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The Economic Approach to Law

The most ambitious and probably the most influential effort in recent years to elaborate an overarching concept of justice that will both explain judicial decision making and place it on an objective basis is that of scholars working in the interdisciplinary field of "law and economics," as economic analysis of law is usually called.[1] I am first going to describe the most ambitious version of this ambitious effort and then use philosophy to chip away at it and see what if anything is left standing.

The Approach

The basic assumption of economics that guides the version of economic analysis of law that I shall be presenting is that people are rational maximizers of their satisfactions—*all* people (with the exception of small children and the profoundly retarded) in *all* of their activities (except when under the influence of psychosis or similarly deranged through drug or alcohol abuse) that involve choice. Because this definition embraces the criminal deciding whether to commit another crime, the litigant deciding whether to settle or litigate a case, the legislator deciding whether to vote for or against a bill, the judge deciding how to cast his vote in a case, the party to a contract deciding whether to break it, the driver deciding how fast to drive, and the pedestrian deciding how bold-

1. The literature is vast; for diverse viewpoints, see *The Economic Approach to Law* (Paul Burrows and Cento G. Veljanovski eds. 1981); Robert Cooter and Thomas Ulen, *Law and Economics* (1988); Mark Kelman, *A Guide to Critical Legal Studies*, chs. 4–5 (1987); A. Mitchell Polinsky, *An Introduction to Law and Economics* (2d ed. 1989); Steven Shavell, *Economic Analysis of Accident Law* (1987); "Symposium: The Place of Economics in Legal Education," 33 *Journal of Legal Education* 183 (1983); and my book *Economic Analysis of Law* (3d ed. 1986).

ly to cross the street, as well as the usual economic actors, such as businessmen and consumers, it is apparent that most activities either regulated by or occurring within the legal system are grist for the economic analyst's mill. It should go without saying that nonmonetary as well as monetary satisfactions enter into the individual's calculus of maximizing (indeed, money for most people is a means rather than an end) and that decisions, to be rational, need not be well thought out at the conscious level—indeed, need not be conscious at all. Recall that "rational" denotes suiting means to ends, rather than mulling things over, and that much of our knowledge is tacit.

Since my interest is in legal doctrines and institutions, it will be best to begin at the legislative (including the constitutional) level. I assume that legislators are rational maximizers of their satisfactions just like everyone else. Thus nothing they do is motivated by the public interest as such. But they want to be elected and reelected, and they need money to wage an effective campaign. This money is more likely to be forthcoming from well-organized groups than from unorganized individuals. The rational individual knows that his contribution is unlikely to make a difference; for this reason and also because voters in most elections are voting for candidates rather than policies, which further weakens the link between casting one's vote and obtaining one's preferred policy, the rational individual will have little incentive to invest time and effort in deciding whom to vote for. Only an organized group of individuals (or firms or other organizations—but these are just conduits for individuals) will be able to overcome the informational and free-rider problems that plague collective action.[2] But such a group will not organize and act effectively unless its members have much to gain or much to lose from specific policies, as tobacco farmers, for example, have much to gain from federal subsidies for growing tobacco and much to lose from the withdrawal of those subsidies. The basic tactic of an interest group is to trade the votes of its members and its financial support to candidates in exchange for an implied promise of favorable legislation. Such legislation will normally take the form of a statute transferring wealth from unorganized taxpayers (for example, consumers) to the interest group. If the target were another interest group, the legislative transfer might

2. A free rider is someone who derives a benefit without contributing to the cost of creating the benefit. For example, even if A and B both favor the enactment of a statute, X, each will prefer the other to invest what is necessary in getting X enacted, since the benefit of X to A or to B will be the same whether or not he contributes to the cost of obtaining it. In Chapter 11 I gave national defense as an example of an activity that would encounter severe free-rider problems if provided privately.

be effectively opposed. The unorganized are unlikely to mount effective opposition, and it is their wealth, therefore, that typically is transferred to interest groups.

On this view, a statute is a deal (recall the "deals" theory of legislation in Chapter 9). But because of the costs of transactions within a multiheaded legislative body, and the costs of effective communication through time, legislation does not spring full-grown from the head of the legislature; it needs interpretation and application, and this is the role of the courts. They are agents of the legislature. But to impart credibility and durability to the deals the legislature strikes with interest groups, courts must be able to resist the wishes of current legislators who want to undo their predecessors' deals yet cannot do so through repeal because the costs of passing legislation (whether original or amended) are so high, and who might therefore look to the courts for a repealing "interpretation." The impediments to legislation actually facilitate rather than retard the striking of deals, by giving interest groups some assurance that a deal struck with the legislature will not promptly be undone by repeal. An independent judiciary is one of the impediments.

Judicial independence makes the judges imperfect agents of the legislature. This is tolerable not only for the reason just mentioned but also because an independent judiciary is necessary for the resolution of ordinary disputes in a way that will encourage trade, travel, freedom of action, and other highly valued activities or conditions and will minimize the expenditure of resources on influencing governmental action. Legislators might appear to have little to gain from these widely diffused rule-of-law virtues. But if the aggregate benefits from a particular social policy are very large and no interest group's ox is gored, legislators may find it in their own interest to support the policy. Voters understand in a rough way the benefits to them of national defense, crime control, dispute settlement, and the other elements of the night watchman state, and they will not vote for legislators who refuse to provide these basic public services. It is only when those services are in place, and when (usually later) effective means of taxation and redistribution develop, that the formation of narrow interest groups and the extraction by them of transfers from unorganized groups become feasible.

The judges thus have a dual role: to interpret the interest-group deals embodied in legislation and to provide the basic public service of authoritative dispute resolution. They perform the latter function not only by deciding cases in accordance with preexisting norms, but also—especially in the Anglo-American legal system—by elaborating those norms. They fashioned the common law out of customary practices,

out of ideas borrowed from statutes and from other legal systems (for example, Roman law), and out of their own conceptions of public policy. The law they created exhibits, according to the economic theory that I am expounding, a remarkable (although not total—remember the extension of the rule of capture to oil and gas) substantive consistency. It is as if the judges *wanted* to adopt the rules, procedures, and case outcomes that would maximize society's wealth.

I must pause to define "wealth maximization," a term often misunderstood. The "wealth" in "wealth maximization" refers to the sum of all tangible and intangible goods and services, weighted by prices of two sorts: offer prices (what people are willing to pay for goods they do not already own); and asking prices (what people demand to sell what they do own). If A would be willing to pay up to $100 for B's stamp collection, it is worth $100 to A. If B would be willing to sell the stamp collection for any price above $90, it is worth $90 to B. So if B sells the stamp collection to A (say for $100, but the analysis is qualitatively unaffected at any price between $90 and $100—and it is only in that range that a transaction will occur), the wealth of society will rise by $10. Before the transaction A had $100 in cash and B had a stamp collection worth $90 (a total of $190); after the transaction A has a stamp collection worth $100 and B has $100 in cash (a total of $200). The transaction will not raise measured wealth—gross national product, national income, or whatever—by $10; it will not raise it at all unless the transaction is recorded, and if it is recorded it is likely to raise measured wealth by the full $100 purchase price. But the real addition to social wealth consists of the $10 increment in *nonpecuniary* satisfaction that A derives from the purchase, compared with that of B. This shows that "wealth" in the economist's sense is not a simple monetary measure, and explains why it is a fallacy (the Earl of Lauderdale's fallacy) to think that wealth would be maximized by encouraging the charging of monopoly prices. The wealth of producers would increase but that of consumers would diminish—and actually by a greater amount, since monopoly pricing will induce some consumers to switch to goods that cost society more to produce but, being priced at a competitive rather than a monopoly price, appear to the consumer to be cheaper. The fallacy thus lies in equating business income to social wealth.[3]

Similarly, if I am given a choice between remaining in a job in which I work forty hours a week for $1,000 and switching to a job in which I

3. On these and other technical details of wealth maximization, see my article "Wealth Maximization Revisited," 2 *Notre Dame Journal of Law, Ethics, and Public Policy* 85 (1985).

would work thirty hours for $500, and I decide to make the switch, the extra ten hours of leisure must be worth at least $500 to me, yet GNP will fall when I reduce my hours of work. Suppose the extra hours of leisure are worth $600 to me, so that my full income rises from $1,000 to $1,100 when I reduce my hours. My former employer presumably is made worse off by my leaving (else why did he employ me?), but not more than $100 worse off; for if he were, he would offer to pay me a shade over $1,100 a week to stay—and I would stay. (The example abstracts from income tax.)

Wealth is *related* to money, in that a desire not backed by ability to pay has no standing—such a desire is neither an offer price nor an asking price. I may desperately desire a BMW, but if I am unwilling or unable to pay its purchase price, society's wealth would not be increased by transferring the BMW from its present owner to me. Abandon this essential constraint (an important distinction, also, between wealth maximization and utilitarianism—for I might derive greater utility from the BMW than its present owner or anyone else to whom he might sell the car), and the way is open to tolerating the crimes committed by the passionate and the avaricious against the cold and the frugal.

The common law facilitates wealth-maximizing transactions in a variety of ways. It recognizes property rights, and these facilitate exchange. It also protects property rights, through tort and criminal law. (Although today criminal law is almost entirely statutory, the basic criminal protections—for example, those against murder, assault, rape, and theft—have, as one might expect, common law origins.) Through contract law it protects the process of exchange. And it establishes procedural rules for resolving disputes in these various fields as efficiently as possible.

The illustrations given thus far of wealth-maximizing transactions have been of transactions that are voluntary in the strict sense of making everyone affected by them better off, or at least no worse off. Every transaction has been assumed to affect just two parties, each of whom has been made better off by it. Such a transaction is said to be Pareto superior, but Pareto superiority is not a necessary condition for a transaction to be wealth maximizing. Consider an accident that inflicts a cost of $100 with a probability of .01 and that would have cost $3 to avoid. The accident is a wealth-maximizing "transaction" (recall Aristotle's distinction between voluntary and involuntary transactions) because the expected accident cost ($1) is less than the cost of avoidance. (I am assuming risk neutrality. Risk aversion would complicate the analysis but not change it fundamentally.) It is wealth maximizing even if the

victim is not compensated. The result is consistent with Learned Hand's formula, which defines negligence as the failure to take cost-justified precautions. If the only precaution that would have averted the accident is not cost-justified, the failure to take it is not negligent and the injurer will not have to compensate the victim for the costs of the accident.

If it seems artificial to speak of the accident as the transaction, consider instead the potential transaction that consists of purchasing the safety measure that would have avoided the accident. Since a potential victim would not pay $3 to avoid an expected accident cost of $1, his offer price will be less than the potential injurer's asking price and the transaction will not be wealth maximizing. But if these figures were reversed—if an expected accident cost of $3 could be averted at a cost of $1—the transaction would be wealth maximizing, and a liability rule administered in accordance with the Hand formula would give potential injurers an incentive to take the measures that potential victims would pay them to take if voluntary transactions were feasible. The law would be overcoming transaction-cost obstacles to wealth-maximizing transactions—a frequent office of liability rules.

The wealth-maximizing properties of common law rules have been elucidated at considerable length in the literature of the economic analysis of law.[4] Such doctrines as conspiracy, general average (admiralty), contributory negligence, equitable servitudes, employment at will, the standard for granting preliminary injunctions, entrapment, the contract defense of impossibility, the collateral-benefits rule, the expectation measure of damages, assumption of risk, attempt, invasion of privacy, wrongful interference with contract rights, the availability of punitive damages in some cases but not others, privilege in the law of evidence, official immunity, and the doctrine of moral consideration have been found—at least by some contributors to this literature—to conform to the dictates of wealth maximization. (And recall the discussion of the fellow-servant rule, and of competition as a tort, in Chapter 8.) It has even been argued that the system of precedent itself has an economic equilibrium. Precedents are created as a by-product of litigation. The greater the number of recent precedents in an area, the lower the rate of litigation will be. In particular, cases involving disputes over legal as distinct from purely factual issues will be settled. The existence of abundant, highly informative (in part because recent) precedents will enable the parties to legal disputes to form more convergent estimates of the

4. See *Economic Analysis of Law*, note 1 above, pt. 2 and ch. 21; William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* (1987).

likely outcome of a trial, and as noted in previous chapters, if both parties agree on the outcome of trial they will settle beforehand because a trial is more costly than a settlement. But with less litigation, fewer new precedents will be produced, and the existing precedents will obsolesce as changing circumstances render them less apt and informative. So the rate of litigation will rise, producing more precedents and thereby causing the rate of litigation again to fall.

This analysis does not explain what drives judges to decide common law cases in accordance with the dictates of wealth maximization. Prosperity, however, which wealth maximization measures more sensitively than purely monetary measures such as GNP, is a relatively uncontroversial policy, and most judges try to steer clear of controversy: their age, method of compensation, and relative weakness vis-à-vis the other branches of government make the avoidance of controversy attractive. It probably is no accident, therefore, that many common law doctrines assumed their modern form in the nineteenth century, when laissez-faire ideology, which resembles wealth maximization, had a strong hold on the Anglo-American judicial imagination; Shaw's opinion in the *Farwell* case (Chapter 8) is a good example.

It may be objected that in assigning ideology as a cause of judicial behavior, the economist strays outside the boundaries of his discipline; but he need not rest on ideology. The economic analysis of legislation implies that fields of law left to the judges to elaborate, such as the common law fields, must be the ones in which interest-group pressures are too weak to deflect the legislature from pursuing goals that are in the general interest. Prosperity is one of these goals, and one that judges are especially well equipped to promote. The rules of the common law that they promulgate attach prices to socially undesirable conduct, whether free riding or imposing social costs without corresponding benefits.[5] By doing this the rules create incentives to avoid such conduct, and these incentives foster prosperity. In contrast, judges can, despite appearances, do little to redistribute wealth. A rule that makes it easy for poor tenants to break leases with rich landlords, for example, will induce landlords to raise rents in order to offset the costs that such a rule imposes, and tenants will bear the brunt of these higher costs. Indeed, the principal redistribution accomplished by such a rule may be from

5. Such imposition is well illustrated by acquisitive crimes: the time and money spent by the thief in trying to commit thefts and the property owner in trying to prevent them have no social product, for they are expended merely in order to bring about, or to prevent, a redistribution of wealth. Overall wealth decreases, as in the case of monopoly, discussed earlier.

the prudent, responsible tenant, who may derive little or no benefit from having additional legal rights to use against landlords—rights that enable a tenant to avoid or postpone eviction for nonpayment of rental—to the feckless tenant. That is a capricious redistribution. Legislatures, however, have by virtue of their taxing and spending powers powerful tools for redistributing wealth. So an efficient division of labor between the legislative and judicial branches has the legislative branch concentrate on catering to interest-group demands for wealth distribution and the judicial branch on meeting the broad-based social demand for efficient rules governing safety, property, and transactions. Although there are other possible goals of judicial action besides efficiency and redistribution, many of these (various conceptions of "fairness" and "justice") are labels for wealth maximization,[6] or for redistribution in favor of powerful interest groups; or else they are too controversial in a heterogeneous society, too ad hoc, or insufficiently developed to provide judges who desire a reputation for objectivity and disinterest with adequate grounds for their decisions.

Finally, even if judges have little commitment to efficiency, their inefficient decisions will, by definition, impose greater social costs than their efficient ones will. As a result, losers of cases decided mistakenly from an economic standpoint will have a greater incentive, on average, to press for correction through appeal, new litigation, or legislative action than losers of cases decided soundly from an economic standpoint—so there will be a steady pressure for efficient results. Moreover, cases litigated under inefficient rules tend to involve larger stakes than cases litigated under efficient rules (for the inefficient rules, by definition, generate social waste), and the larger the stakes in a dispute the likelier it is to be litigated rather than settled; so judges will have a chance to reconsider the inefficient rule.

Thus we should not be surprised to see the common law tending to become efficient, although since the incentives of judges to perform well along any dimension are weak (this is a by-product of judicial independence), we cannot expect the law ever to achieve perfect efficiency. Since wealth maximization is not only a guide in fact to common law judging but also a genuine social value and the only one judges are in a good position to promote, it provides not only the key to an accurate description of what the judges are up to but also the right benchmark for crit-

6. For example, it is unclear whether Weinrib's Kantian theory of tort law (see Chapter 11) has different substantive implications from the economic theory; the differences may be in vocabulary only.

icism and reform. If judges are failing to maximize wealth, the economic analyst of law will urge them to alter practice or doctrine accordingly. In addition, the analyst will urge—on any legislator sufficiently free of interest-group pressures to be able to legislate in the public interest—a program of enacting only legislation that conforms to the dictates of wealth maximization.

Besides generating both predictions and prescriptions, the economic approach enables the common law to be reconceived in simple, coherent terms and to be applied more objectively than traditional lawyers would think possible. From the premise that the common law does and should seek to maximize society's wealth, the economic analyst can deduce in logical—if you will, formalist—fashion (economic theory is formulated nowadays largely in mathematical terms) the set of legal doctrines that will express and perfect the inner nature of the common law, and can compare these doctrines with the actual doctrines of common law. After translating from the economic vocabulary back into the legal one, the analyst will find that most of the actual doctrines are tolerable approximations to the implications of economic theory and so are formalistically valid. Where there are discrepancies, the path to reform is clear—yet the judge who takes the path cannot be accused of making rather than finding law, for he is merely contributing to the program of realizing the essential nature of the common law.

The project of reducing the common law—with its many separate fields, its thousands of separate doctrines, its hundreds of thousands of reported decisions—to a handful of mathematical formulas may seem quixotic, but the economic analyst can give reasons for doubting this assessment. Much of the doctrinal luxuriance of common law is seen to be superficial once the essentially economic nature of the common law is understood. A few principles, such as cost-benefit analysis, the prevention of free riding, decision under uncertainty, risk aversion, and the promotion of mutually beneficial exchanges, can explain most doctrines and decisions. Tort cases can be translated into contract cases by recharacterizing the tort issue as finding the implied pre-accident contract that the parties would have chosen had transaction costs not been prohibitive, and contract cases can be translated into tort cases by asking what remedy if any would maximize the expected benefits of the contractual undertaking considered ex ante. The criminal's decision whether to commit a crime is no different in principle from the prosecutor's decision whether to prosecute; a plea bargain is a contract; crimes are in effect torts by insolvent defendants because if all criminals could pay the full social costs of their crimes, the task of deterring antisocial behavior

could be left to tort law. Such examples suggest not only that the logic of the common law really is economics but also that the teaching of law could be simplified by exposing students to the clean and simple economic structure beneath the particolored garb of legal doctrine.

If all this seems reminiscent of Langdell, it differs fundamentally in being empirically verifiable. The ultimate test of a rule derived from economic theory is not the elegance or logicality of the derivation but the rule's effect on social wealth. The extension of the rule of capture to oil and gas was subjected to such a test, flunked, and was replaced (albeit through legislative rather than judicial action) by efficient rules. The other rules of the common law can and should be tested likewise.

Criticisms of the Positive Theory

Stated as boldly, as provocatively, as I have stated it, the economic thesis invites attack from a variety of quarters. The discussion in earlier chapters will turn out to be helpful in evaluating some of these attacks. It will be convenient to divide the attackers into two camps: those who attack the positive aspect of the economic theory of law (law can best be understood in wealth-maximizing and rent-seeking terms, the former being the domain of common law, the latter of statute law), and those who attack the normative aspect (law should be made to conform as closely as possible to the dictates of wealth maximization). Of course often the same people attack on both fronts.

Two criticisms of the positive theory are fundamental. The first is that the economic model of human behavior is wrong, and economic science phony. The second is that the proper study of economics is markets rather than nonmarket activity, the latter being the category that includes crime, adjudication, and other characteristic concerns of the legal system.

Economists pride themselves on being engaged in a scientific endeavor.[7] From the basic premise that people are rational maximizers of their

7. There is a rich literature on the methodology of positive economics. The place to start is Daniel M. Hausman's superb review essay, "Economic Methodology in a Nutshell," 3 *Journal of Economic Perspectives,* Spring 1989, at 115. For illustrative longer works reflecting a variety of points of view, see *The Boundaries of Economics* (Gordon C. Winston and Richard F. Teichgraeber III eds. 1988); *Rational Choice: The Contrast between Economics and Psychology* (Robin M. Hogarth and Melvin W. Reder eds. 1987); Lawrence A. Boland, *The Foundations of Economic Method* (1982); Bruce J. Caldwell, *Beyond Positivism: Economic Methodology in the Twentieth Century* (1982); Martin Hollis and Edward J. Nell, *Rational Economic Man: A Philosophical Critique of Neo-Classical Economics* (1975); Homa Katouzian, *Ideology*

satisfactions the economist deduces a variety of hypotheses, of which the best known is the "law of demand"—a rise in the relative price of a product will, other things held constant, cause a reduction in the quantity of the product demanded. These hypotheses are confirmed or refuted by studies of actual economic behavior. Usually the studies are statistical in nature, though much of the evidence that actually persuades people that there is "something to" economics is of a more casual sort—for example, observing that nonprice rationing leads to queuing. Although many positive economists are followers of Karl Popper and therefore believe that falsifiability is the defining characteristic of a scientific theory, empirical economists in practice place far greater emphasis on confirmation than on falsification.[8] In part this is because economic theory has become so rich, so complex, that almost any hypothesis,

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and Method in Economics (1980); Alexander Rosenberg, *Microeconomic Laws: A Philosophical Analysis* (1976), and *Sociology and the Preemption of Social Science* 53–91 (1980) (modifying the argument of *Microeconomic Laws*). Among works that address the methodology of social science as part of a larger concern with scientific method, Ernest Nagel, *The Structure of Science: Problems in the Logic of Scientific Explanation,* chs. 13 and 14 (1961), is particularly good, although dated.

8. Popper's influence on economic methodology has been great, but this fact is not well known because the principal vehicle by which he was introduced into economics—Milton Friedman's famous article "The Methodology of Positive Economics," in Friedman, *Essays in Positive Economics* 3 (1953)—does not cite Popper. The article also blurs its Popperite message by its exaggeratedly positivist suggestion that the only purpose of economic theories is to generate verifiable predictions and by its related emphasis, at once unnecessary and misleading, on the supposed desirability of making the assumptions of economics *un*realistic. What Friedman means, I believe, is not that lack of realism is a plus in a scientific theory but that a theory is not a description. The theorist abstracts from the inessential features of the behavior that he is interested in studying. To this it can be added that a theory need not be intuitive to be correct—the heliocentric example once again. Further, commitment to the assumptions of economics need only be methodological; it need not induce political action (fear that it will is one of the causes of academic hostility to economics). Just because the analyst believes that economic theory, perhaps drastically simplified, is the most powerful tool for *studying* social behavior, it does not follow that he must be guided in his personal life or political preferences by the theory. Here is an example of the difference between pure reason and practical reason in its first sense mentioned in Chapter 2.

Withal, economics does have a decidedly positivist flavor, as shown by the fondness of economists for "as if" hypotheses: for example, the hypothesis that the best explanation of the common law of torts is that it is "as if" the judges were trying to maximize wealth. See Landes and Posner, note 4 above, at 1. This type of hypothesis leaves unexplored the underlying "reality" that causes judges to behave in this way. It invites the observation that theories with good predictive power may be false: Ptolemaic astronomy is false even though it generates accurate predictions concerning the apparent location of the stars and can therefore be used to guide navigation.

even one that appeared to deny a fundamental implication of the theory such as the law of demand, could be made to conform to the theory. For example, a finding that the demand for a product had risen in response to an increase in its price could be rationalized by arguing either that the product was a Giffen good[9] or that consumers had been fooled by the price increase into thinking that the quality of the product had improved; consumers often take prices as an index of quality and often are warranted in doing so. In fact, the law of demand seems robust; but it is distressingly easy to explain away empirical findings that appear to conflict with the basic theoretical assumptions and propositions of economics.

Falsifiability is placed still farther beyond the economist's reach by the infeasibility in most areas of economic inquiry of performing controlled experiments. The normal method of seeking to confirm or falsify an economic hypothesis is by conducting a "natural" experiment: an economic model is used to predict a relationship between statistical variables (for example, between price data and quantity data) and the reliability of the prediction is evaluated by applying tests of statistical significance. The problems with this methodology include the tedium, expense, and sometimes impossibility of obtaining the data that the model implies are relevant, and as a result of these obstacles the low ratio of empirical to theoretical work; the absence of professional rewards for negative findings, or, what amounts to the same thing, career pressures to come up with positive results by hook or by crook; the large, sometimes indefinite number of omitted independent vari-

9. This is a special type of what economists call an "inferior good," which is a good the demand for which rises when people's incomes fall. Potatoes in Ireland are the conventional example of an inferior good. If a large fraction of a person's income is consumed in buying an inferior good and the price of that good rises, the person may be so impoverished as a result that he consumes even more of the good (for example, he buys even more potatoes—and much less meat). A good with this property is known as a Giffen good. It is not clear that such a good has ever existed. See, for example, George J. Stigler, "Notes on the History of the Giffen Paradox," 55 *Journal of Political Economy* 152 (1947); Rogert Koenker, "Was Bread Giffen? The Demand for Food in England circa 1790," 59 *Review of Economics and Statistics* 225 (1977); L. A. Boland, "Giffen Goods, Market Prices, and Testability," 16 *Australian Economic Papers* 72 (1977); Gerald P. Dwyer and Cotton M. Lindsay, "Robert Giffen and the Irish Potato," 74 *American Economic Review* 188 (1984); Morten Berg, "Giffen's Paradox Revisited," 39 *Bulletin of Economic Research* 79 (1987). Certainly there have not been many of them, so the possibility that not all demand curves are downward-sloping because some of them may describe Giffen goods is not a serious embarrassment for economic theory. Nor is it economic theory alone that requires auxiliary principles (in this instance, the empirical unlikelihood of Giffen goods) in order to give the theory predictive power. This is a general feature of science. See, for example, Hilary Putnam, *Representation and Reality* 9 (1988).

ables that may be correlated with the independent variables the researcher is trying to test for; the typically very low percentage of the variance in the observations that is explained by the model, suggesting either that the data are poor or that the economic model is able to capture only a small part of the social phenomenon being investigated; the ease of explaining away poor results as being due to problems with data; and the fact that the results being predicted are known in advance, which creates both pressure and opportunity to tinker with the model in order to make it conform better to the data—and the complexity of economic theory makes such tinkering easy to do. The last two points may explain why negative findings are likely to be ascribed to lack of imagination on the part of the researcher.

A theory that is not effectively falsifiable, but only confirmable, is tenuously grounded. One can never be certain whether observations that confirm (that is, are consistent with) theory A are not really confirming theory B instead, which overlaps with or includes A. The low percentage of variance explained by most econometric studies makes this a lively possibility. This is a less serious problem for sciences that do not only generate insights into natural phenomena, such as the origin of the universe or of species, but also enable dramatic interventions. The atomic bomb is proof (not conclusive, but then no proof is) that modern atomic theory is more than just another clever speculation about invisible entities; and so with biotechnology and genetic theory. Although economics, too, has its technological side as well as its academic side—economic theory can take credit for some new trading strategies in securities markets, some new methods of pricing, and some new public policies, such as the deregulation of transportation and banking—these interventions are less dramatic, and more ambiguous in their results and interpretation, than the interventions of natural science in such areas as weaponry and medicine.

There is a further problem. The basic assumption of economics—that people are rational maximizers—seems not only counterintuitive (a common feature of scientific theory, however, well illustrated by the heliocentric theory of the solar system and by evolution, not to mention by quantum theory) but also seriously incomplete. People have difficulty in dealing with low-probability events, which are important in many areas of behavior studied by economists; and much human behavior appears to be impulsive, emotional, superstitious—in a word, irrational. These are reasons for concern that observations which confirm theory A (economics) may in fact be confirming a more inclusive, more realistic, theory B.

only a small part, of the phenomena it seeks to explain. In this respect as well as in its heavy reliance on calculus for the formulation of its models, economics resembles Newtonian physics. This resemblance points up the confusion in the common criticism of economics as "reductionist" in seeking to use mathematical models to describe human social behavior. All science involves abstraction. Newton's law of falling bodies abstracts from many of the particulars of such bodies (for example, was the apple red?) in an effort to discover a law of nature—specifically, a law to describe the behavior of a variety of bodies, from apples to tides to cannonballs to stars, that differ in many of their particulars. "All scientific theorizing proceeds by abstraction. It concerns itself with spatial relations, with number, with motion, with the evolution of biological species, and so on. If a theory attempted to concern itself instead with, say, the concrete aggregate of actual animals, which not only have shapes and numbers and the ability to move and breed but also an indefinite variety of other characteristics, the theoretical enterprise would inevitably choke on a superfluity of detail."[11] We do not describe this process as reductionism; we reserve, or should reserve, that word for unsuccessful efforts to explain one thing in terms of another, for example, ideas in terms of molecular changes in the brain.

We should not forget that an important branch of physics, astrophysics, is for the most part not an experimental science; that there are other nonexperimental natural sciences as well, including geology and paleontology; that some of the most important theories in science, notably theories of evolution in biology and geology, cannot as a practical matter be falsified;[12] that experiments are highly fallible, since an excluded

10. On the characteristics of a pseudo-science, see the interesting discussion in Raimo Tuomela, *Science, Action, and Reality,* ch. 10 (1985), esp. p. 229. For some economists, of course, economics is an ideology as well as a method of analysis.

11. L. Jonathan Cohen, *The Dialogue of Reason: An Analysis of Analytical Philosophy* 123 (1986). To which it could be added that if a theory is too rich, it may not be falsifiable—a looming danger for economics, as I have noted. Maybe economics isn't reductionist enough!

12. The methodological problems of the theory of evolution, indeed of biology generally, are very similar to those of economic theory. Cf. Michael Ruse, *Philosophy of Biology Today,* ch. 1 (1988); Alexander Rosenberg, *The Structure of Biological Science* (1985). And

variable may be the real cause that the experiment is trying to test for, and the variable that the experimenter finds to be the cause merely a correlate of the real cause; that much of science is breathtakingly counterintuitive—an offense to common sense (quantum theory, for example, or the evolution of the human eye); that scientists often make arbitrary, unprovable assumptions (such as that the laws of physics as we know them hold throughout the universe); and that because of the impossibility of ever really "confirming" a scientific hypothesis it might be best to view all scientific knowledge as conjectural. In short, some of the most salient methodological weaknesses, real or apparent, of economic science are shared with natural science—to which it should be added that economists and other social scientists do on occasion conduct controlled experiments.[13]

Should the weaknesses of economics discourage attempts to apply economics to nonmarket behavior? Surely not. Although much nonmarket behavior is indeed baffling, this is so whether one approaches it from the standpoint of economics, which assumes that human beings behave rationally, or from the standpoint of other human sciences, which do not make that assumption but have nothing to put in its place. The economics of law may well be a weak field, partaking of the general weakness of economics and of additional weaknesses specific to itself. But is the psychology of law strong? The sociology of law? Legal anthropology? Jurisprudence as a positive theory of law? These fields of interdisciplinary legal studies, and others that could be named, are older than economic analysis of law yet are weaker candidates for a leading role in fashioning a positive theory of law.

Some arguments against applying economics to nonmarket behavior are particularly interesting from the perspective of this book because they are based on stubborn philosophical fallacies, in particular that of essentialism, the idea that everything has a property that defines it and is, indeed, its metaphysical essence, so that if this property is missing, the thing to which it is supposed to be attached is a different thing from what we thought it was. (Langdell was an essentialist.) Thus it is argued

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David L. Hull, *Science as a Process: An Evolutionary Account of the Social and Conceptual Development of Science* 495 (1988), points out that actual falsification in the natural sciences is a rare event and that contrary to Popper's theory scientists will often accept a theory that has not been subjected to serious attempts at falsification. Popper himself long ago moved away from the strict falsificationism of his early writings.

13. See Alvin E. Roth, "Laboratory Experimentation in Economics," 2 *Economics and Philosophy* 245 (1986).

enumerated. It is not like "rabbit," a word that can be defined and then "attached" unambiguously to each member of a finite set of real-world objects that satisfy the definition. (Well, not quite, because the word is not misused when it is applied to Harvey or the Easter Bunny, or to a timid human being.) Definitions of economics are hopeless. One cannot say that economics is what economists do, because many noneconomists do economics—or do they become economists by doing so? One cannot, at least when attempting to speak precisely, call economics the science of rational choice. There are theories of rational choice that do not resemble economics, either because they assume unstable preferences, which alters many of the predictions of economics, or because they assume a plurality of rational actors within each human being—for example, an impulsive self and a future-regarding self. And there are theories of economics that are nonrational or not consistently rational. These include survival theories in industrial organization (firms that happen to hit on more efficient methods of doing business will grow relative to less efficient firms) and the many macroeconomic theories in which people are assumed to have propensities (to save, to consume, to hold a fixed fraction of their assets in cash) that are not derived from the rational model of human behavior. One cannot call economics the study of markets, because other disciplines study markets—for example, sociology and anthropology—and because it begs the question of the proper domain of economics to define economics as the study of markets and refuse to defend the definition.

What is true is that historically the emphasis of economics has been on studying markets. This is partly because data of the sort useful for economic analysis have been abundant, partly because (unlike such areas of human behavior as law, religion, education, statecraft, love, and madness) the study of markets has been of only marginal interest to practitioners of other human sciences, partly because economic theory has many applications to the understanding of markets, partly (related to the last point) because rational behavior seems more pervasive in markets than in most other arenas of social interaction, and partly because money offers a measuring rod for the study of markets comparable to the role of mass and velocity in physics. But the history of a field—even

the character of its greatest triumphs—does not determine its future or delimit its scope.

Nor is it a good argument that the extension of economics to nonmarket behavior must wait upon the solution of the main problems of market economics. It is indeed tempting to ask how economists can hope to explain the divorce rate when they cannot even explain behavior under oligopoly. But this question reflects the fallacy that economics has a fixed domain. The methods of economics may be no good for answering a number of important questions about behavior in markets; that is no reason to keep hitting one's head against the wall. Economics does not have a predestined mission to dispel all the mysteries of the market. Maybe it will do better with some types of nonmarket behavior than with some types of market behavior, even if it can answer more questions about market behavior than about any other type.

Nor is it a good argument that the economist cannot possibly compete on the lawyer's turf because the economist lacks formal initiation into the mysteries of legal thinking. Not only are those mysteries exaggerated, but it is just another form of essentialism to assume that law is what is done by a person with a law degree and by no one else. Or, for that matter, that economics is what is done by a person who has a Ph.D. in economics and by no one else. An economist is someone who does economics, and if he does economics without the degree (maybe because he is a lawyer, and is tired of graduate education) or in collaboration with someone who has one, it is still economics: maybe less fancy, less polished, less sophisticated, less rigorous, less mathematical, but not necessarily less capable of enlarging our knowledge of law or other nonmarket activity.

It is an empirical question whether economics has much to contribute to human knowledge outside the domain of explicit markets,[14] but the answer seems to be yes, judging from the extensive economic literature dealing with such nonmarket fields as education, economic history, anthropology, the causes of regulation, the behavior of nonprofit institutions, racial and other forms of discrimination, the family, and pri-

14. For a skeptical view, see Ronald H. Coase, "Economics and Contiguous Disciplines," 7 *Journal of Legal Studies* 201 (1978). But it would be more accurate to say that Professor Coase believes not that economics has little to contribute outside this domain but that *economists* have little to contribute. Coase thinks lawyers, sociologists, psychologists, and so on will borrow the parts of economic theory that are useful in their own fields and, thus equipped, will have a decisive advantage over economists in doing research in their own fields because they know more about them.

vacy.[15] This in turn suggests that the economic theory of law ought to be evaluated on its merits—always bearing in mind that the weaknesses of economics as a science require caution in assessing claims made in any area of economics—rather than dismissed on the basis of an a priori conception of the scope of economics.

A number of specific objections are made to the positive side of the economic theory of law.[16] The first is that the theory cannot really be tested (and is therefore pseudo-scientific), because the data required to form a judgment on whether a particular legal doctrine is wealth maximizing are, as a practical matter, unobtainable. This criticism, which is frequently and inconsistently joined to the criticism that particular doctrines believed by economic analysts of law to be efficient can be shown to be inefficient, is overstated. The data required to test the positive theory—in the case of tort doctrines, data on number of accidents, number and cost of lawsuits, levels of liability insurance and accident insurance premiums, and variations in legal doctrine, both statutory and

15. See, for example, Jack Hirshleifer, "The Expanding Domain of Economics," 75 *American Economic Review* 53 (special anniversary issue, Dec. 1985); *Discrimination in Labor Markets* (Orley Ashenfelter and Albert Rees eds. 1973); *Education, Income, and Human Behavior* (F. Thomas Juster ed. 1976); *Household Production and Consumption* (Nestor E. Terleckyj ed. 1975); *Economics of the Family: Marriage, Children, and Human Capital* (Theodore W. Schultz ed. 1974); *The Reinterpretation of American Economic History* (Robert William Fogel and Stanley L. Engerman eds. 1971); Gary S. Becker, *The Economic Approach to Human Behavior* (1976); Becker, *A Treatise on the Family* (1981); Victor R. Fuchs, *Women's Quest for Economic Equality* (1988); James M. Buchanan and Gordon Tullock, *The Calculus of Consent* (1962); Michael Grossman, *The Demand for Health* (National Bureau of Economic Research 1972); George J. Stigler, *The Citizen and the State: Essays on Regulation* (1975); and my book *The Economics of Justice* (1981). For efforts to extend the domain of economics even into psychology, see, for example, Thomas C. Schelling, "Self-Command in Practice, in Policy, and in a Theory of Rational Choice," 74 *American Economic Review Papers and Preceedings* 1 (May 1984); Richard H. Thaler and H. M. Shefrin, "An Economic Theory of Self-Control," 89 *Journal of Political Economy* 392 (1981); George A. Akerlof and William T. Dickens, "The Economic Consequences of Cognitive Disonance," 72 *American Economic Review* 307 (1982). The careful reader of the present book will have noted that in various places I imply that economics may have a foundational role to play in dealing with a number of philosophical issues in the areas of epistemology and ontology—but to develop this suggestion would require another book.

16. Most of these will be found in articles in "Symposium on Efficiency as a Legal Concern," 8 *Hofstra Law Review* 485, 811 (1980); see also Cento Veljanovski, "Legal Theory, Economic Analysis, and the Law of Torts," in *Legal Theory and Common Law* 215 (William Twining ed. 1986); Peter Carstensen, Book Review (of Landes and Posner, *The Economic Structure of Tort Law*), 86 *Michigan Law Review* 1161 (1988); Tom Campbell, *Justice*, ch. 5 (1988); Frank I. Michelman, "Norms and Normativity in the Economic Theory of Law," 62 *Minnesota Law Review* 1015 (1978). For a defense of the positive approach, see Landes and Posner, note 4 above, ch. 1.

common law—are obtainable, and are no more scanty or refractory than the data that are required for testing many other economic theories. What is true, however, is that few statistical tests have been performed on the positive economic theory of law and that instead analysts have been largely content to make a qualitative assessment of the wealth-maximizing properties of the legal rules, doctrines, and decisions being studied. It would be error to think that rules cannot be data for science; several branches of linguistics that study language rules are scientific.[17] But characterizing legal rules as efficient or inefficient, in circumstances where the measurement of costs and benefits is infeasible or simply not attempted, is fraught with subjectivity and makes it difficult to evaluate claims that the theory has been confirmed or falsified by being confronted with the actual rules of law or outcomes of cases. The looseness of economic theory does not help.

This is a substantial criticism, but one easily exaggerated. A number of common law doctrines, including Hand's negligence formula, verge on being explicitly economic. In others the implicit economic logic lies just beneath the surface. And in still others a comparison between counterpart doctrines in different jurisdictions (for example, England and America) reveals differences suggestively correlated with differences in economic conditions—density of habitation, amount of land in cultivation, and so forth.[18]

A related criticism of the positive theory is that either it has been acknowledged by its proponents to be false or it is too ill defined to be falsifiable. As no one believes either that every common law rule is wealth maximizing or that every statute merely redistributes wealth in favor of some interest group, the strongest form of the theory—that it accurately describes the total behavior of the legal system, as Newtonian physics was once thought to describe the motion of every object in the universe—is totally untenable. What then is the weak form to which proponents retreat? Either that the positive theory describes most legal rules or merely that it has identified one influence, perhaps one of a great many, on the formation of legal rules. In either form the theory is unsatisfactory because it leaves unexplained many, possibly most, of the phe-

17. See Frederick J. Newmeyer, *The Politics of Linguistics* (1986); *Historical Linguistics* (B. Brainerd ed. 1983); Theodora Bynon, *Historical Linguistics* (1977); William Labov, *Sociolinguistic Patterns* (1972); John T. Waterman, *Perspectives in Linguistics* (2d ed. 1970). For a skeptical view on whether any part of linguistics has yet achieved scientific status, see Victor H. Yngve, *Linguistics as a Science* (1986).

18. For examples, see Landes and Posner, note 4 above.

nomena it set out to explain, without providing any suggestions for how this large residuum of ignorance might be shrunk.

Next is the objection that no adequate explanation has been offered for *why* judges would shape common law doctrine in the direction indicated by the norm of wealth maximization.[19] The evolutionary explanations sketched earlier are unsatisfactory. The intervals over which the common law has "evolved" are too short for a random process to have generated efficient rules, and the particular random process posited (the greater propensity to litigate cases in which the stakes are large than cases in which they are small) is likely to be dominated by other determinants of legal rules—in particular by the judges' policy goals. Explanations that focus on judges' incentives trip over the fact, exasperating to an economist, that the judicial process is designed to remove the principal incentives that economists use for predicting behavior. The conditions of judicial employment are intended to make the judge indifferent, from the standpoint of his pecuniary self-interest, to how he decides. Pecuniary self-interest does not exhaust the economic concept of self-interest. But the other dimensions can be difficult to identify, let alone measure. Although judges are as self-interested as other people, it is the exceptional case in which a particular decision will promote a judge's self-interest other than by giving him the satisfaction of having performed his duty (which may involve the promotion of an ideology, even one he is not aware of) to the best of his ability—and this particular maximand does not seem readily amenable to economic analysis.

Yet, poorly understood as judicial incentives are, it is at least plausible that they push judges toward common law rule making that promotes the diffuse but powerful social policy of making markets work. For this may be the only social policy that the tools of the judicial process enable judges to promote in a consistent and reasonably uncontroversial fashion; if so, wealth maximization offers judges a comfortable as well as socially useful guidepost. Against this it can be argued that the articulation of legal rules in judicial opinions is a self-conscious, expressive activity, unlike a consumer's response to a change in relative prices; so that if wealth maximization were really the life blood of the common law we could expect to find the judges using the vocabulary of economics—especially now that economic analysts have extended that vocabulary to embrace legal doctrine. The vocabulary of economics, however, is designed for the use of specialists in economics. We should

19. For a helpful discussion, see Paul H. Rubin, "The Objectives of Private and Public Judges: A Comment," 41 *Public Choice* 133 (1983).

be no more surprised that judges talk in different terms while doing economics than that businessmen equate marginal cost to marginal revenue without using the terms and often without knowing what they mean. And we should bear in mind that *any* "structure possessed by judicial opinions will be a deep structure, not one that is at once apparent on the face of the text," because the common law system (and Anglo-American adjudication generally) does not have "a crisply defined form of legal opinion, or a closed canon of justificatory material, or a convention that effectively depersonalizes the court's opinion."[20]

The last important criticism of the positive economic theory of law, and the bridge to the criticisms of the normative theory, is that wealth maximization is so incoherent and repulsive a social norm that it is inconceivable that judges would embrace it. Let me defer consideration of this criticism for a moment and ask the reader to accept provisionally the conclusion of the next section: that as a universal social norm wealth maximization is indeed unsatisfactory, but that it is attractive or at least defensible when confined to the common law arena. With this stipulation, let us see where the positive theory stands. Plainly it has many weaknesses; legal theory has not yet had its Isaac Newton or its Adam Smith. Nor can these weaknesses be waved away with the observation that one can beat a theory only with a better theory. This observation is true—what else could one *beat* a theory with?—but trivial. If the only theoretical explanation that has been offered for a phenomenon is unconvincing despite the absence of a competing explanation, one is entitled to regard the phenomenon as unexplained. Maybe *compelled* to do so: an absence of competing explanations is one reason for believing an explanation, and if nevertheless you do not believe it the proponent cannot force you to do so merely by pointing out that there are no competing explanations. There is much about society (as about nature) that we do not yet understand.

But this would be the wrong note on which to end discussion of the positive economic theory of law. Apart from its pedagogical merit in enabling the jumble of common law rules and doctrines to be arranged in a coherent system, the theory has alerted legal scholars to the possibilities of scientific theorizing about law and has challenged them to seek competing theories, although so far the search has been pretty barren. Moreover, in its weakest form the positive economic theory can claim some empirical support. It seems that intuitions about wealth maximi-

20. A W. B. Simpson, "Legal Reasoning Anatomized: On Steiner's *Moral Argument and Social Vision in the Courts*," 13 *Law and Social Inquiry* 637, 638 (1988).

zation *have* shaped to a significant degree the doctrines of the common law and that statute law *does* reflect to a much greater degree the pressure of interest groups. Although it would be a gross overstatement to conclude from the evidence gathered to date that the logic of the common law has been wealth maximization and the logic of statute law wealth redistribution, the statement contains some truth—and, to return to one of the abiding concerns of this book, undermines suggestions that law is an autonomous field of social thought and action.

An extreme Popperian might respond that as long as there is a *single* anomalous observation—in the present setting, a single rule or doctrine or decision of the common law that is inefficient, or a single legislative rule that is efficient—the positive economic theory of law has been refuted. But such a response would reflect a misunderstanding of scientific method.[21] The natural law that water boils at 212° Fahrenheit is not refuted by the observation that it boils at a lower temperature at high altitudes, but qualified; we subsume the law under a broader theory of the effects of heat. Some day what I have been calling the positive economic theory of law will be subsumed under a broader theory—perhaps, although not necessarily, an economic theory—of the social behavior we call law. Meanwhile, like the principle that water boils at 212°F, the economic theory of law is a default rule, or presumption—the right place to start, although not necessarily to end, in analyzing law from a positive standpoint.

Criticisms of the Normative Theory

The question whether wealth maximization *should* guide legal policy, either in general or just in common law fields (plus those statutory fields where the legislative intent is to promote efficiency—antitrust law being a possible example), is ordinarily treated as separate from the question whether it *has* guided legal policy, except insofar as the positive theory may be undermined by the inadequacies of the normative theory. Actually the two theories are not as separable as this,[22] illustrating again the lack of a clear boundary between "is" and "ought" propositions. One of the things judges ought to do is follow precedent, although not inflexibly; so if efficiency is the animating principle of much common

21. Cf. William C. Wimsatt, "False Models as Means to Truer Theories," in *Neutral Models in Biology* 23 (Matthew H. Nitecki and Antoni Hoffman eds. 1987). Popper himself, as I noted, would no longer accept it.

22. I am indebted to Steven Hetcher for this point.

law doctrine, judges have some obligation to make decisions that will be consistent with efficiency. This is one reason why the positive economic theory of the common law is so contentious.

The normative theory has been highly contentious in its own right. Most contributors to the debate over it conclude that it is a bad theory, and although many of the criticisms can be answered, several cannot be, and it is those I shall focus on.[23]

The first is that wealth maximization is inherently incomplete as a guide to social action because it has nothing to say about the distribution of rights—or at least nothing we want to hear. Given the distribution of rights (whatever it is), wealth maximization can be used to derive the policies that will maximize the value of those rights. But this does not go far enough, because naturally we are curious about whether it would be just to start off with a society in which, say, one member owned all the others. If wealth maximization is indifferent to the initial distribution of rights, it is a truncated concept of justice.

Since the initial distribution may dissipate rapidly,[24] this point may have little practical significance. Nor is wealth maximization completely silent on the initial distribution. If we could compare two otherwise identical nascent societies, in one of which one person owned all the others and in the other of which slavery was forbidden, and could repeat the comparison a century later, almost certainly we would find that the second society was wealthier and the first had abolished slavery (if so, this would further illustrate the limited effect of the initial distribution on the current distribution). Although it has not always and everywhere been true, under modern conditions of production slavery is an inefficient method of organizing production. The extensive use of slave labor

23. For the major criticisms, see Jules L. Coleman, "Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law," 94 *Ethics* 649 (1984); Coleman, *Markets, Morals, and the Law,* pt. 2 (1988); Ronald M. Dworkin, "Is Wealth a Value?" 9 *Journal of Legal Studies* 191 (1980), reprinted in Dworkin, *A Matter of Principle,* ch. 12 (1985); Anthony T. Kronman, "Wealth Maximization as a Normative Principle," 9 *Journal of Legal Studies* 227 (1980); Nicholas Mercuro and Timothy P. Ryan, *Law, Economics, and Public Policy* 130–137 (1984); Joseph M. Steiner, "Economics, Morality, and the Law of Torts," 26 *University of Toronto Law Journal* 227 (1976); Ernest J. Weinrib, "Utilitarianism, Economics, and Legal Theory," 30 id. at 307 (1980). For answers to some of the criticisms, see "Wealth Maximization Revisited," note 3 above; Lloyd Cohen, "A Justification of Social Wealth Maximization as a Rights-Based Ethical Theory," 10 *Harvard Journal of Law and Public Policy* 411 (1987); D. Bruce Johnsen, "Wealth *Is* Value," 15 *Journal of Legal Studies* 263 (1986).

24. "Almost all earnings advantages and disadvantages of ancestors are wiped out in three generations." Gary S. Becker and Nigel Tomes, "Human Capital and the Rise and Fall of Families," 4 *Journal of Labor Economics* S1, S32 (1986).

by the Nazis during World War II may seem an exception—but only if we disregard the welfare of the slave laborers.

This response to the demand that wealth maximization tell us something about the justice of the initial distribution of rights is incomplete. Suppose it were the case—it almost surely *is* the case—that some people in modern American society would be more productive as slaves than as free persons. These are not antisocial people whom we want to punish by imprisoning (a form of slavery that is tolerated); they are not psychotic or profoundly retarded; they just are lazy, feckless, poorly organized, undisciplined people—people incompetent to manage their own lives in a way that will maximize their output, even though the relevant output is not market output alone but also leisure, family associations, and any other sources of satisfaction to these people as well as to others. Wealth would be maximized by enslaving these people, provided the costs of supervision were not too high—but the assumption that they would not be too high is built into the proposition that their output would be greater as slaves than as free persons, for it is net output that we are interested in. Yet no one thinks it would be right to enslave such people, even if there were no evidentiary problems in identifying them, the slave masters could be trusted to be benign, and so on; and these conditions, too, may be implicit in the proposition that the net social output of some people would be greater if they were slaves.

It is no answer that it would be inefficient to enslave such people unless they consented to be enslaved, that is, unless the would-be slavemaster met the asking price for their freedom. The term "*their* freedom" assumes they have the property right in their persons, and the assumption is arbitrary. We can imagine assigning the property rights in persons (perhaps only persons who appeared likely to be unproductive) to the state to auction them to the highest bidder. The putative slave could bid against the putative master, but would lose. His expected earnings, net of consumption, would be smaller than the expected profits to the master; otherwise enslavement would not be efficient. Therefore he could not borrow enough—even if capital markets worked without any friction (in the present setting, even if the lender could enslave the borrower if the latter defaulted!)—to outbid his master-to-be.

This example points to a deeper criticism of wealth maximization as a norm or value: like utilitarianism, which it closely resembles, or nationalism, or Social Darwinism, or racialism, or organic theories of the state, it treats people as if they were the cells of a single organism; the welfare of the cell is important only insofar as it promotes the wel-

fare of the organism. Wealth maximization implies that if the prosperity of the society can be promoted by enslaving its least productive citizens, the sacrifice of their freedom is worthwhile. But this implication is contrary to the unshakable moral intuitions of Americans, and as I stressed in the last chapter, conformity to intuition is the ultimate test of a moral (indeed of any) theory.

Earlier chapters provide illustrations of collisions between, on the one hand, moral intuitions that have been influential in law and, on the other hand, wealth maximization. Recall, first, that the idea of corrective justice may well include the proposition that people who are wronged are entitled to some form of redress, even in cases when from an aggregate social standpoint it might be best to let bygones be bygones. Such an idea has no standing in a system powered by wealth maximization. Second, the prohibition of involuntary confessions rests on a notion of free will that has no standing in a system of wealth maximization, even though the particular notion of free will that the law uses equates free will with capacity for rational choice, and rational choice is fundamental to economics. The lawfulness of confessions in a system single-mindedly devoted to wealth maximization would depend entirely on the costs and benefits of the various forms of coercion, which range from outright torture to the relatively mild psychological pressures that our legal system tolerates. Cost-benefit analysis might show that torture was rarely cost-effective under modern conditions, being a costly method of interrogation (especially for the victim, but perhaps also for the torturer) that is apt to produce a lot of false leads and unreliable confessions. Nevertheless, even the most degrading forms of torture would not *necessarily* be ruled out, even in the investigation of ordinary crimes. I suggested in Chapter 5 that cost-benefit thinking has made inroads into coerced-confession law, but at some point these inroads would collide with, and be stopped by, strong moral intuitions that seem incompatible with economic thinking.

Or suppose it were the case—it may be the case—that some religious faiths are particularly effective in producing law-abiding, productive, healthy citizens. Mormonism is a plausible example. Would it not make sense on purely secular grounds, indeed on purely wealth-maximizing grounds, for government to subsidize these faiths? Practitioners of other religious faiths would be greatly offended, but from the standpoint of wealth maximization the only question would be whether the cost to them was greater than the benefits to the country as a whole.

Consider now a faith that both has few adherents in the United States and is feared or despised by the rest of the population. (The Rastafarian

faith is a plausible example.)[25] Such a faith will by assumption be imposing costs on the rest of the community, and given the fewness of its adherents, the benefits conferred by the faith may, even when aggregated across all its adherents, be smaller than the costs. It could then be argued that wealth maximization warranted or even required the suppression of the faith. This example suggests another objection to wealth maximization, one alluded to in the discussion of slavery: its results are sensitive to assumptions about the initial distribution of rights—a distribution that is distinct from the initial distribution of wealth (which is unlikely to remain stable over time), but about which wealth maximization may again have relatively little to say. If Rastafarians are conceived to have a property right in their religion, so that the state or anyone else who wants to acquire that right and suppress the religion must meet their asking price, probably the right will not be sold. Asking prices can be very high—in principle, infinite: how much would the average person sell his life for, if the sale had to be completed immediately?[26] But if rights over religious practices are given to the part of the populace that is not Rastafarian, the Rastafarians may find it impossible to buy the right back; their offer price will be limited to their net wealth, which may be slight.

No doubt in this country, in this day and age, religious liberty is the cost-justified policy. The broader point is that a system of rights—perhaps the system we have—may well be required by a *realistic* conception of utilitarianism, that is, one that understands that given the realities of human nature a society dedicated to utilitarianism requires rules and institutions that place checks on utility-maximizing behavior in particular cases. For example, although one can imagine specific cases in which deliberately punishing an innocent person as a criminal would increase aggregate utility, one has trouble imagining a system in which government officials could be trusted to make such decisions.[27] "Wealth maximizing" can be substituted for "utilitarian" without affecting the analysis. Religious liberty may well be both utility maximizing and wealth maximizing, and this may even be why we have it. And if it became *too* costly, probably it would be abandoned; and so with the

25. See Reed v. Faulkner, 842 F.2d 960 (7th Cir. 1988); Note, "Soul Rebels: The Rastafarians and the Free Exercise Clause," 72 *Georgetown Law Journal* 1605 (1984).

26. We of course "sell" years of expected life by living in an unhealthy fashion, engaging in dangerous sports, driving too fast, and so on.

27. See Russell Hardin, "The Utilitarian Logic of Liberalism," 97 *Ethics* 47, 62–67 (1986); Hardin, *Morality within the Limits of Reason* 101–105 (1988); John Rawls, "Two Concepts of Rules," 64 *Philosophical Review* 3, 10–11 (1955).

prohibition of torture, and the other civilized political amenities of a wealthy society. If our crime rate were much lower than it is, we probably would not have capital punishment—and if it gets much higher, we surely will have fewer civil liberties.

But at least in the present relatively comfortable conditions of our society, the regard for individual freedom appears to transcend instrumental considerations; freedom appears to be valued for itself rather than just for its contribution to prosperity—or at least to be valued for reasons that escape the economic calculus. Is society really better off in a utilitarian or wealth-maximizing sense as a result of the extraordinarily elaborate procedural safeguards that the Bill of Rights gives criminal defendants? This is by no means clear. Are minority rights welfare maximizing—when the minority in question is a small one? That is not clear either, as the Rastafarian example showed. The main reasons these institutions are valued seem not to be utilitarian or even instrumental in character. *What* those reasons are is far from clear; indeed, "noninstrumental reason" is almost an oxymoron. And as I have suggested, we surely are not willing to pay an infinite price; perhaps not even a very high price, for freedom. While reprobating slavery we condone similar (but more efficient) practices under different names—imprisonment as punishment for crime, preventive detention, the authority of parents and school authorities over children, conscription, the institutionalization of the insane and the retarded. The Thirteenth Amendment has been read narrowly. Although the only stated exception is for punishment for crime ("neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction"), laws requiring jury service, military service, and even working on the public roads have been upheld.[28] We reprobate the infliction of physical pain as a method of extracting confessions or imposing punishment but, perhaps in unconscious tribute to the outmoded dualism of mind and body, condone the infliction of mental pain for the same purposes.

Still, hypocritical and incoherent as our political ethics may frequently be, we do not permit degrading invasions of individual autonomy merely on a judgment that, on balance, the invasion would make a net addi-

28. See Hurtado v. United States, 410 U.S. 578, 589 n. 11 (1973); Selective Draft Law Cases, 245 U.S. 366, 390 (1918); Butler v. Perry, 240 U.S. 328 (1916); cf. Robertson v. Baldwin, 165 U.S. 275, 288 (1897). No *expressio unius est exclusio alterius* here!

tion to the social wealth. And whatever the philosophical grounding of this sentiment,[29] it is too deeply entrenched in our society at present for wealth maximization to be given a free rein. The same may be true of the residue of corrective-justice sentiment.

I have said nothing about the conflict between wealth maximization and equality of wealth, because I am less sure of the extent of egalitarian sentiment in our society than that of individualistic sentiment (by "individualism" I mean simply the rivals to aggregative philosophies, such as utilitarianism and wealth maximization). Conflict there is, however, and it points to another important criticism of wealth maximization even if the critic is not an egalitarian. Imagine that a limited supply of growth hormone, privately manufactured and sold, must be allocated. A wealthy parent wants the hormone so that his child of average height will grow tall; a poor parent wants the hormone so that his child of dwarfish height can grow to normal height. In a system of wealth maximization the wealthy parent might outbid the poor parent and get the hormone. This is not certain. Amount of wealth is only one factor in willingness to pay. The poor parent might offer his entire wealth for the hormone, and that wealth, although meager, might exceed the amount of money the wealthy parent was willing to pay, given alternative uses to which he could put his money. Also, altruists might help the poor parent bid more than he could with only his own resources. The poor might actually be better off in a system in which the distribution of the hormone were left to the private market, even if there were no altruism. Such a system would create incentives to produce and sell the hormone sooner, and perhaps at a lower price, than if the government controlled its distribution; for the costs of production would probably be lower under private rather than public production, and even a monopolist will charge less when his costs fall.

But what seems impossible to maintain convincingly in the present ethical climate is that the wealthy parent has the *right* to the hormone by virtue of being willing to pay the supplier more than the poor parent can; more broadly, that consumers have a right to purchase in free markets. These propositions cannot be derived from wealth maximization. Indeed, they look like propositions about transactional freedom rather than about distribution only because I have assumed that the growth hormone is produced and distributed exclusively through the free mar-

29. Perhaps it is the Kantian sense that we should not treat one another merely as objects (as, I argued in Chapter 5, the criminal law does and should). See P. F. Strawson, "Freedom and Resentment," in Strawson, *Freedom and Resentment, and Other Essays* 1, 9 (1974).

ket. An alternative possibility would be for the state to own the property right in the hormone and to allocate it on the basis of need rather than willingness to pay. To argue against this alternative (socialist medicine writ small) would require an appeal either to the deeply controversial idea of a natural right to private property, or to purely instrumental considerations, such as the possibility that in the long run the poor will be better off with a free market in growth hormone—but to put the question *this* way is to assume that the poor have some sort of social claim by virtue of being poor, and thus to admit the relevance of egalitarian considerations and thereby break out of the limits of wealth maximization.

A stronger-seeming argument for the free-enterprise solution is that the inventor of the hormone should have a right to use it as he wishes, which includes the right to sell it to the highest bidder. But this argument seems stronger only because we are inclined to suppose that what has happened is that *after* the inventor invented it the government decided to rob him of the reward for which he had labored. If instead we assume that Congress passes a law in 1989 which provides that after the year 2000 the right to patent new drugs will be conditioned on the patentee's agreeing to limit the price he charges, we shall have difficulty objecting to the law on ethical, as distinct from practical, grounds. It would be just one more restriction on free markets.

We saw in Chapter 11 why a quest for a natural-rights theory of justice is unlikely to succeed. Although the advocate of wealth maximization can argue that to the productive should belong the fruits of their labor, the argument can be countered along the lines suggested in that chapter—production is really a social rather than individual effort—to which it can be added that wealth may often be due more to luck (and not the luck of the genetic lottery, either) than to skill or effort. Furthermore, if altruism is so greatly admired, as it is by conservatives as well as by liberals, why should not its spirit inform legislation? Why should government protect only our selfish instincts? To this it can be replied that the spirit of altruism is voluntary giving. But the reply is weak. The biggest reason we value altruism is that we *desire* some redistribution—we may admire the altruist for his self-sacrifice but we would not admire him as much if he destroyed his wealth rather than giving it to others—and we think that voluntary redistribution is less costly than involuntary. If redistribution is desirable, some involuntary redistribution may be justifiable, depending on the costs, of course, but not on the principle of the thing.

There is a still deeper problem with founding wealth maximization

on a notion of natural rights. The economic perspective is thoroughly (and fruitfully) behaviorist. "Economic man" is not, as vulgarly supposed, a person driven by purely pecuniary incentives, but he is a person whose behavior is completely determined by incentives; his rationality is no different from that of a pigeon or a rat. The economic task from the perspective of wealth maximization is to influence his incentives so as to maximize his output. How a person so conceived could be thought to have a *moral* entitlement to a particular distribution of the world's goods—an entitlement, say, to the share proportional to his contribution to the world's wealth—is unclear. Have marmots moral entitlements? Two levels of discourse are being mixed.

By questioning anti-egalitarian arguments I do not mean to be endorsing egalitarian ones. We glimpsed some of their weaknesses in Chapter 11, and here is another. The egalitarian is apt to say that differences in intelligence, which often translate into differences in productivity, are the result of a natural lottery and therefore ought not guide entitlements. But if differences in intelligence are indeed genetic, as the argument assumes, then liberal and radical arguments about the exploitiveness of capitalist society are undermined. A genetic basis for intellectual differences and resulting differences in productivity implies that inequality in the distribution of income and wealth is to a substantial degree natural (which is not to say that it is morally good), rather than a product of unjust social and political institutions. It also implies that such inequality is apt to be strongly resistant to social and political efforts to change it.

The strongest argument for wealth maximization is not moral, but pragmatic. Such classic defenses of the free market as chapter 4 of Mill's *On Liberty* can easily be given a pragmatic reading.[30] We look around the world and see that in general people who live in societies in which markets are allowed to function more or less freely not only are wealthier than people in other societies but have more political rights, more liberty and dignity, are more content (as evidenced, for example, by their being less prone to emigrate)—so that wealth maximization may be the most direct route to a variety of moral ends. The recent history of England, France, and Turkey, of Japan and Southeast Asia, of East versus West Germany and North versus South Korea, of China and Tai-

30. For another fine pragmatic defense of economic liberalism, see Arnold C. Harberger, "Three Basic Postulates for Applied Welfare Economics: An Interpretive Essay," in his book *Taxation and Welfare* 5 (1974). See generally C. L. Ten, *Mill on Liberty* (1980); Norman P. Barry, *On Classical Liberalism and Libertarianism* (1987).

wan, of Chile, of the Soviet Union, Poland, and Hungary, and of Cuba and Argentina provides striking support for this thesis.[31]

Writing in the early 1970s, the English political philosopher Brian Barry doubted the importance of incentives. "My own guess," he said, "is that enough people with professional and managerial jobs really like them (and enough others who would enjoy them and have sufficient ability to do them are waiting to replace those who do not) to enable the pay of these jobs to be brought down considerably . . . I would suggest that the pay levels in Britain of schoolteachers and social workers seem to offer net rewards which recruit and maintain just enough people, and that this provides a guideline to the pay levels that could be sustained generally among professionals and managers."[32] He rejected the "assumption that a sufficient supply of highly educated people will be forthcoming only if lured by the anticipation of a higher income afterwards as a result," adding that "it would also be rash to assume that it would be an economic loss if fewer sought higher education" (p. 160 and n. 3). He discussed with approval the Swedish experiment at redistributing income and wealth but thought it hampered by the fact that "Sweden still has a privately owned economy" (p. 161). He worried about "brain drain" but concluded that it was a serious problem only with regard to airline pilots and physicians; and a nation can do without airlines and may be able to replace general practitioners "with people having a lower (and less marketable) qualification" (p. 162). (Yet Barry himself was soon to join the brain drain, and he is neither a physician nor an airline pilot.) He proposed "to spread the nastiest jobs around by

31. See, for example, Samuel Brittan, *The Role and Limits of Government: Essays in Political Economy*, ch. 10 (1983) (discussing the "British sickness"); Alan Ryan, *Property and Political Theory*, ch. 7 (1984) ("Why There are So Few Socialists"); Nick Eberstadt, *The Poverty of Communism* (1988); John McMillan, John Whalley, and Lijing Zhu, "The Impact of China's Economic Reforms on Agricultural Productivity Growth," 97 *Journal of Political Economy* 781 (1989); Paul Wiedemann, "Comparing the Process of Socio-Economic Development in Market and Non-Market Economies: The EEC and CMEA," 8 *Cambridge Journal of Economics* 311 (1984); Janos Horvath, "Economic Reform in Hungary: Role of Plan and Market," 4 *Cato Journal* 511 (1984); Francis G. Castles, "Whatever Happened to the Communist Welfare State?" 19 *Studies in Comparative Communism* 213 (1986); Jerry Z. Muller, "Capitalism: The Wave of the Future," 86 *Commentary*, Dec. 1988, at 21. Comparing the recent trend toward free markets with the long history of depictions of capitalism as being in its "late" (and last) phase, Muller comments mordantly: "After late capitalism comes more capitalism." Id. at 23.

32. *The Liberal Theory of Justice: A Critical Examination of the Principal Doctrines in "A Theory of Justice" by John Rawls* 159 (1973). Subsequent page references to this book are in the text. The book was written while Barry was teaching at Oxford. He later moved to the United States and has now returned to (Margaret Thatcher's) England.

requiring everyone, before entering higher education or entering a profession, to do, say, three years of work wherever he or she was directed. (This would also have educational advantages.) To supplement this there could be a call-up of say a month every year, as with the Swiss and Israeli armed forces but directed towards peaceful occupations" (p. 164).

At least with the benefit of hindsight we can see that Barry wrote a prescription for economic disaster. It may be impossible to lay solid philosophical foundations under wealth maximization, just as it may be impossible to lay solid philosophical foundations under the natural sciences, but this would be a poor reason for abandoning wealth maximization, just as the existence of intractable problems in the philosophy of science would be a poor reason for abandoning science. We have reason to believe that markets work—that capitalism delivers the goods, if not the Good—and it would be a mistake to allow philosophy to deflect us from the implications, just as it would be a mistake to allow philosophy to alter our views of infanticide (see Chapter 11).

A sensible pragmatism does not ignore theory. The mounting evidence that capitalism is more efficient than socialism gives us an additional reason for believing economic theory (not every application of it, to be sure). The theory in turn gives us greater confidence in the evidence. Theory and evidence are mutually supporting. From the perspective of economic theory, brain drain is not the mysterious disease that Barry supposes it to be; it is the rational response to leveling policies by those whose incomes are being leveled downward.

I said that Mill's defense of free markets in *On Liberty* is most persuasive when viewed in pragmatic terms. This suggestion will jar some readers, for whom pragmatism is associated with socialism. Many leading pragmatists have been socialists, such as Dewey, Habermas, and Wittgenstein. But Holmes was a pragmatist, and he was not a socialist; ditto with Sidney Hook. If there is a correlation between pragmatism and socialism, it tells us more about academic fashions than about the nature of pragmatism. I will illustrate with an article by Richard Rorty that outdoes Brian Barry in political and economic naïveté, and with less excuse, because it was published in 1988 rather than in 1973.[33] Dis-

33. Rorty, "Unger, Castoriadis, and the Romance of a National Future," 82 *Northwestern University Law Review* 335 (1988). Barry appears, however, to be unregenerate. See Brian Barry, "Does Democracy Cause Inflation? Political Ideas of Some Economists," in *The Politics of Inflation and Economic Stagnation: Theoretical Approaches and International Case Studies* 280, 317 (Leon N. Lindberg and Charles S. Maier eds. 1985).

cussing Roberto Unger's socialist revolutionary treatise, *Politics,* Rorty expresses the hope that some Third World nation may be inspired by Unger's work to experiment with a radical restructuring of society—for example, by decreeing an absolute equality of incomes. The fact that one can offer no good arguments for such an experiment ought not count as a significant objection, Rorty argues; our inability to offer good arguments may reflect simply the poverty of our imagination and (in William Blake's phrase) the "mind-forged manacles" of our culture.

> Suppose that somewhere, someday, the newly-elected government of a large industrialized society decreed that everybody would get the same income, regardless of occupation or disability. Simultaneously, it instituted vastly increased inheritance taxes and froze large bank transfers. Suppose that, after the initial turmoil, it worked: that is, suppose that the country did not collapse, that people still took pride in their work (as streetcleaners, pilots, doctors, canecutters, Cabinet ministers, or whatever), and so on. Suppose that the next generation in that country was brought up to realize that, whatever else they might work for, it made no sense to work for wealth. But they worked anyway (for, among other things, national glory). That country would become an irresistible example for a lot of other countries, "capitalist," "Marxist," and in-between. The electorates of these countries would not take time to ask what "factors" had made the success of the experiment possible. Social theorists would not be allowed time to explain how something had happened that they had pooh-poohed as utopian, nor to bring this new sort of society under familiar categories. All the attention would be focused on the actual details of how things were working in the pioneering nation. Sooner or later, the world would be changed.[34]

34. Rorty, note 33 above, at 349–350. Yet Rorty believes that capitalism (in its welfare-state rather than laissez-faire version) is best for the United States, although irrelevant for most of the rest of the world. See *Consequences of Pragmatism (Essays 1972–1980)* 207, 210 (1982); *Contingency, Irony, and Solidarity* 53, 63 (1989); "Thugs and Theorists: A Reply to Bernstein," 15 *Political Theory* 564, 565–567 (1987); "On Ethnocentrism: A Reply to Clifford Geertz," 25 *Michigan Quarterly Review* 525 (1986). This belief has earned him the fierce enmity of the far Left. See, for example, Rebecca Comay, "Interrupting the Conversation: Notes on Rorty," in *Anti-Foundationalism and Practical Reasoning: Conversations between Hermeneutics and Analysis* 83 (Evan Simpson ed. 1987); Robert Burch, "Conloquium Interruptum: Stopping to Think," in id. at 99; Richard J. Bernstein, "One Step Forward, Two Steps Backward: Richard Rorty on Liberal Democracy and Philosophy," 15 *Political Theory* 538 (1987). Rorty's belief that capitalism is best for us seems inconsistent with his belief that you can't know whether you would prefer a different social system until you have tried it.

Rorty realizes that no Western country is likely to embark on such an experiment, but he hopes that a Third World country might be desperate enough to try.[35]

The pragmatist character of Rorty's analysis is unmistakable. Reason and argument are not everything; the big changes are gestalt switches; life is an experiment;[36] trial and error is the method of science; people are historically situated, and their situation must change before they will. We recall that John Dewey founded the Laboratory School at the University of Chicago, and with it progressive education. But there is something big missing from Rorty's analysis—learning from experience. The experiment he describes—eliminating or radically curtailing the use of material incentives to guide economic production—has been tried many times, in the Third World as elsewhere, with catastrophic consequences to the experimental subjects. A pragmatist might be expected to have concluded by this time that other forms of social experimentation are likely to be more fruitful than radical egalitarianism. Rorty, however, believes in the infinite plasticity of human nature and social institutions. His position is compatible with pragmatist philosophy, but not compelled by it. Neither Barry nor Rorty, it should be added, attempts to evaluate his utopian proposals from the standpoint of history or economics.[37]

In implying that Barry and Rorty would change their minds and agree with *my* pragmatic judgment—that capitalist wealth maximization offers the Third World (and the First and the Second) a lot more than socialism—if they knew more about economics and modern history, I

35. "If there is hope, it lies in the Third World." Rorty, note 33 above, at 340. "No single change could do more to expose the contingency, poverty, and insignificance of some of the central signifiers of the national neuroses of both superpowers than some third country's success at equalizing incomes." Id. at 351.

36. See John Dewey, "The Need for a Recovery of Philosophy," in Dewey, *Creative Intelligence: Essays in the Pragmatic Attitude,* 3, 7–8 (1917); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

37. Rorty has a weak sense of fact. This is evident in his political musings (writing in 1987, he denounced as a "gang of thugs" "the shadowy millionaires [unnamed] manipulating Reagan" and predicted the "gradual absorption of the Third World by the Second" because "time seems to be on the Soviet side," "Thugs and Theorists," note 34 above, at 566–567), and is perhaps connected to his coolness toward science, both natural and social, and resulting indifference to empirical investigation, the systematic study of social fact, and learning from past experiments. In this respect he is very different from his hero, Dewey. For criticism of Rorty's view of science, and in particular his airy dismissal of the differences between scientific and theological reasoning as revealed in the debate between Galileo and Cardinal Bellarmine over the moons of Jupiter, see Richard W. Miller, *Fact and Method: Explanation, Confirmation, and Reality in the Natural and the Social Sciences* 488–493 (1987).

may seem to be flirting with moral realism à la Plato. I am indeed saying that what happens to be an ethical disagreement is a disagreement over facts; that with knowledge will come ethical convergence. But my proposition is not that all value questions are reducible to questions of fact, but that the fact-value distinction shifts as knowledge grows. There happens to be substantial consensus in our society concerning ends (including ends for other societies). The disagreement is over means, and it will lessen as more of us learn more about how economic systems work.

My pragmatic judgment is, moreover, a qualified one. All modern societies depart from the precepts of wealth maximization. The unanswered question is how the conditions in these societies would change if the public sector could somehow be cut all the way down to the modest dimensions of the night watchman state that the precepts of wealth maximization seem to imply. That is a difficult counterfactual question (it seems that no society's leadership has both the will and the power to play the guinea pig in an experiment with full-fledged wealth maximization), though one untouched by Barry's musings on economics or by Rorty's romantic experimentalism. Until it is answered, we should be cautious in pushing wealth maximization; incrementalism should be our watchword.

The fact that wealth maximization, pragmatically construed, is instrumental rather than foundational is not an objection to its use in guiding law and public policy. It may be the right principle for that purpose even though it is right only in virtue of ends that are not solely economic. At least it may be the right default principle, placing on the proponent of departures from wealth maximization the burden of demonstrating their desirability.

Even if my observations on comparative economic performance in the Third World and elsewhere are correct, do such matters belong in a book on jurisprudence? They do. The object of pragmatic analysis is to lead discussion away from issues semantic and metaphysical and toward issues factual and empirical. Jurisprudence is greatly in need of such a shift in direction. Jurisprudence needs to become more pragmatic.

Common Law Revisited

The case for using wealth maximization as a guiding principle in common law adjudication is particularly strong. The common law judge operates within a framework established by the Constitution, which, by virtue of a number of the amendments, not only rules out of bounds the ethically most questionable applications of wealth maximization but

largely eliminates the problems of incompleteness and indeterminacy that result from the uncertain relationship between wealth maximization and the initial distribution of rights. That initial distribution is more or less a given for the common law judge. A related point is that such a judge operates in a domain where distributive or egalitarian considerations can play at best only a small role. The judge whose business is enforcing tort, contract, and property law lacks effective tools for bringing about an equitable distribution of wealth, even if he thinks he knows what such a distribution would be. He would be further handicapped in such an endeavor by the absence of consensus in our society on the nature of a just distribution, an absence that undermines the social acceptability of attempts to use the judicial office to achieve distributive goals. A sensible division of labor has the judge making rules and deciding cases in the areas regulated by the common law in such a way as to maximize the size of the social pie, and the legislature attending to the sizes of the slices.

The case is strongest in those common law areas where the relevant policies are admitted to be economic. Suppose the idea of an implied warranty of habitability—which entitles a tenant to sue his landlord if the premises fall below the standards of safety and comfort specified in the local housing code—is defended, as normally it is defended, on the ground that it is needed to protect tenants from deception and overreaching by landlords and will not lead to a reduction in the stock of housing available to poor people or to higher rentals than the poor are willing and able to pay. If research demonstrates that these assumptions are incorrect, the proponent, if fair-minded, will have to withdraw the proposal. In this example, in principle (for the necessary research is difficult to conduct), legal questions can be made determinate by the translation of a legal question into a social-scientific one in a setting of common ends, and therefore the valid Benthamite project of placing law on a more scientific basis can be advanced without injury to competing values.

If it could be shown or if it is conceded that common law decision making is indeed not an apt field for efforts to redistribute wealth, then it may be possible to ground wealth maximization (as used to guide such decision making) in a more powerful normative principle of economics, the Pareto principle. A transaction is Pareto superior when it makes at least one person better off and no one worse off. A simple contract approximates a Pareto-superior transaction. Neither party would sign the contract unless he thought he would be better off as a result. So, assuming adequate information (which does not mean assuming omni-

turn out one of the parties (perhaps both) may be made worse off by the contract. This possibility is inevitable if there is uncertainty, and uncertainty is inevitable.

The ethical appeal of the Pareto principle is similar to that of unanimity. If everyone affected by a transaction is better off, how can the transaction be socially or ethically bad? There are answers to this question,[38] yet a Pareto-superior transaction makes a powerful claim for ethical respect because it draws on intuitions that are fundamental to both utilitarianism and Kantian individualism—respect for preferences, and for persons, respectively. It may seem paradoxical to derive a norm of wealth maximization from the principle of Pareto superiority, when the hallmark of the latter is compensation of all potential losers (for remember that no one must be made worse off by the transaction if it is to be Pareto superior), while wealth maximization requires only that the winners' gains exceed the losers' losses. But if, as in the contract example, compensation is permitted to be ex ante, the paradox disappears.

The difference between the ex ante and ex post perspectives is fundamental, and failure to attend to it underlies much confused thinking about markets and transactional competence. Because many choices are made, unavoidably, under conditions of uncertainty, a fair number *must* turn out badly. Ex post, they are regarded as mistaken and engender regret, yet ex ante they may have been perfectly sensible. Suppose I have a choice between two jobs. One would pay me $50,000 every year with certainty, the other either $500,000 a year (with a 90 percent probability) or nothing (with a 10 percent probability). The expected income in the first job is $50,000 and in the second $450,000. (Notice the use of Bayesian probability, mentioned in Chapter 6.) The second, however, involves uncertainty. If I am risk averse—and let us assume I am—I will value an uncertain expectation at less than its actuarial equivalent. Hence the second job will not really be worth $450,000 to me, and let us suppose it will be worth only one-third as much—$150,000. Still, that is more than $50,000, so I will take the second job. But I am unlucky, the 10 percent chance materializes, and my income is zero. I would be less (or more) than human if I did not regret my choice, rail against my fate,

38. As argued, for example, in Robin West, "Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner," 99 *Harvard Law Review* 384 (1985), to which I respond in *Law and Literature: A Misunderstood Relation*, ch. 4 (1988). I consider the authenticity of preferences in Chapter 13.

berate myself for having chosen stupidly. But in fact I made the right choice—and would make it again, given the same uncertainty as before.

Consider now the case where negligence is the more efficient principle, in a wealth-maximizing sense, than strict liability because when all the costs and benefits are toted up the negligence regime turns out to produce the greater excess of benefits over costs. If so, the sum of liability and accident insurance premiums will be lower in the negligence regime and all drivers will be better off ex ante, although ex post, of course, some may do better in a regime of strict liability. Actually, not *all* will be better off even ex ante. Some people who are more prone to be injured than to injure will be worse off, since negligence favors injurers relative to strict liability, and some who are more prone to injure than to be injured will be better off. The "losers" will lose little, though—a matter of slightly higher insurance premiums. And both the "winners" and the vast majority of drivers who are neither disproportionately likely to injure than to be injured nor vice versa will be better off. Complete unanimity will be unattainable, but near unanimity can be presumed and the few losers will hardly be degraded, their autonomy wrecked, or their rights destroyed by having to pay a few dollars a month more in automobile insurance premiums.

I am painting with slightly too rosy a palette. Some people will lack the knowledge, intelligence, and foresight to buy insurance (I am putting to one side the deliberate risk takers); some may not be able to afford adequate insurance; and insurance that pays off as generously as common law damages may not be available in the market. When a person becomes a victim of a serious accident in which the injurer is not at fault, it may spell a financial disaster not attributable to the choices or the deserts of the victim—a disaster that strict liability could have avoided. An alternative, of course, is social insurance—the famous safety net. If cases of catastrophic uninsured nonnegligent accidental injury are rare, social insurance may be a better solution than a strict liability system that would require compensation through the tort system in all accident cases.

The essential point is that the availability of insurance, private or social, is necessary to back wealth maximization with the ethical weight of the Pareto principle. Once it is so backed, however, wealth maximization provides an ethically adequate quide to common law decision making—indeed a superior guide to any other that has been suggested. And the adequacy of private and public insurance markets, on which this conclusion depends, is an empirical, a studiable, issue.

No doubt most judges (and lawyers) think that the guiding light for

the same thing,"[39] and if pressed such a judge would probably have to admit that what he called utilitarianism was what I am calling wealth maximization. Consider whether a thief should be permitted to defend himself at trial on the ground that he derived greater pleasure from the stolen item than the pain suffered by the owner. The answer obviously is no, but it is offered more confidently by the wealth maximizer than by the pure utilitarian. The former can point out that the thief is bypassing the market system of exchange and that the pleasure he derives from the good he has stolen has no social standing because his desire for the good is not backed by willingess to pay. These are separate points. The thief might be willing to pay if he had to—that is, he might value the good more than its owner—yet prefer theft because it is a cheaper way for him to acquire the good. So theft might be utility maximizing, although this is unlikely because a *practice* of theft would result in enormous, utility-reducing expenditures on protection of property.

Since utility is more difficult to estimate than wealth, a system of wealth maximization may seem a proxy for a utilitarian system, but it is more; its spirit is different. Wealth maximization is an ethic of productivity and social cooperation—to have a claim on society's goods and services you must be able to offer something that other people value—while utilitarianism is a hedonistic, unsocial ethic, as the last example showed. And an ethic of productivity and cooperation is more congruent with the values of the dominant groups in our society than the pure utilitarian ethic would be. Unfortunately, wealth maximization is not a pure ethic of productivity and cooperation, not only because even lawful efforts at maximizing wealth often make some other people

39. See, for example, James Barr Ames, "Law and Morals," 22 *Harvard Law Review* 97 (1908); Henry T. Terry, "Negligence," 29 *Harvard Law Review* 40 (1915); Lon L. Fuller, "Consideration and Form," 41 *Columbia Law Review* 799 (1941); Benjamin Kaplan, "Encounters with O. W. Holmes, Jr.," 96 *Harvard Law Review* 1828, 1849 (1983). "The law is utilitarian. It exists for the realization of the reasonable needs of the community. If the interest of an individual runs counter to this chief object of the law, it must be sacrificed." Ames, above, at 110. Recall the utilitarian flavor of Chief Justice Shaw's analysis in the *Farwell* case (Chapter 8); and see next footnote.

40. *Farwell* is again a good example; Shaw's analysis of the fellow-servant rule in terms of justice, policy, and the convenience of the public is isomorphic with an analysis of the rule in terms of wealth maximization. Or consider a representative utilitarian analysis of criminal law, R. B. Brandt, "The Insanity Defense and the Theory of Motivation," 7 *Law and Philosophy* 123 (1988)—it reads very much like an analysis in terms of wealth maximization, except that the vocabulary is philosophical rather than economic.

worse off, but more fundamentally because luck plays a big role in the returns to market activities. What is worse, it is always possible to argue that the distribution of productivity among a population is itself the luck of the genetic draw, or of upbringing, or of where one happens to have been born, and that these forms of luck have no ethical charge. There are counterarguments, of course, but they are not decisive. So, once again, the foundations of an overarching principle for resolving legal disputes are rotten, and one is driven back to the pragmatic ramparts.