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An Exchange: About Law and Economics: A Letter to Ronald Dworkin

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AN EXCHANGE

ABOUT LAW AND ECONOMICS: A LETTER TO RONALD DWORKIN

*Guido Calabresi**

August 29, 1979

Professor Ronald M. Dworkin
Oxford University
Oxford, England

Dear Ronny,

In the course of preparing the Cooley lectures for the University of Michigan I had occasion to read your exchange with Dick Posner which clustered around the Cornell-Chicago conference of this April and May[1] and which, I take it, will be the basis of both

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* Sterling Professor of Law, Yale University; Arthur Goodhart Professor in Legal Science, University of Cambridge (1980-81).

1. The papers from this conference are published in a symposium entitled *Change in the Common Law: Legal and Economic Perspectives*, 9 J. LEGAL STUD. 189 (1980). I was originally scheduled to attend the conference which was organized by Mario J. Rizzo. Unfortunately a series of unexpected events made it impossible for me to be there. I received the conference papers from the editors of the *Hofstra Law Review* and read them at the end of the summer of 1979 while I was working on the Thomas M. Cooley Lectures, which I delivered at the University of Michigan Law School in October 1979, under the title: Nonsense on Stilts? The New Law and Economics Twenty Years Later. This paper was not written to be more than a letter to Professors Dworkin and Posner (who received a copy) commenting on their interesting exchange. As is my habit, the Cooley Lecures were delivered from notes, and I am now in the course of writing them up. They include, among other things, a fuller statement of my views on the subjects touched on, rather casually, in this letter. It did not seem to me inappropriate, nevertheless, to let the editors of the *Hofstra Law Review* publish this letter as a "Comment," especially since they hoped, correctly as it turned out, that publication would stimulate some more excellent thoughts from Professor Dworkin.

A footnote is not the place to answer Professor Dworkin fully, but a few comments can be usefully made. It seems to me that the differences between him and me are largely verbal, which is not to say unimportant. It is true that I speak of trade-offs between wealth and its distribution, but I try not to speak of trading off equality (largely because it means too many different things). And, even when I speak of wealth and its distribution, I as often use "recipe" language (*see, e.g.*,

your and his contributions to the *Hofstra Law Review* symposium. Despite the perhaps unnecessarily provocative language in your first article,[2] language which I fear will lead some to misunderstand the piece to mean that efficiency in the production of wealth is irrelevant to a "just" society, I found myself substantially in agreement with it. If I may oversimplify your fuller and more complex discussion, it seems to me that you make two points that are hard to challenge. (Indeed, I think I may have made them myself from time to time,[3] though certainly not as systematically.):

(1) That without starting points—whether termed rights, enti-

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"blend" and "ingredients" at p. 558 *infra*, and "mix" at p. 559 *infra*) as what Dworkin assumes to be "compromise" language (like "trade-offs"). In fact, the whole tone of my letter is to ask that we concentrate on what blend of wealth, its distribution, and "other justice" notions leads to what can go by the name of justice. Dworkin asks, instead, what blend or recipe leads to "deep equality." Dworkin, *Why Efficiency?* 8 HOFSTRA L. REV. 563, 568-70 (1980). He is entitled to use that phrase, of course. But while I have no great confidence in the term "justice," I must say that I find the term "deep equality" somewhat misleading and even loaded. In my view of justice, what can be called "deep equality," is close enough to permit its use without stretching language. (I certainly have never suggested that I was a teleological utilitarian, *see, e.g., id.* at 572.) But other views of justice—other blends—do exist, and to assert that the goal of the blend of wealth and its distribution is deep equality psychologically stacks the deck against some of these. (Psychologically, not logically, since Dworkin does not define deep equality and so one could introduce what to some would seem like mighty inegalitarian notions into the term, though perhaps only at some cost to the ordinary meaning of words.) In the end, however, what one calls the "value term" may be less important than the functional issues, reached at the end of both my letter and Dworkin's paper, on when specific institutions like courts are likely to be good in defining or achieving the blend and when, instead, they are not.

Two other notes: Dworkin is precisely correct in his discussion on p. 568-69 of the type of regret one feels at an inability to make a Pareto improvement on a fair distribution and the type of regret-sacrifice that one does not feel. He is equally correct in his statement on pp. 582-83 that the Pareto criterion can only be treated as an all-or-nothing criterion and that *any* move that involves a deviation from the result ordained by what he calls the "fanatical" Pareto criterion requires justification in some non-Paretian moral theory. Since I have been saying this, and its close cousin (that "what *is*, is Pareto optimal—unless what *is* can be unanimously changed," and then, of course, it will be) for some time, *see, e.g.*, G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 83-87 (1978); Calabresi, *On the General State of Law and Economics Research Today and its Current Problems and Prospects*, in LAW AND ECONOMICS 9, 11-12 (G. Skogh ed. 1978); *cf.* Dahlman, *The Problem of Externality*, 22 J. L. & ECON. 141 (1979) (advocating a similar position), I was particularly pleased to find Dworkin making so elegant and rigorous (more than I could) a statement of the point.

2. Dworkin, *Is Wealth A Value?*, 9 J. LEGAL STUD. 191 (1980).

3. *See, e.g.*, G. CALABRESI, & P. BOBBITT, *supra* note 1, at 32-34; Calabresi, *supra* note 1, at 12-15; Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

tlements, bodily security, or what have you—it is hard to give any meaning to the term "an increase in wealth."[4] What is viewed as wealth, at the very least, must depend on the desires of individuals. Since these desires in turn depend on the characteristics of individuals, one must, at a minimum, justify in terms other than wealth maximization why a person "owns," rather than just possesses, the characteristics that give rise to his or her desires. In a way, this is merely a more general way of stating that my superior intelligence, my ability to hit a baseball as well as Rod Carew, or my possession of two good kidneys will affect my wants differently depending upon whether kidneys, intelligence, or batting skill belong to society, to those who wish or need to use them, or to me.

To put it still another way, each individual's desires are dependent on, indeed are a function of, his or her initial "wealth." Since wealth necessarily, in this sense, includes whether one starts off advantaged or disadvantaged by having a specific characteristic (like brains, kidneys, or batting skill) in that society, it is hard to know what to make of a statement that maximizing wealth is a good thing, unless one has accepted something, other than wealth maximization, as a ground for initial starting points.

One can get a starting point, of course, if one takes existing starting points to be "inevitable." But this is simply contrary to fact. Possession of a characteristic may be inevitable, but ownership is not. And possession without ownership can put one at a distinct disadvantage. That is, it can alter completely the starting point; viz., the plight of the beautiful slave and of the slave who is strong enough to do horrible, killing work. One can also get a starting point if one is willing to accept historical starting points as "just," or if one is willing to make some fairly strong assumptions (which I am inclined to believe most of us do) about "similarity among individuals regardless of characteristics" in their desire for "happiness" or "utility."[5] But this merely emphasizes that simple "desire for wealth" is not a meaningful starting point, because while one may be able to give meaning to a desire for happiness, say, apart from other characteristics, one cannot give meaning to "wealth" and hence to a desire for wealth in such an abstract state.

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4. The term is Posner's. *See* Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

5. Tony Kronman is currently arguing, persuasively, that an analogous assumption is implicit in Rawls. Kronman, *Talent Pooling*, NOMOS (forthcoming). *See generally* J. RAWLS, A THEORY OF JUSTICE (1971).

(2) That even with a starting point it is hard to see how an increase in wealth constitutes an improvement in a society unless it furthers some other goal, like utility or equality. Even an efficiency move that makes some *A* wealthier without making any *B* poorer —an extraordinary situation—is not a move toward a better society unless one is prepared to make the frequently plausible, but not necessary, assumption that the change also made that *A* happier and did not make any *B* less happy, or that *A* is made happier and that any *B* made less happy by *A's* greater wealth deserves to be less happy because envy is "bad." In either event, the efficiency move is, as you say,[6] merely instrumental and needs to be attached to some account of what it is instrumental toward before it can be evaluated. The same is true, a fortiori, in the ordinary situation in which *A's* greater wealth makes some *B* poorer.

It seems to me that at the end of your and Dick's polemic he does not really disagree with this last point; rather he does not find it necessary to specify the complex mixture of desirable goals (utility is too simple for him) which he claims wealth maximization serves better than any other *testable* instrument. Not being a philosopher, I would not myself require a precise complex of goals to be spelled out. I am even skeptical of such an exercise in an open society.[7] Posner's concept of wealth maximization would be enough for me if I thought it were, in practice, a better instrument than any other available one for furthering a plausible, if not completely coherent, complex of goals that were apparently adhered to by most people in a society, even if with no great consistency. Were that the case, the furthering of wealth maximization simpliciter might indeed be a worthwhile aim of some institutions (even judges, perhaps) in that society.

The trouble is that wealth maximization, apart from its distribution, does not seem to me (and I would warrant to most) to further even that muddle of aims which I, more tolerantly than you, would accept. It only necessarily serves "utility" on the most peculiar, not to say absurd, assumption about the relationship between wealth and utility, namely, that $1 is as likely to be worth as much to the rich person as to the poor person. One can be quite an agnostic about interpersonal comparisons and still say that *that* particular assumption is a lousier one than most. It clearly does not serve equality. It might, ironically, serve a bastardized maximin,

6. Dworkin, *supra* note 2, at 195.
7. *See generally* G. CALABRESI & P. BOBBITT, *supra* note 1.

but only under a series of uncertain empirical assumptions, perhaps more commonly made in the nineteenth century than today, about the trickling down of wealth. (I say bastardized, because the poor who would benefit, even under these assumptions, would usually be the next generation of poor. Thus, the beneficiaries are those who would benefit in the future from economic growth and not the currently least advantaged.) In any case, one would be hard put to explain why even this would not occur sooner if one self-consciously traded off some wealth maximization for some speedier redistribution, assuming a trade-off were needed.

I do not doubt that there exists an unspecified complex of goals—that can be spoken of in justice-value terms—that are better served by wealth maximization, without redistribution, than by other "measurable" instruments. I also do not doubt that Dick Posner, in a not totally systematic way (of which as I said I do not disapprove), "holds" these goals. I only suggest that in holding to these, he is in a very small minority. And, I would suspect that most people would say, and indeed do say, "Your goals, Richard, are fine for you, but without a lot more in the way of equality (pass, for now, of what) they are totally unacceptable to me."

All this leads to the part of your polemic with Dick that I find less successful. And that, as you might have suspected, is Part IV, where you speak of me and of the more "modest" efficiency-as-value theorists.[8] My argument with you here is less with your analysis than with its applicability to me. I do not, and never have, held that one can trade off efficiency and justice. I will admit that I am clearer on this point in some of my writings than in others. But even *The Costs of Accidents*,[9] which is the one to which you advert[10] and which is perhaps the least clear, should be clear enough. I do say of any system of accident law that it has two principal goals. "First, it must be just or fair; second, it must reduce the costs of accidents."[11] I do not find *any* passage in which I say that "these goals may sometimes conflict so that a 'political' choice is needed about which goal should be pursued."[12] What I do say is quite different:

> Though I list justice or fairness as a goal, it will soon be apparent that . . . I do not treat it as a goal of the same type as cost

8. Dworkin, *supra* note 2, at 201-05.
9. G. CALABRESI, THE COSTS OF ACCIDENTS (1970).
10. Dworkin, *supra* note 2, at 201.
11. G. CALABRESI, *supra* note 9, at 24.
12. Dworkin, *supra* note 2, at 201 (footnote omitted).

> reduction but as a veto or constraint on what can be done to achieve cost reduction. Viewed this way fairness becomes a final test which any system of accident law must pass.[13]

I then criticize "claims . . . that justice is in some sense a goal concurrent with accident cost reduction" on the ground that "[t]hey seem to suggest that a 'rather unjust' system may be worthwhile because it diminishes accident costs effectively," and conclude that "justice is a totally different order of goal from accident cost reduction. Indeed . . . it is not a goal but rather a constraint that can impose a veto."[14] None of this supports trade-offs, I think.

Justice language *is* different from efficiency and, I think, wealth distributional language. As a result it only confuses things to talk about trading justice for efficiency. This is consistent with the assertion that both wealth-efficiency and its distribution are, in your terms, at least ingredients of justice. They certainly are in utilitarian theories. It may even be that, in some theories, equality of distribution of wealth is, in your terms, a "component of value."[15] I do not think it is in utilitarian theories, and I wonder whether there is value in a society in which all equally starve to death. But that is neither here nor there.

What is more to the point is that "modest" theorists, like myself, do contend that it is possible to speak of trade-offs between efficiency-wealth maximization and wealth distribution. Indeed, we would say that it is nearly impossible not to do so and still make some sense out of what goes on in just about every society one can look at. In your "last" reply to Posner you do the same when you say, "The question is not whether redistribution inhibits efficiency or whether a great decline in efficiency hurts the poor. It is whether justice is better served by some redistribution at the cost of some efficiency."[16] I would go further and say that an appropriate blend of efficiency and distribution is highly instrumental toward, and closely correlated with, achieving what many would view as a just society.

Some would go further (and on some utilitarian assumptions it is easy to see how) and say that the appropriate blend *is* the just

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13. G. CALABRESI, *supra* note 9, at 24 n.1.

14. *Id.* at 25.

15. Dworkin, *supra* note 2, at 195.

16. R. Dworkin, Unpublished Comments at 14 (1979) (commenting on Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243 (1980)) (on file at *Hofstra Law Review*).

society, or would be if it could be defined and achieved. I have been more reluctant than many to go that far. I have always believed that efficiency and distributional language does not translate directly into justice language; that there are components of the just society that could only be encompassed in the terms efficiency and distribution if these terms were given a meaning far different from their ordinary ones. Hence the discussion of "Other Justice" in *The Costs of Accidents*[17]—which has been misinterpreted by some to imply that I believe that "justice" is a value separate from efficiency and distribution and to be traded off against them. "Other Justice," as I have made clear in later writings, was meant to suggest that an appropriate mixture of wealth-efficiency and its distribution does not guarantee a just society.[18] To put it another way, equating an appropriate efficiency-distribution mix with justice requires assumptions that are neither intuitively obvious nor so widely accepted as to permit me to say, "Solve the problem of that mix and you have justice."

Whether one wants to call these constraints (within which efficiency and distribution must work if they are to be instrumental toward justice), "rights" or, as I did, "veto points," is not terribly interesting. More interesting would be the question of what one ought to do if, in fact, an agreed upon efficiency-distribution mix ran into one of these veto points. Ought one to assume that such rights are definable with sufficient precision and absoluteness that either (a) an error has been made in the efficiency-distribution mix or assumptions, or (b) in the particular case at hand the instrument fails to further the goal?[19] Or may one, instead, use the clash to question whether what one thought was a right is, in fact, a right? Mistakes are made by all, and what may seem to be rights may just be perpetuations of historical injustices. If one believes the "instrument" generally leads very near the "good," one is more apt to take this last position and use the clash to force a reexamination not only of the efficiency-distribution assumptions, but also of the asserted veto.

Where does all this leave law and economics? Not in bad shape, I think. Clearly, the relationship between the instruments (efficiency, distribution) and the goal (justice) needs to be studied.

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17. G. CALABRESI, *supra* note 9, at 24-26.

18. *See* Calabresi & Melamed, *supra* note 3, at 1102-05.

19. A utilitarian might say, "That mix which in other cases furthers utility does not do so here."

Intuitively most people would, I would guess, think the fit reasonably close. Sufficiently so, in fact, to assign to some institutions the task of furthering a given mixture in a given context. Enough also to justify criticizing institutions or laws when they blatantly fail in furthering either of the instruments, or what plausibly seems an appropriate mixture of the two.

But why not say, instead, that all should study the "goal" directly? That assumes that all should be philosophers, and, more important, that the best way to get to a point is always to focus directly on it, rather than on some road signs that point toward it. This is an assumption that is, I think, patently false. If, moreover, it be the case that some institutions are pretty good at finding road signs while others are better at defining the end point and suggesting when the road signs are apt to head away rather than towards the goal, it would be silly to ask both sets of institutions to be concerned either with the end point or with the road signs.

I believe that law-and-economics is concerned with the road signs. I also believe that this is both an intellectually worthy and difficult task. It is especially difficult because finding road signs that are not too misleading to be worth spending time on (like "wealth maximization" simpliciter) requires the lawyer-economist to make assumptions about distribution.[20]

Such assumptions about distribution have not been made and studied in any systematic fashion by economists in the past. Philosophers, like Jules Coleman, are trying to make a start at examining economics from this point of view.[21] And certainly the kind of work Sen is doing[22] and the kind of work Little did[23] (which characteristically Sen is among the few wise enough to appreciate) suggests that a great deal can be done. I would also not shrug off old Abba Lerner—after all, in the absence of knowledge to the contrary, the guess that any member of a species of animal is more like other members of that species[24] than different from them is not a silly guess.

20. Assumptions which I would argue, but cannot do here, are no more precarious than those which traditionally have been made by economists in talking about efficiency.

21. *See* Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221 (1980).

22. *See, e.g.*, Sen, *Social Choice Theory: A Re-examination*, 45 ECONOMETRICA 53 (1977); Sen, *The Welfare Basis of Real Income Comparisons: A Survey*, 17 J. ECON. LITERATURE 1 (1979); Sen, *Utilitarianism and Welfarism*, 76 J. PHILOSOPHY 463 (1979).

23. I. M. D. LITTLE, A CRITIQUE OF WELFARE ECONOMICS (2d ed. 1957).

24. *See, e.g.*, A. LERNER, THE ECONOMICS OF CONTROL 23–40 (1944).

But once again that is all beside the point, which in the end is simply: if lawyer-economists do not make the mistake of claiming too much for what they are doing, and if they are willing to work at defining and analyzing pretty good instruments leading toward the just society, philosophers ought not be troubled. Indeed, they might even find it profitable to reexamine critically their conclusions as to particular rights and particular manifestations of justice when the lawyer-economists' instruments seem to conflict with, rather than further, the results which the philosophers' particular conception of justice would seem to call for. Conversely, the lawyer-economist should be highly skeptical of the empirical assumptions on which he or she has based his or her analysis when such a conflict exists. This factual failure is as likely to be the source of the conflict, as is the more obvious possibility: namely that the best instruments or ingredients are not the "goal" or even components of the "goal" and so may at times mislead.

I have not, and this may seem odd to you, said anything in this letter about the role of courts in all this. That is too large a topic, and is in any case separate from the topics treated above. I know you believe that courts are eminently suited to further the "goal" directly and are not suited to define and work out the "instruments." Dick Posner, conversely, thinks courts good only at furthering what, for him, is at least a crucial instrument—wealth maximization. (I assume that by now you have disabused him of the notion that it is the "goal.") He also thinks we can show empirically that they have been doing just that.

I find it hard to explain judicial behavior in America simply in terms of wealth maximization. But I find it equally hard to explain it only in terms of ultimates or principles. In other words, my guess would be that courts do decide policies as well as principles, and perhaps more often the first than the second. The policies are based, and again I am guessing, on that mixture of efficiency and distribution that in the particular context is thought by the court to be instrumental toward justice and, in particular, does not violate any fairly precisely defined rights or veto points.

Whether that is an appropriate task for that institution is another matter and one that I wish to pass for now. My only thought on that at this point is that such a discussion works better in context than in the abstract. I find it difficult, in other words, to consider that issue apart from the capabilities of other institutions. For that reason, discussions of the role of courts that do not distinguish England from America (let alone both of these countries from Italy

and France) seem to me prima facie suspect. One can say: "If they are assigned task *X* (policies, for example) because they are the most suited to that task in that society, they are no longer courts." But that, I think, would just trivialize a very important issue in the allocation of functions in a society.

Enough, enough. As you can see, your excellent paper set me off on many a tangent, and for that as well as for your acute analysis I am grateful to you and to Dick Posner who, in a way, set you off.

Best always,
Guido