plausible historical view is that the material development of capitalism helped shape and, in limited ways, realize the values which then react against their origins—thus providing a basis for at least partial critiques and alternatives to class dominance and to capitalist relations. Nevertheless, I am not prepared to show whether, or how, normative theory either influences historical development or guides practice. Instead, given the emphasis in this paper on the policy relevance of starting points, I will conclude with a few comments on the directions that an adequate normative theory would take.

**Normative Analysis**

While many of the symposium's contributors usefully focused on the dependence of economic analysis on starting points and normative theory,\(^8\) for me, the most disappointing aspect of the symposium was that there were few attempts to offer descriptions of an adequate normative theory or appropriate starting points from which economic analysis could proceed.\(^8\) In contrast, some other

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85. Bebchuk, for example, effectively identified starting-point issues, explored several alternatives, but self-consciously admitted that he did not yet have answers. Bebchuk, supra note 2, at 707-09.
86. Dworkin did advocate a starting point: "[A]n equal share of the resources of
recent writings do carefully employ normative theory in a search for appropriate starting points. Anthony Kronman, a former colleague of Professor Posner, in an excellent article that leaves most of the law-and-economics writing in its shadow, provides a relatively rare example of explicit and careful attention to the necessary normative evaluation of starting points. In his investigation of the libertarian position, Professor Kronman concludes that the voluntary, that is, noncoerced, agreements that the libertarian defends do not include agreements in which a party engages in advantage-taking behavior unless permitting that form of advantage-taking behavior is to the long-run benefit of most of the people taken advantage of. The baseline is that "the advantage-taking in question is legally forbidden: advantage-taking is to be allowed only if the disadvantaged are made better off than they would be were it prohibited." This version of the libertarian position could clearly have radical implications. For example, it may imply that the rules regulating agreements between capitalists and workers should allow the capitalists to take advantage of their own ownership of the means of production only on terms that are to the greatest possible benefit to the workers.

Careful examination of Kronman's discussion suggests that even greater attention to baselines or starting points may be necessary. As he notes, in most "mutually advantageous exchanges, there is advantage-taking by both parties." Thus, one must determine which advantage-taking should be permitted. As Kronman applies his principle of "Paretianism," a person should be able to exploit private information in making a contract only if those to whom this information is not disclosed are better off than if disclosed. The community measured abstractly—that is, before these resources are committed to any particular production route—[should be] devoted to the life of each." Dworkin, supra note 33, at 570. One must wait, however, for his further elaboration to see if he can give meaning and content to "equal share . . . measured abstractly" and "devoted to the life of each" and whether, when he does, the principle will be ethically defensible.

88. Id. at 483-88. See also Baker, supra note 79, at 1001.
89. Kronman, supra note 87, at 491-92. Kronman also suggests that private property rights should exist only when they are in the long-run interest of the people who do not possess the property to allow private rather than common ownership. Id. at 493.
90. See id. at 497.
91. Id. at 480.
92. I assume he means this type of information, in which case one must eventually face the problem of describing "types."
closure were required. The problem is, those who initially privately or uniquely possess information may be better off if those with whom they enter into agreements are not allowed to take advantage of this information. Thus, prohibiting a form of advantage-taking behavior because it is not in the long-run interests of one group may allow a form of advantage-taking behavior that is not in the long-run interests of the other group. In this situation, Kronman's approach leads to two contradictory conclusions. To resolve the conflict a further normative investigation of the method of identifying the appropriate baseline is necessary.

One response, suggested by Kronman, is to adopt common ownership of all resources (including information) as the baseline or starting point and to allow special or private control only when it benefits those who would not have special control or special rights. This solution, however, is also indeterminate; various ways of allowing private control may each benefit those out of control—in which case one needs some additional criteria for choosing which to adopt. A second response is only to allow advantage-taking that one expects will be in the long-run interest of society's worst off groups—in other words, a Rawlsian baseline—or advantage-taking consistent with some other conception of distributive justice. A third possibility is that the law should permit advantage-taking in interactions and grant special rights to exploit a resource for one's own benefit whenever these laws are morally acceptable—while recognizing that these ethical conclusions may depend on a plurality of moral principles that have a different relevance in different circumstances. For example, the mere fact of possession of great strength or intelligence or a particular body may not provide a justification for allowing the possessor to reap all the gain that results from the attribute's use in satisfying the desires of others. The fact of possession, however, might provide a reason to give the possessor veto power over the choice of use of that body. The need to choose among these or other approaches or to know if, for example, the first response could be properly combined with the second, highlights the necessity of careful normative consideration of starting points.

93. Id. at 492.
94. See id. at 488.
95. See id. at 497. As an initial premise, this could conflict with the first response. It could also, however, be used as a secondary criterion to eliminate the indeterminacy in the first.
96. See Baker, supra note 20. But see Kronman, supra note 87, at 494.
97. A description and justification of an appropriate framework or starting point
In earlier papers not addressed specifically to either law-and-economics or to contract and property law, I have made initial efforts to consider the normative issues on which proper delineation of starting points depend. Starting with the central notion that the collective must manifest an equality of respect and concern for each individual—a notion that seems central to the rationale of modern ethical approaches from utilitarianism to most versions of Kantian theory as well as to many of our most basic political practices including democracy—I reached several conclusions. First, an egalitarian political process and not an economic market, which is necessarily based on an inegalitarian distribution of wealth, provides the proper basis for defining or determining value to the extent that value notions are used in necessarily collective decisions such as the choice of legal rules. This leaves both the choice of allocation (or property rules) and the scope and functioning of economic markets subject to collective decisions. Second, the same norm of equality of respect and concern that requires a democratic political order also requires certain limitations on the political arena. Respect for people’s autonomy requires that the collective recognize arenas of liberty where individual choice is free from collective control. And respect and concern for people prohibits the collective from adopting policies for certain reasons, for example, for the purpose of denying, or in ways that implicitly deny, people’s equality of worth; it also requires that the collective recognize individuals’ claims for the fulfillment of a certain amount of just wants. Third, concern and respect for the individual generally calls for institutions that lead to the satisfaction or fulfillment of people’s preferences. Thus, utilitarianism is generally an appropriate policy criterion.

Nevertheless, the propriety of focusing on existing preferences, as well as our confidence in our ability properly to specify ethical norms or even fully to understand the requirements of

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is also necessary to resolve other problems that could affect the results of applying any of the approaches described above. For example, the order by which one chooses legal rules could affect the final result. In addition, whether one should choose rules appropriate for a just society or rules that advance welfare in our actual society could affect what is chosen. See Caban v. Mohammed, 441 U.S. 380 (1979).

98. Baker, supra note 20; Baker, supra note 2.

equality of respect, is undermined to the extent that our existing perceptions, preferences, and values are a product of present or past unjust conditions. For example, the present legacy of past or present class-, race-, or sex-based restrictions on opportunities or other “structures of domination” undermine the normative relevance of many of our preferences. I have argued that the proposed limitations on welfare-advancing political decisions—limitations required by respect for equality and liberty—will systematically influence change in ways that will undermine these structures of domination. These limitations will thereby lay the basis for an increasing degree of confidence in our normative judgments and preferences.\(^{100}\)

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These conclusions about the appropriate starting points for policy discussions are complex and controversial and, no doubt, incomplete. Nevertheless, the use of economic analysis as an aid in developing an adequate theory of property and contract or, more generally, an adequate theory of the legal order requires that economic analysis rest upon and be integrated with this or some better normative theory of value and change. Hopefully, future efforts in the area will take up this constructive task of developing normative theory and integrating it, where appropriate, with economic theory.

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