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A REPLY TO SOME RECENT CRITICISMS OF THE EFFICIENCY THEORY OF THE COMMON LAW

Richard A. Posner*

The *Hofstra Law Review* has devoted the major part of two recent issues to articles on the theme of "efficiency as a legal concern."¹ Many of these articles are highly critical of a theory (really two theories, one positive and one normative) about the common law that I, among others, have advocated. This is the efficiency theory of the common law.² The positive branch of the theory hypothesizes that common law rules and decisions are best explained on the "as if" assumption, not intended to be realistic, that judges are consciously trying to promote efficient resource allocation, where efficiency is defined as wealth maximization. The normative branch of the theory asserts that this is what judges *should* try to do in deciding common law cases.

I want first to make some explanatory points about these theories in order to help the reader orient himself in the debate, and then address some of the criticisms in the *Hofstra* articles.³

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1. *A Response to the Efficiency Symposium*, 8 HOFSTRA L. REV. 811 (1980); *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

2. I shall sometimes call the theory "the economic theory," but the reader should bear in mind that other economic theories about the common law are possible, though none has yet appeared.

3. The articles I shall be discussing are: Baker, *Starting Points in the Economic Analysis of Law*, 8 HOFSTRA L. REV. 939 (1980); Bebhuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?*, 8 HOFSTRA L. REV. 671 (1980); Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980); Dworkin, *Why Efficiency?*, 8 HOFSTRA L. REV. 563 (1980); Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980); Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591 (1980); Markovits, *Legal Analysis and the Economic Analysis of Allocative Efficiency*, 8 HOFSTRA L. REV. 811 (1980); Tullock, *Two Kinds of Efficiency*, 8 HOFSTRA L. REV. 659 (1980). There are other articles in the symposium, some critical of the efficiency theory, but either the criticisms are peripheral or I have nothing new to say about them. In the latter category is Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641 (1980) (arguing that information requirements for courts to make efficient allocative judgments are overwhelming).

The first thing to be noted about the positive and normative economic theories of the common law is that they are independent of each other. The positive could be true and the normative false (if "false" is the right word to apply to a normative theory), and vice versa. To be sure, the positive theory may be more plausible if the normative theory is valid than if it is not; but this is so only if one believes (1) that the common law reflects judges' ethical views and (2) that judges are more likely to hold sound than unsound ethical views. If either of these assumptions is rejected, the positive theory derives no support from the normative theory. Similarly, if the positive theory is correct, the normative theory may gain some support from it, but only if one believes the common law is a source of ethical insight.

The positive theory has two aspects. It is both a theory about the content of common law rules and a theory about the effect of those rules on the people subject to them. A rule of the common law—say, the rule of contributory negligence—might embody a policy of maximizing wealth yet not itself contribute to effectuating that policy. The people to whom the rule was addressed might not know about it or even if they knew about it might not conform to it, perhaps because their incentives to conform were blunted by insurance, private or social. Although empirical analysis to date has focused primarily on the economic content rather than economic effects of common law rules, some interesting recent evidence suggests that the common law does promote efficient behavior.⁴

As usually stated, the positive theory is an explanation of the rules and possibly the effects of the common law, rather than an explanation of why the common law has come to be concerned with efficiency. Several such explanations have been offered: (1) Wealth maximization is closely related to utilitarianism, and the formative period of the common law as we know it today, roughly 1800-1950, was a period when utilitarianism was the dominant political ideology in England and America; (2) judges lack effective tools for enriching an interest group or social class other than by

4. E. Landes, *Insurance, Liability and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault on Accidents* (Center for the Study of the Economy and the State, University of Chicago, May 1980), finds that moving from the traditional negligence system of automobile-accident liability to a no-fault system results in substantially higher accident costs. It is unlikely that these costs are offset by lower administrative expenses, if only because it is unclear that the administrative expenses of no fault are lower. See ABA, *Automobile No-Fault Insurance 29-39* (Feb. 1978) (study by Special Committee on Automobile Insurance Legislation).

increasing the society's wealth as a whole in which the favored group or class presumably will share;⁵ and (3) the process of common law adjudication itself leads to the survival of efficient rules.⁶

The scope of the positive theory is somewhat uncertain. No one contends that every rule of the common law is efficient or that no rule of statute law is efficient. Developments in tort and contract law since about 1950 raise in acute form the question of how well the theory actually describes the common law today. At the other end of the chronological spectrum, my work on primitive law suggests that the efficiency theory may have considerable explanatory power even as applied to primitive and ancient legal systems.⁷

Not only is the scope of the positive theory uncertain, but the evidence thus far presented in support of it is at most suggestive, not definitive. The evidence consists mostly of case studies of various rules and outcomes in tort and contract law and to a lesser extent in remedies, procedure, property law, and criminal law.⁸ Statistical evidence is, as mentioned, as yet fragmentary. And efforts to explain *why* the common law is efficient (if it is) have been handicapped by the lack of an accepted economic model of judicial incentives.⁹ Complacency about the positive theory is not warranted. In this the critics and I are at one.

5. This point is stressed in my contribution to the symposium. See Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 502-06 (1980).

6. The evolutionary theories are discussed critically in Kornhauser, *supra* note 3, at 627-33; Landes & Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 259-84 (1980).

7. See Posner, *A Theory of Primitive Society, with Special Reference to Law*, 23 J. L. & ECON. 1, 28-53 (1980).

8. For a survey of the evidence in support of the positive theory, as of 1977, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* pt. II (2d ed. 1977). Since then, there have been more studies. See, e.g., Bishop, *Negligent Misrepresentation Through Economists' Eyes*, 96 LAW Q. REV. 360 (1980); Jordan & Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. LEGAL STUD. 527 (1979); Landes & Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517 (1980); Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 801 (1981); Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 290 (1979) (authorities cited therein); Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. LEGAL STUD. 463 (1980); Wittman, *First Come, First Served: An Economic Analysis of "Coming to the Nuisance,"* 9 J. LEGAL STUD. 557 (1980); W. Landes & R. Posner, *An Economic Theory of Intentional Torts* (Feb. 23, 1981) (unpublished University of Chicago Law School, Law and Economics Working Paper No. 5) (copy on file in office of the *Hofstra Law Review*).

9. For a stab at developing such a model, see Landes & Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*, 9 J. LEGAL STUD. 367, 369-72 (1980).

The normative branch of the efficiency theory has a strong and a weak version. The strong is that wealth maximization should guide public policy in all spheres; the weak is that it should guide common law adjudication. The weak says that judges shouldn't try to redistribute wealth, say from landlords to tenants, or producers to consumers, or promisors to promisees, in part because judges lack effective tools of wealth redistribution and in part because there is no social consensus on the principles of distributive justice.¹⁰ But the weak version takes no position on whether legislatures should redistribute wealth among these groups. The distinction is significant. The strong version of the normative theory is highly controversial, the weak version less so. Yet only the weak version must be accepted in order to sustain the normative theory as applied to common law adjudication.

The strong version can be defended on various grounds: (1) as constrained utilitarianism, the constraint deriving from a desire to limit coercion; (2) as a compromise among utility, rights, and altruism as competing moral principles; and (3) as the outcome of a hypothetical social choice.¹¹ The third ground is limited to settings in which everyone or almost everyone benefits *ex ante* from the wealth-maximization principle. But since this condition probably is fulfilled in many common law settings, it provides another ground for regarding wealth maximization as the proper criterion for use in common law adjudication.

THE CRITICISMS APPRAISED

Just as the foregoing discussion is not intended to be an exhaustive description of the efficiency theory of the common law, what follows is not intended to be an exhaustive discussion of the criticisms of the theory. It is not even an exhaustive discussion of the *Hofstra* critics. Many of their criticisms have been made before

10. The second reason is equally applicable to other uncertain, nonobjective, highly controversial theories of justice as guides to judicial decisionmaking. Wealth maximization, in contrast, is a relatively objective concept, and there is broad agreement that wealth is a value, though not necessarily the only value, relevant to public policy, and it may be the only value judges can promote efficiently. Consider as an alternative guide to judicial decisionmaking Coleman's suggestion that "the responsibility of a judge is to determine which of the litigants in a dispute has the relevant legal right." Coleman, *supra* note 3, at 550 (footnote omitted). At one level this statement is unexceptionable, at another wholly nondirective.

11. See R. POSNER, *THE ECONOMICS OF JUSTICE* chs. 3-4 (1981) (consolidating and revising my earlier writings on normative economic theory of law).

and answered before.¹² So I can be selective, and at times summary, in my reply.

Misconceptions of My Work

I begin by attempting to correct two misconceptions of my work that some of these critics have. The first is that my primary interest is normative analysis.¹³ It is not. While I find normative issues fascinating, I attach greater significance to my efforts—however incomplete and, some believe, unsuccessful they may be—to understand and explain the legal system. In analyzing the law normatively, one is treading a well-worn path, whereas our knowledge of how the legal system operates is so meager that there is a sense of discovery and adventure in using economics to add to the knowledge.

The second misconception is that my own contribution to the *Hofstra* symposium¹⁴ represents a change in my view of the efficiency theory. Dworkin says that I have narrowed my earlier claim that wealth maximization should guide public policy¹⁵ and he speaks of my “long search for a philosophical basis”¹⁶ for my normative theory and even of my “voyage.”¹⁷ Bebchuk states that I have abandoned my earlier position.¹⁸ Horwitz takes my recent writing on normative economics “as a dramatic sign that the scientific pretensions of the economic analysis of the law are rapidly crumbling.”¹⁹ He adds that

once the ground of debate shifts to social theory—as the cumulative assaults on Posner’s position finally have forced him to acknowledge—it is only a short time before the main attraction of efficiency analysis—the promise of a single “scientific” right answer—will begin to fade into a quaint and nostalgic past.²⁰

12. For earlier criticisms see, e.g., Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); Michelman, *A Comment on Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 307 (1979) (criticizing Posner). And for earlier replies to criticism see, e.g., R. POSNER, *supra* note 8, at § 2.3; R. POSNER, *supra* note 11, chs. 3-4; Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243 (1980); Posner, *supra* note 8, at 287-95, 301-06.

13. See Coleman, *supra* note 3, at 549.

14. See Posner, *supra* note 5.

15. Dworkin, *supra* note 3, at 573.

16. *Id.* at 590.

17. *Id.* at 584.

18. Bebchuk, *supra* note 3, at 688-89.

19. Horwitz, *supra* note 3, at 905 (footnote omitted).

20. *Id.*

And, “[a]fter twenty years of attempting to claim that they stood above ideology in their devotion to science, the practitioners of law-and-economics have finally been forced to come out of the closet and debate ideology with the rest of us.”²¹

These biographical observations are incorrect. I continue to believe that wealth maximization should guide public policy in all spheres. My *Hofstra* article advanced *another* reason why wealth maximization is ethically attractive, a reason that applies with special force to common law adjudication; I expressly declined to abandon my broader position.²² My critics may think that that position is all wrong but I beg them not to represent me as one of them!

Horwitz claims that I began to write on the efficiency theory’s normative aspect because I was reeling under the blows of the critics of my positive theory and that by doing normative analysis, or “social theory” as Horwitz calls it, I demonstrate that my positive theory is at bottom ideological. This is pure conjecture, by someone who knows neither me nor my work well, concerning my motivations and psychology. My “psychohistory” is in any event irrelevant to the validity of either the positive or normative branches of the efficiency theory. Suppose it is true (I doubt that anything could convince Horwitz otherwise) that I am but a shameless apologist for capitalism who promotes the positive theory in order to inculcate capitalist ideology in the guise of science. This would not make the positive theory false or the normative theory unsound.

Criticisms of the Positive Theory

I want to turn now to the more substantial criticisms of the efficiency theory. I shall begin with the positive branch, not because the critics give it more emphasis—they give it less—but in order to underscore my contention that it is the more interesting branch.

Only three of the *Hofstra* authors devote significant attention to the positive theory—Kornhauser, Tullock, and Markovits. Kornhauser, moreover, does not examine the evidence pro and con the theory. He avoids having to do so because (1) he considers only statistical evidence to be empirical,²³ (2) he thinks the positive eco-

21. *Id.* at 912.

22. “I consider [wealth maximization] an attractive objective to guide social choice generally, but do not pursue the argument for that position in this Article.” Posner, *supra* note 5, at 487 n.3.

23. See Kornhauser, *supra* note 3, at 622 n. 70.

economic theory of the common law is solely a theory about the effects of law on behavior and not a theory about the structure or meaning of the rules themselves,²⁴ and (3) he has strong empirical hunches that substitute for evidence. Thus, he thinks it obvious that "judicial proceedings are poorly structured for promoting the goal of wealth maximization"²⁵ (compared to what?, one might ask). He states, without elaboration, that "[a] judicial system designed to effectuate wealth maximization would undoubtedly look significantly different than the current system."²⁶ He accepts without comment Professor Dworkin's argument "that courts are peculiarly able (and required) to decide on principle as opposed to policy,"²⁷ and in the next breath he offers a one-sentence theory of the development of the administrative process.²⁸

Kornhauser's main criticism of the positive economic theory of the common law is methodological. He argues that the economic model that the positive theorists have used to derive empirical implications for legal rules (implications that these theorists then compare with the actual rules in an effort to confirm or refute the model) leaves out important aspects of reality; when they are included, he contends, the model no longer yields the same implications.²⁹ The point is correct, but it is not a good criticism. There is no virtue in complicating a model just to make it more realistic. The more complicated a model is, the less likely it is to yield empirically refutable implications; and a model that is not refutable cannot tell us anything about the world. Kornhauser describes complicated models of accidents but does not tell the reader how they could be used to explain tort law or anything else. I have discussed all this before in a paper that Kornhauser cites, but does not discuss;³⁰ evidently we have reached an impasse, and I will move on.

Tullock's criticism of the positive theory is that the evidence supporting it is weak. To demonstrate this he cites two passages from my book, *Economic Analysis of Law*, and argues that the em-

24. See *id.* at 620 n.68 (misreading Michelman to suggest that this aspect of positive theory is a theory about judicial psychology).

25. *Id.* at 606.

26. *Id.*

27. *Id.* at 607 (footnote omitted).

28. *Id.*

29. See *id.* at 613-27.

30. Posner, *supra* note 8, at 301-04; see Kornhauser, *supra* note 3, at 591 n.2, 606 n.35, 621 n.69.

piricism in these passages is casual,³¹ as indeed it is. The first passage contrasts the common law rule that there is no duty of care to (human) trespassers with the exception requiring railroads to keep a careful lookout for trespassing cattle. The paragraph that follows (not quoted by Tullock) makes the contrast a bit more intelligible. It describes the doctrine of attractive nuisance, which required railroads to fence turntables to keep out child trespassers, and was later extended to other dangerous machinery that was alluring to children. My point was that it makes good economic sense to hold potential injurers to a higher duty of care toward people (or creatures) who cannot take care of themselves than toward those who can. I recognized that in principle both cattle and children could be fenced as an alternative to the railroad's taking greater care. But drawing covertly on my extremely modest experience as the one-time owner of a farm and a slightly more extensive experience as a parent of young children, I suggested that both children and cattle were difficult to fence securely and hence that optimal accident avoidance probably required that some care be taken by the railroad as well as by the owners of cattle and the parents of children. I find this analysis convincing, but it is, as Tullock points out, pretty thin. The book from which it is taken, however, is for the most part a summary of more extensive research published elsewhere,³² so that Tullock is not examining the strongest evidence for the theory. But I admit that much of the underlying research also flunks the demanding standard that Tullock (himself not an empirical economist) has set for the positive theorists.

The second passage from my book that Tullock quotes describes briefly the "last clear chance" doctrine. By virtue of this doctrine, if a train's crew actually saw an adult trespasser on the track, it would be required to try to avoid hitting him. As Tullock correctly points out, the fact that at the moment when the crew discovers the trespasser it can avoid the accident at lower cost than the trespasser can should not be decisive on the question of liability; the railroad's accident-avoidance cost may still be higher than the trespasser's cost of not trespassing in the first place (and so avoiding the accident that way).³³ But in most last-clear-chance

31. See Tullock, *supra* note 3, at 666-68 (discussing R. POSNER, *supra* note 8, § 3.4 at 37, § 6.7 at 129).

32. See, with particular reference to negligence law, Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

33. See Tullock, *supra* note 3, at 666-67. For a more detailed discussion of this

cases the cost of avoidance to the injurer is trivially small; it is the cost of hitting the brakes or ringing the bell. If it were zero, then so long as the cost of avoiding trespassing was positive, however small, efficiency would require that the railroad be held liable. If the railroad's cost of avoidance is close to zero, then, given that many trespasses are done inadvertently or enable the trespasser to save some time at little or no cost to the owner of the land, probably the common law approach is efficient.

Analyzed thus, the doctrine of last clear chance is a device for comparing the injurer's and victim's accident-avoidance costs. It is perhaps a crude device, but it does serve to mitigate what would otherwise be a potentially serious problem with the common law negligence approach. The problem arises when a victim is barred from recovering damages on the ground that the costs to him of avoiding the accident were lower than the expected accident costs (because the victim was careless or because he was a trespasser), even though they were greater than the injurer's costs of avoidance.³⁴

Tullock remarks that if the railroad crew has to keep a sharp lookout for cattle on the tracks, it is bound to see the human trespasser as well, so there will never be a case of inadvertently running down a trespasser.³⁵ This is incorrect. When the crew sees a trespasser on the track, it usually can assume that the train's noise will cause him to get off or, if not, that blowing the whistle or ringing the bell will do the trick. Trespassers who are deaf are sometimes killed as a result, but so long as the crew doesn't know they are deaf there is no liability even if the train was speeding.

Tullock also states (here lapsing into a bit of casual empiricism himself) that he has "great difficulty imagining an attorney arguing to a jury that the railroad is not liable for hitting the plaintiff because the engineer, drunk perhaps, was not watching where the train was going."³⁶ I do not know of a case involving a drunken engineer; but the settled principle of the American common law is that antecedent negligence does not provide a basis for recovery of damages by a trespasser. If the engineer is helpless to avert the ac-

point, see Wittman, *Optimal Pricing of Sequential Inputs: Last Clear Chance, Mitigation of Damages, and Related Doctrines in the Law*, 10 J. LEGAL STUD. 65 (1981).

34. See R. POSNER, *supra* note 8, § 6.3.

35. Tullock, *supra* note 3, at 667.

36. *Id.*

cident because the train's brakes are defective, the trespasser cannot invoke the last-clear-chance doctrine and recover damages.³⁷

Markovits, in his discussion of the positive economic theory of the common law, makes the surprising assertion that unless the positive theorists show why the common law is efficient, the theory cannot "explain or help us to understand anything."³⁸ In other words, we can have no knowledge of a subject until our knowledge is complete. But, as is well known, Newton developed the law of universal gravitation without knowing what gravity was:

Some of Newton's contemporaries were so troubled by the idea of an attractive force acting at a distance that they could not begin to explore its properties, and they found it difficult to accept the Newtonian physics. They could not go along with Newton when he said he had not been able to explain how gravity works but that "it is enough that gravity really exists and suffices to explain the phenomena of the heavens and the tides."³⁹

Markovits also challenges the evidence for the positive economic theory of the common law, and this to me is the most interesting part of his article. But his discussion has a curious warp to it. He states that the evidentiary question is whether "the Hand negligence formula accurately represents the governing standards of the common law of torts."⁴⁰ But the positive economic theory of tort law does not predict that the Hand formula will be used to resolve every accident case. An important task of that theory is in fact to explain why tort law sometimes uses negligence (the standard summarized by the Hand formula) as the standard of liability and sometimes uses strict liability instead.⁴¹ Markovits points out—having, it seems, rediscovered a point already in the economic literature on torts⁴²—that where an accident is avoidable at lowest cost by a change in the nature or amount of the activity giving rise to the accident rather than by taking greater care, strict liability may be the economically superior liability standard to negli-

37. See *Andersen v. Bingham & Garfield Ry. Co.*, 117 Utah 197, 214 P.2d 607 (1950).

38. Markovits, *supra* note 3, at 848.

39. Cohen, *Newton's Discovery of Gravity*, SCIENTIFIC AM., Mar. 1981, at 166, 178 (quoting I. NEWTON, PHILOSOPHIAE NATURALIS PRINCIPIA MATHEMATICA (1686)).

40. Markovits, *supra* note 3, at 829.

41. See R. POSNER, *supra* note 8, § 6.11 at 140-41; Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 24 (1980).

42. Markovits, *supra* note 3, at 846-47; see Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 208-09 (1973); Shavell, *supra* note 41.

gence. The point is correct and invites a test of the positive theory that involves determining whether strict liability is the standard used when optimal accident avoidance requires that the potential injurer alter the nature or amount of his activity. Markovits does not attempt this test but it has been attempted by others,⁴³ and it provides some support for the positive theory.

Markovits argues that strict liability probably is always allocatively superior to negligence.⁴⁴ By shifting the cost of unavoidable accidents (unavoidable in the economic, not necessarily the literal, sense) from victim to injurer, strict liability does provide the injurer with the proper incentive to consider changes in the nature or amount of his activity, as negligence does not. But it leaves the victim with an inadequate incentive to adjust his own activity—a problem that the negligence standard avoids. The distortion introduced by strict liability is thus symmetrical to that brought about by the negligence standard, and prevents one from judging strict liability to be a priori the superior standard even on narrow allocative grounds.⁴⁵ But it is in any event improper to consider only the effect of a liability rule on the incentive to avoid accidents, and ignore the costs of administering the rule. Where unavoidable accidents are a high proportion of all accidents, strict liability has the disadvantage of requiring more extensive legal intervention (to redistribute losses caused by such accidents) than a negligence system would.

Markovits' acquaintance with tort law is no more extensive than his acquaintance with the economic literature on tort law. Rather than doing his own research on tort law, he relies on what unnamed "experts" told him about how the law is interpreted in the cases.⁴⁶ He treats the reasonable-man rule of negligence law as an alternative basis of liability to the Hand formula,⁴⁷ which it is not; it is a method of limiting the scope of inquiry under the Hand formula.⁴⁸ And he dismisses the law of nuisance by announcing summarily that "[t]he common law of nuisance is such a mess that I hesitate to say whether the Hand formula has prevailed under the nuisance rubric"⁴⁹

43. See authorities cited note 41 *supra*.

44. Markovits, *supra* note 3, at 847.

45. See Posner, *supra* note 42, at 209.

46. Markovits, *supra* note 3, at 831-32.

47. See *id.* at 831.

48. See R. POSNER, *supra* note 8, § 6.4.

49. Markovits, *supra* note 3, at 833 n.30.

Criticisms of the Normative Theory

Let me turn now to the criticisms of the normative branch of the efficiency theory. The critics I shall discuss are Coleman, Dworkin, Kornhauser, Bebchuk, Markovits, and Baker.

Coleman and Kornhauser argue that wealth maximization cannot be an ethically attractive system because it depends on prices.⁵⁰ The wealth of society (in their view) is the sum of the outputs of all goods and services, weighted by their prices. Therefore, they argue, it might be increased by actually destroying valuable goods (if the price increase due to the resulting scarcity was greater than the reduction in the quantity demanded of the goods—*i.e.*, if the demand for the goods was inelastic) or by monopolizing markets. But their definition of social wealth is incorrect. It leaves out consumer and producer surplus. When these are included, as they are whenever economists talk about the wealth of the society, it becomes clear that monopolizing a market or destroying valuable resources reduces the total wealth of the society.⁵¹

The heavy reliance that economists place on prices in analyzing the economic system reflects the utility of price as a measurement device. The link between wealth and price is thus practical rather than theoretical. At the theoretical level (and increasingly the practical as well, as economists' empirical tools become more refined), shadow prices—for example, the price of leisure, which can be inferred from a person's decision not to work longer hours at market wages—enter into the calculation of wealth. So does consumer surplus, which is a measure of value based on the hypothetical prices that a perfectly price-discriminating monopolist would charge consumers.

Coleman also argues that the wealth-maximization criterion is circular, because changes in the distribution of wealth can alter prices (by altering the demands for different goods), which in turn can change the wealth-maximizing allocation of resources.⁵² This point—that prices affect incomes affect prices—has been made and answered a number of times,⁵³ but is so persistent as perhaps to deserve further consideration. The point is theoretically correct; it is its empirical importance that is at issue. A marginal change in public policy—even so important a change, to the legal system, as

50. Coleman, *supra* note 3, at 523-24; Kornhauser, *supra* note 3, at 596-97.

51. See R. POSNER, *supra* note 11, at 60.

52. See Coleman, *supra* note 3, at 525-26.

53. See, *e.g.*, R. POSNER, *supra* note 11, at 109, 111-12.

moving from negligence to strict, or to no, liability—would be unlikely to have so large an effect on prices as to require reversing the policy, thereby setting off the endless cycle that Coleman fears. Even with fundamental policy changes—abolishing private property, for example—it is often possible to compare the wealth of the society before and after, or with other societies, albeit many prices are changed by the policy. The Soviet Union has a very different property system from our own, but few doubt that one can legitimately and accurately pronounce Soviet society poorer than ours. The burden should be on those who make the theoretical point to demonstrate its empirical significance.

Both Coleman and Dworkin take issue with my use of the principle of consent⁵⁴ to justify basing common law rules on wealth maximization.⁵⁵ The dispute is terminological. Perhaps I am using the word “consent” in a rather strained sense when I say that if one enters a lottery and loses, one has consented to the loss. But, as Dworkin notes in a partial retraction of this criticism of my position, we could alter my sentence to read “I consent to having a lottery decide whether I lose or gain a particular sum of money,”⁵⁶ without affecting the substance of my argument. Dworkin elsewhere renames my principle of consent the “antecedent-interest principle,”⁵⁷ which I also accept. But Sager, in his *Hofstra* article, discusses the “welfare-registration aspect of consent, the force of which depends upon the perceived relationship between the act of consent, the preferences, and, ultimately, the well-being of the consenting individual.”⁵⁸ So perhaps I used the term correctly after all!

Coleman also makes a substantive allegation about the principle of consent, that it would legitimize all sorts of wealth-minimizing activities. It implies, he thinks, that if one lives in a dangerous neighborhood one consents to being burglarized from time to time because one is compensated *ex ante* for the occasional burglary by having a lower cost of housing.⁵⁹ But Coleman does not have a consistent view of what it is that is being consented to. In the burglary case, it would be improper for the victim to com-

54. R. POSNER, *supra* note 11, at 92-103. Posner, *supra* note 5, at 491-502.

55. Coleman, *supra* note 3, at 534-40; Dworkin, *supra* note 3, at 573-90.

56. See Dworkin, *Correspondence*, 9 HOFSTRA L. REV. 335, 335 (1980).

57. Dworkin, *supra* note 3, at 584.

58. Sager, *Pareto Superiority, Consent, and Justice*, 8 HOFSTRA L. REV. 913, 930 (1980) (emphasis in original).

59. Coleman, *supra* note 3, at 536-37 n.45.

plain to his landlord that the rent was too high given the danger of crime; by assumption, that danger is already reflected in the rent. But it would not be improper for the victim to complain to the burglar, for the victim did not consent to having people burglarize him. It is different in the accident context, which I discussed in my contribution to the symposium. I assumed that a system in which victims are not compensated for unavoidable accidents was cheaper than one where they were so compensated—and cheaper for potential victims as well as for potential injurers.⁶⁰ If so, a person should not be heard to complain if he is injured in such an accident, and not compensated; no wrong has been committed. But burglary is a wrong, so long as punishing burglary is deemed preferable to abolishing the criminal law and remitting people to exclusive reliance on their own resources of self-protection and insurance.

Coleman is puzzled that in applying the principle of consent I depart from John Rawls' "veil of ignorance" assumption.⁶¹ Consistently with the emphasis in wealth maximization on producing things that other people want and will pay for, I do not see why the unproductive members of society—the people who demand to be supported by the productive members of the society—should be consulted in the design of social institutions. I admit, however, and this is the real force of Coleman's argument, that in using this distinction as a reason against adopting Rawls' approach I went outside the principle of consent to help justify wealth maximization. But I am not convinced that this makes much difference to my argument. If one dons the veil of ignorance but then assumes that people in the original position would choose to maximize expected utility rather than, less plausibly, the utility of the worst-off members of society, one is likely to end up with the system of common law rights and duties that maximizes wealth.⁶²

Coleman's culminating argument against the normative economic theory of the common law proceeds from the observation, which is correct, that proponents of the theory think that the common law's proper role is to "mimic" the market (in cases where the costs of market transactions are prohibitive), that is, to try to bring about the same allocation of resources that the market would bring about if it could be made to work. But, Coleman argues, the mar-

60. Posner, *supra* note 5, at 493.

61. Coleman, *supra* note 3, at 539 n.49; see J. RAWLS, A THEORY OF JUSTICE 136-42 (1971).

62. Posner, *supra* note 5, at 498.

ket has two aspects, only one of which the common law mimics.⁶³ The market is a method of promoting efficiency, but also a locus of autonomous exchange. The common law lacks the second feature of the market, autonomous exchange, because often no compensation is paid to the loser in the forced exchange regulated by the law (*e.g.*, to the victim of an unavoidable accident). Lacking the compensatory aspect of the market, the common law also fails to duplicate the market's efficiency-enhancing role, since without compensation there is no assurance that a transaction is a Pareto improvement. Coleman concludes that the wealth maximizer's mimic-the-market approach derives support from neither utilitarianism nor libertarianism.⁶⁴

It derives support from both. If markets are assumed to promote aggregate utility, as Coleman concedes for purposes of this argument, then the compensation of losers cannot be a condition of efficiency. For there are *ex post* losers in the market just as there are in the activities that the common law regulates. For example, if demands change, you may find that your human capital—your earning power—has been wiped out completely, and you will receive no compensation *ex post*. Likewise, if you are driven out of business by a more efficient competitor or driven out of the labor market by automation you will not be compensated *ex post*. If, then, risk of uncompensated loss is accepted as part of the market system, why isn't it equally acceptable as part of the common law's regulation designed to make the market work better?

As for liberty, it is difficult to understand what Coleman means by a "free" but inefficient market. Suppose that, because there is no common law or statutory regulation of pollution, firm *A*, in making automobiles for sale to *B*, increases the cost to *C* of producing milk for sale to *D*. Is the market more or less free if the common law forces *A* to take account of the costs to *C* in its price to *B*? Probably more free, because the term liberty as usually understood does not include the right to harm other people in pursuit of one's own ends. Both liberty and efficiency are enhanced by the proper kind and amount of regulation and in particular by the common law regulation that is necessary to make the market work.

There is another puzzle in Coleman's attempt to distinguish the market itself from the common law regulation of it. It is very

63. Coleman, *supra* note 3, at 541-42.

64. *Id.* at 540-45. A similar argument appears in Weinrib, *Utilitarianism, Economics, and Legal Theory*, 30 U. TORONTO L.J. 307, 320-25 (1980).

difficult to think about the market apart from the property rights, tort-liability rules, and contractual-enforcement provisions by which the common law regulates the market. In particular, if there were no property rights, and no tort or criminal laws to deter invasions of them, it would be difficult to see how the market would work at all. So when Coleman discusses "the market," he presumably has in mind some background of legal rules by which a market is enabled to function. He does not explain, however, what background he has in mind and wherein it differs from the common law as we know it.

The other criticisms of wealth maximization in the symposium articles relate to the principle's specific policy consequences. Kornhauser says that wealth maximization requires that indolent people be forced to work hard and that people who are not productive be killed.⁶⁵ This is incorrect. If a person chooses not to work harder than he is doing, it means that he is unwilling to sell additional time at the market price. If so, wealth is maximized by his not working harder. If he could sell an additional hour of time in the market for \$10, then he incurs an opportunity cost of \$10 (I am ignoring the complications introduced by the fact that the real but nonpecuniary income people derive from leisure is not taxed) when he decides not to work the additional hour. In effect he buys time from the market for \$10, and he does so because the time is worth more to him as a source of leisure than it is to the market. The wealth of society (which includes his wealth) would therefore be reduced by a forced reallocation of his time to the market.⁶⁶ Kornhauser is making the same mistake here that he did when he said that monopolizing might increase wealth: He is limiting the concept of wealth or value to explicit prices. (Perhaps he mistook my point that an indolent person contributes less wealth to the rest of society than a hard-working person⁶⁷ for a statement, which

65. See Kornhauser, *supra* note 3, at 602-03.

66. There is a possible exception to this point, which Kornhauser does not discuss. Suppose that the total value of a person's labor in the market exceeds its marginal value, but he cannot capture that total value; he is paid only his marginal product. He can, however, capture the total value of his leisure time. In that event, because the total value of his leisure time might be less than the total, though greater than the marginal, value of reallocating that time to the market, the wealth of society might be greater if he were forced to work. But the costs of outright coercion would probably exceed the allocative gain; this may be an area where inculcation of values—the work ethic—is a more cost-effective form of regulation than the law.

67. See Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 135 (1979).

would be incorrect in general, that forcing the indolent person to work would increase the total wealth of society.) As for killing the nonproductive, it is true that I do not think there is a broad social duty to support people who cannot or will not support themselves. Some nonproductive people might therefore starve in a system guided by wealth maximization.⁶⁸ But it does not follow that there is any ground for using real resources to kill the nonproductive. At best, those resources would have no positive social product; they would have a negative product if the nonproductive can get by on charity.

Baker and Bebchuk provide additional examples where wealth maximization seems to lead to intolerable or grotesque results. Baker accepts the argument that slavery is generally less efficient than freedom, but thinks it would be more efficient if the slave owner derived utility from the fact of domination itself.⁶⁹ This example illustrates an interesting set of cases where the utility of a forced exchange inheres in part in the fact that it is forced. (Another example⁷⁰ is rape—the rapist's pleasure may be enhanced by the coercion involved.) But the pleasures of domination are ruled out by the wealth-maximization criterion itself because the criterion authorizes coercion only where it is necessary to overcome high transaction costs that prevent a voluntary negotiation from taking place. If the slave owner cannot purchase the slave's consent to be a slave, or the rapist his victim's consent to sexual relations, this is a failure to pay the market price rather than a market failure.

Bebchuk gives the example of the poor woman whom a wealthy man desires as a sexual partner.⁷¹ Bebchuk argues that if the right to her person is assigned initially to the man, she may not be able to buy it back because she does not have good market skills or opportunities (that is what is meant by saying that she is poor). But if the right is assigned to her, presumably she will not sell it to the man. Bebchuk concludes that the wealth-maximization criterion does not lead to a determinate assignment of rights in this

68. There are, however, several grounds for public support of the poor that are consistent with wealth maximization. *See id.* at 131. It is unlikely that poor people would starve in a wealthy society dedicated to wealth maximization. But they might well starve in a poor society, regardless of its ruling ethic—and a society that rejects wealth maximization is more likely to be poor than one that embraces it.

69. Baker, *supra* note 3, at 952.

70. *See* Schwartz, *Economics, Wealth Distribution, and Justice*, 1979 Wis. L. Rev. 799, 806.

71. Bebchuk, *supra* note 3, at 688.

case and that one of the assignments that is consistent with that criterion is monstrous. But he has failed to think through his example. Suppose the woman is assigned the right to her person initially. What will she do? By assumption, it is her only asset. She has to exchange it for something in order to live. Presumably she will marry some rich man (at least rich relative to her). The only question is which one? Bebachuk apparently believes that since she has no marketable assets she will not be able to buy her way out of an unhappy marriage, in which event whom she marries will depend on whether she, or a man, is initially assigned the right to her person. Such reasoning confuses economic value with explicit prices. A woman who does not work in the market (which is to say, until recently, most women) is not unproductive; her product is simply household rather than market commodities. She will be less productive in some households than in others; if she hates her husband, or if he treats her like a chattel, she will be less productive, just as the slave will be less productive than the free man. This is an economic argument for having a "marriage market," formal or informal, rather than just randomly assigning poor women to rich men. But even if random assignment is used initially, the Coase Theorem implies that there will be a subsequent reassignment of women so as to maximize their household production, provided some form of marriage market is allowed to operate. The amount of reshuffling of marriage partners can be reduced, however, and resources thereby conserved, by giving women (or their families, in a society where women cannot enforce rights on their own behalf effectively) the exclusive right to their own person in the first place. The economic argument for this assignment of rights is compelling.⁷² There is no indeterminacy of rights assignments.

Bebchuk uses the example of the rich man and the poor woman to make the broader argument that wealth maximization systematically favors the rich. The argument is that where the initial assignment of rights is based on willingness to pay, the rich are likely to be assigned the lion's share of the rights.⁷³ The distributive effects of wealth maximization are in fact complex. No matter what resources a person starts with, he cannot use them to

72. For a discussion of the economics of the marriage market, see G. BECKER, *A Theory of Marriage*, in *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 205 (1976). For a discussion of that market in primitive societies, see Posner, *supra* note 7, at 36-42.

73. See Bebachuk, *supra* note 3, at 684.

maximize his utility without offering other people advantageous trades, a process with a built-in redistributive effect. In time, even a great magnate's wealth will be small relative to that of groups of poorer people against whom he must compete for scarce resources. This point is suggested by Bebchuk's own example of mink breeding.⁷⁴ He argues that even if the breeder is himself poor, the wealth of his customers will enable him to bid away resources from producers who are serving poorer customers. Yet mink breeding is a tiny industry, and one that has fared poorly in its collisions with other industries whose customers are much poorer than the people who buy mink coats. For example, despite the well-known effects of loud noises on the mink's young, mink breeders are rarely awarded damages for losses due to noise.⁷⁵

But if all Bebchuk is really saying is that wealth maximization does not posit income equality as a social goal, he is correct. He is also correct in pointing out the unlikelihood that everyone is better off as a result of negligence liability for automobile accidents even if it is true that negligence is a more efficient liability rule in this instance than strict liability would be.⁷⁶ This is not to say, however, as Markovits suggests, that wealth maximization does not assign distributional weights to the gains and losses of the people affected by the criterion.⁷⁷ The distributional weight assigned is one for both groups.

Markovits, finally, points out that it is not the case that the patent system necessarily undercompensates the successful inventor by limiting the term of the patent (an example I used in arguing that wealth maximization automatically redistributes a certain amount of the successful people's wealth in the society to the less well off).⁷⁸ The patent system may actually overcompensate an inventor, by giving him the total market value of the invention for seventeen years even though his contribution may just have been to bring the product or process to market a few days before some competing inventor. The point is correct, but does not refute the production-for-others aspect of wealth maximization. First, it shows only that the present patent system may not be the wealth-

74. *See id.*

75. *See* *Gronn v. Rogers Constr., Inc.*, 221 Or. 226, 350 P.2d 1086 (1960); *Madsen v. East Jordan Irr. Co.*, 101 Utah 552, 125 P.2d 794 (1942); *Foster v. Preston Mill Co.*, 44 Wash. 2d 440, 268 P.2d 645 (1954).

76. *See* *Bebchuk*, *supra* note 3, at 674.

77. *See* *Markovits*, *supra* note 3, at 815.

78. *See id.* at 870-71.

maximizing one. Second, and more important, even if the first inventor is overcompensated, inventors as a class are not. The first inventor captures the marginal product of the whole group's efforts. He is overcompensated but the group as a whole is undercompensated because of the seventeen-year term and the infeasibility of perfect-price discrimination. There is still consumer surplus from the invention.