The Ideology of the Economic Analysis of Law

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Fritz Kessler once told my first-year contracts class that in the vast majority of legal cases we could, without knowing the law, predict who would win merely by consulting our common-sense opinion of who ought to win. Later, it became clear that "who ought to win" did not refer to the party who evoked our sympathy, but to the party favored by a more sophisticated and disinterested "common sense." Richard Posner, in *Economic Analysis of Law*,¹ makes clear to any student the considerable degree to which our legal common sense is simply economic sense. To the extent that economics is the science of rational choice, we are shown what we might have expected, e.g. that common-law judges, through the force of argument preserved as precedent, have chosen a rule structure which could be derived by applying economic (rational choice) analysis to problematic situations.

Posner, having found that economic analysis is a powerful tool for understanding—and for criticizing—the law, has used this technique to illuminate problems and rules governing almost the whole scope of the legal arena: common law, regulatory law, procedural law, statutory and constitutional law. Using economic analysis to investigate legal problems is anything but new,² but the breadth of Posner's


coverage combined with its accessibility to the noneconomist make his book an important contribution.

In this paper, I shall not demonstrate the obvious—that Posner's book is a substantial effort of scholarship as well as an important popularization of what is becoming an all-pervasive approach to legal analysis. Rather, taking Posner's *Economic Analysis of Law* as the representative of this "all-pervasive approach," I shall point out biases and inconsistencies in Posner's economic methodology, and will argue that welfare economics as currently used by legal writers provides an ideological, and frequently objectionable, basis for policy guidance.

I

Posner's entire approach is based on certain important, though traditional, definitions of "efficiency" and "value" (p. 4): "Efficiency... means exploiting economic resources in such a way that human satisfaction as measured by aggregate consumer willingness to pay for goods and services is maximized." "When resources are being used where their *value* is greatest, we may say that they are being employed efficiently." "Value too is defined by willingness to pay. Willingness to pay is in turn a function of the existing distribution of income and wealth in a society."*

The intuitive idea behind these market paradigm definitions of value and efficiency is quite simple. In a voluntary trade, both parties are better off than before the trade—"value" is increased. In monetary transactions, as long as a buyer is willing and able to pay an amount

3. For the purposes of this paper, a "bias" exists if a type of result or a particular interest is favored and if no defense or justification of the favoritism has been advanced.

4. Posner's definition of efficiency is basically the same as one frequently used by welfare economists: efficiency is increased if a change results in someone being made better off and no one being made worse off. An optimal allocation occurs when no one could be made better off without someone being made worse off ("better off" and "worse off" being subjectively defined by the individual affected).

In a case where the gain to those made better off is more than enough to pay for the loss to those made worse off, such that if those hurt were actually compensated and the change with the payoff thus would meet the efficiency requirement, writers have disagreed about whether the payoff must actually be made. In his analysis of the law, Posner clearly adopts the position not requiring an actual payoff, in part because the legal question is usually not, Should X be
which a seller is willing to accept, value could be increased by the trade—that is, by his behavior each party indicates that he thinks his situation has improved. When no more such trades can be made, the situation is "efficient." Law, then, can be evaluated in terms of its contribution to achieving efficient allocations. For example, in the case of an alleged nuisance, the law could grant the right to the party to whom the right was most valuable (pp. 18, 94). Negligence rules could be designed to allocate rights and duties so that parties will use the cheapest methods of avoiding economic costs (p. 69). Property rules could define rights such that transfers to the highest valued use are made easier (cheaper) (pp. 10–13). Contract rules could help to "minimize the breakdowns in the process of exchange" and reduce the costs of exchange (pp. 42, 44). Throughout his book, Posner attempts to clarify the understanding of the various ways legal rules can impede or promote the goals of increasing value and achieving efficiency.

Of course, an analysis in terms of operationalized definitions of efficiency and value is irrelevant unless efficiency and value measure something that concerns us. If Posner's measuring rod of human satisfaction, aggregate consumer willingness to pay, is accepted as a "correct" measure of human satisfaction,\(^6\) then presumably anyone who accepts human satisfaction as a goal would accept efficiency as a goal. Posner modestly says that the "economist cannot tell us whether . . . consumer satisfaction should be the dominant value of society" (pp. 4–5). But presumably any utilitarian\(^6\) would readily argue that it is and should be. Despite Posner's disclaimer, the book as a whole constantly uses efficiency as a standard of criticism,\(^7\) and most readers

taken from A and given to B? but, Who, A or B, does or should have a right to X? The economic solution is to recognize the right in the one who would be made more "better off," the one who would be willing to pay the most for the right.

5. Posner argues that increasing efficiency involves increasing human satisfaction (p. 2).

6. Posner states that "Bentham's utilitarianism . . . is another name for economic theory" (p. 356).

7. For example: "The right should be assigned to the party whose use is more valuable . . ."; "The limitation has an economic justification." "If the analysis . . . is correct, the ultimate question for decision in many lawsuits is, what allocation of resources would maximize efficiency"; "There is abundant evidence that legislative regulation . . . brings about less efficient results than
will see that efficiency is used as a normative, and not merely as a
technical standard. Although Posner does not try to demonstrate that
"maximizing" human satisfaction should be our only goal, he may be
right that most would accept it as the dominant goal. Thus, to the
extent that human satisfaction is maximized by increasing efficiency,
this implicit but continual use of efficiency as his policy guide appears
warranted.

The relevance of efficiency for policy use implies one further argu-
ment. Both human satisfaction and value are measured by consumer
willingness to pay. And as Posner points out, "willingness to pay is . . .
a function of the existing distribution of income and wealth in a
society" (p. 4). If the existing distribution is unjust, then maximizing
human satisfaction on the basis of willingness to pay would presum-
ably produce unjust results. More to the point, if "human satisfaction"
could be increased by changing the existing distribution, then in-
creasing efficiency, which is operationally tied to the existing distri-
bution, would not be the unambiguous route to maximizing human
satisfaction. The utilitarian or the "rational maximizer" would not
necessarily be concerned to promote efficiency. (If the efficiency
results from an actual trade or if payments are made such that no
one is made worse off while someone is made better off, then presum-
ably human satisfaction is increased—but not necessarily by as much
as it would be increased from an "inefficient" change in the distribu-
tion.) Moreover, if in a dispute the legal rule is to assign the right to

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8. If compensation takes place when a change occurs, such that everybody
is better off, then human satisfaction is presumably increased. But the increase
may not be as much as would occur from a change in distribution. If compen-
sation is not paid (it is normally not paid to the losing claimant in cases
in which Posner's criteria are used to determine the assignment of a right),
the "efficient" award may decrease human satisfaction as compared to an in-
efficient solution which "improved" the distribution.

9. "Economics is the science of human choice. . . . It explores and tests the
implications of the assumption that man is a rational maximizer of his ends in

10. Posner's claim that "whether he [the economist] can supply criteria . . .
for preferring one distribution over another is [a] question . . . that in many
practical contexts does not have to be answered" (p. 313), is unjustified in a
the party who would pay the most for the awarded right, this "potentially" efficient move, by itself creating the distribution, may decrease human satisfaction—depending on the specific effect on distribution.) Thus, in order to use efficiency as an adequate guide for increasing satisfaction, Posner must assert either that human satisfaction would not be increased by changing the existing distribution or, at least, that there is no reason to believe that an identifiable type change in distribution could be expected to increase human satisfaction. In fact, Posner makes such assertions. Although he argues that the "economist cannot tell us whether the existing distribution of income and wealth is just" (p. 4), he also asserts that "there is no theoretical [economic?] basis for [the] conclusion" that a "transfer of money from a wealthy man to a poor one is likely to increase the sum of the two men's total utilities" (p. 216). This claim, that no theoretical basis exists for believing that a specific type change in distribution would increase human satisfaction, is crucial for the argument which concludes that shifting resources to the most highly valued use increases human satisfaction. However, a direct evaluation of this claim is best reserved for Part III.

Legal rules allocate rights and duties on the basis of relevant characteristics of a situation. Typically, legal disputes in actual cases concern the parties' divergent claims of right or denials of duty. The court decision frequently affects efficiency. The award may create an efficient or inefficient situation, may affect the difficulty (cost) of the behavior necessary to reach an efficient situation, or may affect the incentive for efficiency generating behavior. If the relevant cost-causing behavior of the parties has been completed, the specific decision may not directly affect efficiency; however, as a guide to future behavior, the rule announced can. For example, the rule may define rights and duties so as to promote efficiency by recognizing the right in the party for whom the right is most valuable or by placing liabilities on the party who is best situated to minimize costs. In addition to its efficiency effect, the legal decision is inevitably distributive—someone is awarded the right (or the money for its violation) and someone else is not. Likewise, the rule embodies a distributive prin-

"practical context" where efficiency is emphasized because of its relation to human satisfaction but where the legal award affects the distribution.
ciple. The rule announces that in such a situation someone does and someone else does not have a certain right. (In this sense, the economic analysis of the legal dispute cannot take the distribution as given since the dispute is over what the distribution is.) The distributive effect is inevitable. The court may award the right to the party who would be better off even if he gave the losing party the amount the losing party would have paid for the right—however, the payment is not made; in fact, making the payment would be equivalent to awarding the right to the other party (who “valued” it less) and then forcing a sale—in other words, choosing a different distribution. The characteristic biases involved in Posner’s recommended economic approach to the solution of these legal disputes will be investigated in Part II.

Since “rights” are more valuable in some hands or in some uses than in others, and since law (and non-legal practices) defines the consequences of various methods of transfer or change (and of attempted transfers), law can be analyzed by asking whether it encourages or frustrates movement to more valued uses. Posner confronted this task. He analyzed law against the standard of encouraging movement to more valued uses (efficiency), given his definition of value. But not only can the goal of maximizing “value” be criticized, the concept of “value” can be examined. Any given set of rules can be criticized by viewing its effect on some kind of value. Conversely, any set of rules can be viewed as defining or illustrating some specific notion of value, although some specific notions will be so far from our own that we would consider the defining rules “irrational.” Disputes about the meaning of “value” are possible; nothing inherent in the human condition forces us to say that value is a totally subjective notion and that it must mean solely the satisfaction of present individual desires. Nor are we required to assume that value is properly defined on the basis of the given distribution of wealth. These disputes over the meaning of “value” may take the form of controversies about what rules of ownership and change are best or most acceptable. Plausible challenges to Posner’s definition of value and the problem of standards for judging competing concepts of value will be considered in Part IV. Finally, Part V will use Posner’s discussion of criminal punishment to illustrate the main themes of this paper.
II

One of the most important uses of Posner’s economic analysis is in determining how rights should be allocated and where liability should be imposed.\(^{11}\) In this context of rights allocation and liability rules, two central biases of Posner’s operational definitions of value and efficiency, a bias in favor of the rich and a bias in favor of the exploitative or productive use of resources will be examined. More specifically, a demonstration of the following set of propositions will be attempted.

Posner’s approach:

I. Favors the claimant of the right whose use is productive over one whose use is consumptive.\(^ {12}\)

II. Favors the rich claimant whose use is consumptive over the poor claimant whose use is consumptive.

And from these propositions, the following corollaries could be formulated:

A. As a general matter, the rich are favored directly by Proposition II and indirectly by Proposition I to the extent that the rich own a disproportionate share of the productive assets, or, more strictly, to the extent that the rich are more likely to be willing and able to buy a right for productive use.\(^ {13}\)

B. A person favored in a previous case is progressively more likely to be favored in the next case because:
   a. if he wants a right for consumptive use, he will be richer because of a previous grant, and because he is richer, the

\(^{11}\) Posner has basically adopted the analysis made by R. H. Coase, “The Problem of Social Cost,” \textit{Journal of Law and Economics} 3:1. For the last five or ten years, this article has been the basis of most legal-economic analysis of liability and property rules.

\(^{12}\) See fn. 21 below. Sometimes whether the use is productive or consumptive is not clear. Often a claimed right will have both uses for both parties. An obviously unclear case is one involving resources necessary to keep a worker living and able to work.

\(^{13}\) This favoritism for the rich depends on the contingent assumption that the rich are more able and willing to buy the right and implement it in productive use—a reasonable assumption. In a capitalist system, the favoritism is less clearly toward the rich as a group, but, almost by definition, is toward the capitalists. Of course, most of the rich might be tied into that group; but if, for instance, a landed gentry existed, its position might be prejudiced.
right claimed will be more valuable to him. (Follows from Proposition i above.)

b. given that the rich are more likely to want a right for productive use (see a above), the one who is richer because of a previous gain will be the one more likely to claim the right for productive use, and thus will be favored by the effect of Proposition i.

c. if a party's gain of a claimed right in a previous case had the effect of making his productive resources (e.g. labor) more valuable to him, then a right not to have his productive resources interfered with or damaged would be more valuable to him because of the previous gain.

To say that Posner's definition of value favors certain groups implies an alternative, coherent definition of value (or a replacement for the concept) which by comparison does not favor those groups. And the label "bias" indicates that no convincing reason has been advanced for choosing this definition rather than some alternative. (The proper method of justifying a concept of value will be discussed in Part IV below.) A demonstration of this insufficiency must await an exact statement of how Posner's economic approach would direct that rights and liabilities be assigned. At first, the economic directive for assigning property rights appears clear. In cases of conflicting property uses, "the right should be assigned to the party whose use is more valuable—the party . . . for whom discontinuance of the interference would be more costly" (p. 18).

14. This assignment promotes efficiency by eliminating the need for market transactions which are not costless. Thus, resources are not wasted getting the right to the holder for whom it is most valuable.

Compare tort-negligence theory, which is merely a specific case of allocation of rights. As would be expected, the economic test for negligence is a specific application of the rule for allocating rights—give to the party whose use is most valuable as measured by willingness to pay. Posner states the economic test—"the defendant is guilty of negligence if the loss caused by the accident, multiplied by the probability of the accident's occurring, exceeds the burden of precautions that the defendant might have taken to avert it" (p. 69). This test, which he identifies as the Hand formula, means that the plaintiff has a right to have precautions taken if the value to him (and other potential victims) is greater than the value to the defendant of not taking the precautions. Although capable of the same ambiguous interpretations as the basic allocation rule (see
Who is the "party whose use is more valuable?" The most "obvious answer," and the only answer consistent with Posner's definition of value (pp. 4; 68, n. 3), is the party who, given the existing distribution of wealth, is willing (and able) to pay the most for the right (hereinafter called the situation ante approach because the criteria used is willingness to pay before the assignment). Absent his precise definition of value based on willingness to pay given the existing distribution, three alternative analytic identifications of the party whose use is most valuable surely would have been suggested: (1) the party who, if he had the right, would require the highest price from the purchaser (hereinafter called the situation post approach because the criteria used presupposes an assignment); (2) the party who, if he had the right, would not sell it to the other party who wanted the right; or (3) the party who, if he did not have the right, would buy it from the other party—assuming, for the obvious answer and the three alternatives, that there are no transaction costs. Posner suggests (p. 18) that the third alternative would have the same economic effect as the "obvious answer." In fact, if Posner's assertion—"that the initial assignment of legal rights does not affect which use ultimately prevails" (p. 17)—were true, then Posner's answer and the three

pp. 11-12), his examples suggest value to the plaintiff as well as to the defendant should be based on willingness to pay for the right. Posner, p. 77 (rescue example) and 68, n. 3 (theft example).  

15. These methods of measuring value are all congruent with typical assumptions of the economic model used here. For example, all are consistent with efficiency—granting to the party whose use is most valuable by any of these definitions results in a situation which cannot be improved by trades. All three are "market" definitions of value. However, they differ in their assumptions about what the initial distribution of wealth is—illustrating the inescapability of the distributive problem and the impossibility of merely taking the initial distribution as given. (For the possibility of nonmarket definitions, see Part IV below.) Of course, an infinite number of notions of value are possible, many of which are very different from those of the economic model. For example, one could assert that right X is more valuable to A than to B because, although A does not want X very much (and B would pay much more for X), in the considered judgment of C (possibly the court or the collective), X would contribute more to A's development than it would to B's.  

16. Transaction costs include all the costs of making the trade. No transaction costs would be the equivalent of a frictionless market.  

17. This statement is thought to be the much quoted conclusion reached in Coase, "The Problem of Social Cost." Repeated statements by Coase seem to
alternatives would all be equivalent. And it is precisely this "theorem" that (assuming there are no transaction costs) the ultimate use of resources will be the same regardless of how rights to control their use are initially distributed, which Coase is generally credited with having established in his now-classic article, "The Problem of Social Cost."  

But Coase's analysis is subject to an important qualification, a qualification which is vital for understanding the biases implicit in Posner's, and much legal-economic, analysis. The initial assignment of a right can affect the wealth of the parties which in turn can affect the parties' "valuation" of the right, and thus affects the ultimate use of the resource. An extreme example, given by Posner, of the initial assignment determining the use which ultimately prevails is the case of a "right to a barrel of water as between two dying men in a desert" (pp. 17–18, n. 1). In this case, the third alternative allocation rule—e.g. assign to the party who would buy it from the other party if the other party had the right—is indeterminate. Neither party would buy because neither party would sell. The bias of Posner's approach also begins to show. If the barrel of water is assigned to the one for whom

support this interpretation, for example: "With costless market transactions, the decisions of courts concerning liability for damage would be without effect on the allocation of resources" (p. 10). See also Coase, pp. 5–8, 15.

A typical restatement of the Coase argument is made by George Stigler: "The Coase theorem [is] that the manner in which legal rights were assigned would have no effect whatever upon methods of production. The same amount of smoke would be released from the factory's chimney whether the factory owner or the householder was legally responsible for the smoke damages." "The Law and Economics of Public Policy: A Plea to Scholars," *Journal of Legal Studies* 1:1, 11–12.

18. Posner credits Coase for his assertion and also notes the qualification to Coase's thesis, which is discussed below (Posner, p. 17, n. 1). However, he never made use of that qualification in the textual discussion. A consistent reading of his text suggests that he adopted the Coase theorem and saw no difference between his original formulation: that the right should be assigned to the one willing to pay the most for it, which appears to be his working principle, and the alternatives which are incorrectly viewed as equivalent restatements.

19. In Posner, *Teacher's Manual for Economic Analysis of Law* (1973), p. 4, he suggests that this point has little practical significance. Interestingly, in making this argument he does not suggest why the initial assignment would not frequently determine the party to whom the rights are finally awarded.
it is most valuable, the one willing and able to pay the most for it, the
water would be assigned to the richer of the two men. But the analysis
is moving too fast. Why would the initial assignment—contrary to the
standard reading of Coase—make a difference?

The initial assignment normally affects the relative wealth of the
parties. An assignment of the right to the barrel of water (or a
right to be free from pollution or a right of property owners not to
have their property damaged by sparks from trains) increases the
wealth of the party assigned the right. As Posner notes, the distribu-
tive effects of the original assignment will affect the general demand
for various goods and services if the parties do not spend their money
in identical ways—and hence will affect the use of resources (pp. 17–
18, n. 1). In addition, since a person's wealth affects how much that
person is willing and able to pay for a specific desired right, the
effect on a person's wealth of the initial assignment of that right will
influence how much the person "values" the right. In these cases, the
initial assignment may determine who "values" the right the most.

Two investigations suggest themselves. First, in what cases (all,
some, none) does the wealth of the party influence how much he is
willing and able to pay for the right in question? Second, what are the
typical implications of the assumption about wealth embodied by the
different definitions of value?

Proposition I: Productive Claimant Favored Over Consumptive
Claimant

The initial assignment of the right, and thus the wealth of the party,
quite clearly determined which of the dying men in the desert ulti-
mately possessed the one barrel of water. However, in Coase's example
of the farmer whose crops are damaged by a rancher's straying cattle
or a train's sparks, the effect of the property or liability rule on the
wealth of the parties appeared not to influence the ultimate use of the

20. The following discussion will rely heavily on E. J. Mishan, "Pareto Opti-
18, n. 1); and idem, "Welfare Criteria for External Effects," American Economic
Review 51:594.
economic resources. The crucial distinction\textsuperscript{21} is that in the first case the right was desired for consumptive uses, in the second case for productive uses.\textsuperscript{22}

Normally, as a person’s wealth increases, the amount he will be willing and able to pay for a right or good which he wants for himself, and not merely in order to convert into more income, will increase.\textsuperscript{23} The “value” of a right to a person who desired it for consumptive use would be greater if the right has already been assigned to him, given

\textsuperscript{21}If they do not immediately reject it, most economists will think twice about this claimed distinction. Professor Mitchell Polinsky pointed out to me that the assignment may have an effect on resource allocation \textit{in both cases} and \textit{for the same reason}; it may affect demand. In the train-farmer example, the use would be affected if the assignment caused a general change in the demand for either farm goods or train service. Also, in both cases, the final use will be efficient given the technical definition of efficiency: that no change will make someone better off without making anyone worse off. However, this description of similarities is too broad. In the “consumptive” case, the assumption about the initial allocation, by affecting the wealth of the parties, \textit{directly affects} how much the parties “value” the right \textit{in that the value of the right to that party is in large part determined by that party’s wealth}—i.e. the party’s wealth has a direct effect on his demand function. In the case of productive use, various processes mediate the result; however, the value of the right in question is \textit{not directly affected} by the initial allocation \textit{in that the wealth of the party does not affect the value of the right to that party}—i.e. does not affect the demand function of the productive user for the right. In the case of productive use, little can be said abstractly about what demands will be increased or decreased by an initial assignment to the railroad or the farmer. Generally, for simplicity, the effect on demand is assumed to be too slight to affect prices and thus is assumed not to affect the value of the right for either party. However, in the case of consumptive use, the initial assignment’s effect on the party’s wealth normally will have a determinant effect on demand—i.e. in the normal case, the party whose wealth is increased will have an increased demand for the right.

\textsuperscript{22}Mishan appeared to recognize the difference between the cases of rights desired for productive and consumptive use. Most of Mishan’s examples were illustrations of rights desired for consumptive purposes. However, in an example involving an airline company, Mishan noted that the maximum the company would pay for a right to use an airfield and the minimum for which it would sell that right would be exactly equal. “Pareto Optimality,” pp. 271–272. Possibly, Coase failed to note the effect described above because he primarily drew examples from, and was concerned with, productive use of rights. See Coase, “Problem of Social Cost.”

\textsuperscript{23}Mishan calls this the “normal welfare effect.” This holds unless the amount the good in question is desired—the amount that a person would buy at a constant price—decreases as his income increases. See Mishan, “Pareto Optimality.”
that: (1) he is wealthier because of the assignment, (2) value is defined in terms of willingness to pay, (3) and he is more willing to pay when he is wealthier.\textsuperscript{24}

However, the wealth of a person should not affect how much he values a right which he desires solely for its productive use.\textsuperscript{25} In a perfect, costless market, goods or rights desired solely for their productive use will be purchased up to the price at which they just give a return for the money and will be sold at any price down to the point equal to the return from their productive use. The maximum purchase price and minimum selling price converge. Thus, although the original assignment may affect the wealth of the parties, in the case of productive use, it would not affect the amount they would be willing to pay for the right (assuming demand for the produced goods does not change). This distinction between productive and consumptive uses is the basis for our first claim, Proposition 1, concerning the bias of Posner's approach. The economic goal is to assign the right to the party for whom the right is most valuable. Posner, by looking to willingness to pay given the existing distribution, that is, the amount the party would pay for a right not already possessed, has picked a time to consider value when the value to the party who wants the right for a consumptive use is lowest (assuming Mishan's "normal welfare effect" holds), thus making it less likely that the right will be "most valuable" to that consuming party. For example, contrary to Stigler's analysis,\textsuperscript{26} householders who want clean air for their enjoyment but will only pay 9 (units of money) for the right to clean air, if they already possessed the right, might be unwilling to sell it for less than 11 (as they are wealthier for possessing the right). Measuring value as the amount one would be willing to pay favors the factory owner who would buy or sell the right to pollute for 10.

\textsuperscript{24} This last assumption, that he is willing and able to pay more when he is wealthier, is not always true. Why it sometimes is not true and how this affects the argument will be discussed below.

\textsuperscript{25} This argument should not be incorrectly interpreted to deny the possibility that people desire ownership in order to control production—not in order to make money—because, for instance, that control is important to maintain a certain form of class society; this desire to have control is equivalent to a desire for consumptive use.

\textsuperscript{26} Stigler, "A Plea to Scholars."
Assigning the right to either the factory or to the householder achieves an efficient result: no change would result in everyone being better off without making someone worse off. Nevertheless, Posner’s method of “valuation” produces a specific efficient result; figuring value as the amount one would require to sell the right if one possessed it (e.g. alternative 1 above) would produce a characteristically different “efficient” result. No neutral efficiency analysis exists which can avoid or segregate the distributive question; in the legal dispute the value maximizing award depends on what initial distribution is assumed while the content of the initial distribution is the precise issue in dispute. (Requiring the winning party to make payments to the losing party or to a third party, e.g. the state, does not remove the distributive issue but merely implies certain answers to it.) Theoretically, some specific initial distribution is adopted for purposes of evaluation. The one chosen indicates what favoritism is adopted.

**Proposition II: Rich Consumptive Claimants Favored Over Poor Consumptive Claimants**

Next we can ask if any groups or types of consumptive claimants are more or less favored by Posner’s *situation ante* method of measuring “value.” However, first we need a more precise inquiry into when and why an increase in wealth will increase the amount a person “values”—is willing to pay for—a right or good. A change in a person’s wealth could be expected to result in some change in his individual “demand” function. In the normal situation, an increase in wealth would cause his demand function to shift upwards—i.e. he would demand more at the given price or be willing, if necessary, to pay a higher price for the same amount. However, this will not always happen. Sometimes an increase in wealth will not increase the amount a person is willing to pay for a right. For example, suppose Alex, whose income is X, is able to devote five dollars to entertainment. His other uses of X are fairly fixed so he does as well as he can with five dollars. Although Alex would much prefer to go to the seven-dollar football game than to the five-dollar movie, given his entertainment budget, he decides to purchase the movie ticket. But then suppose someone gives him a movie ticket. Alex may offer to sell the movie ticket for four dollars so that
he can buy the seven-dollar football ticket and have two dollars left for a beer and a hot dog. (For another, more extreme case, consider the effect on the "value" of cat food—sometimes used as human food—of an increase in personal wealth.)

The movie-ticket case presents a right (one admission to the movie) which is valued less when the person's wealth is increased. In the man-in-the-desert situation the right (to the barrel of water) is valued more as wealth increases—and thus involves the opposite effect. In the movie-ticket case, the desire for the movie ticket declined because greater wealth made available more desired uses of time and resources; in the water in the desert case, the desire for water remained the same (although its "value" increased) when the person had more money. This difference suggests that, when predicting the influence of an increase of wealth on the value of a good, one should consider how the increase will affect the "utility" or desire for that good. If the desire remains the same, the value would increase with an increase in wealth. If the desire or utility decreases at the same or a faster rate than the utility of wealth decreased, the value would remain the same or decline. Two slightly different schemata exemplify decreasing desire or utility. First, more expensive goods may become attainable which substitute for the originally desired good—thus providing an alternative, but preferred, satisfaction of a need. Second, the needs that a person wants to satisfy may change. (Often either schema could apply depending upon the abstractness of the concept of need.) More generally, greater satisfaction of some desires may make the satisfaction of a given desire less important. The crucial factors determining the effect of the increase in wealth on the "utility" or desire for a specific "good" or right—the effect on demand—appear to be the persistence of the need or the availability of superior, but more expensive, substitutes for the good (change in desires, change in satisfiers of desire).

The argument for Proposition 1 assumed that if the wealth of the consumer was increased he would value the right more. When this generally valid proposition holds, the increase in value is directly related to the increase in wealth. The larger the proportional increase in wealth, the larger will be the proportional increase in value. Since the award of the right would provide a greater proportional increase
in the wealth of a poor person than of a rich person, an initial assumption that each claimant has the right increases the "measured" value of the right for the poor person more than it does for the rich person. (More formally, in most cases, $\Delta V_p - \Delta V_r > 0$ where $V_p$ is value for poor person and $V_r$ is value for the rich person.) However, this will only be true in the normal case where the increase in wealth does not decrease the desire for, or "utility" of, the right. To assert that Posner's analysis as applied to law exhibits these biases is to assert that in the most frequent or important cases of application, an increase of wealth (of the amount resulting from possessing the right in question) will have what I shall call the normal effect, that is, will increase the value of the right for consumptive claimants. The validity of this essentially empirical assertion is beyond the scope of this paper. However, a general characterization of when the normal effect does and does not hold provides a basis for an informed guess as to the legal situations in which the propositions and the corresponding biases hold.

As noted above, for some specific consumables the normal effect may not hold because of the availability of superior alternative goods or because of a change in desires that accompanies the increase in wealth. In cases where the "right" in dispute relates to one's personal capacities, one's identity, or the constant feature of one's environment the normal effect should normally apply. The value of health, a basic education, the vote, control over or guaranteed availability of some instruments of production—e.g. future income and provision for the exercise of personal capacities—the quality of the environment, personal relations, "free" time, liberty, and items of intrinsic personal value can be expected to increase as one's wealth increases, although in some cases the specific items filling some of these needs may change.

I merely hypothesize that the normal effect holds in most cases where the content of the legal rule is disputed or where the rule requires a direct application of a utility analysis. For example, I would assume this generally to be true in most pollution and nuisance cases; in individual rights cases, e.g. free speech, right to counsel, right of entry into the judicial process, right to vote, rights relating to education
(these, although not controversies between consumptive claimants, are cases where the poorer the claimant the more he is prejudiced by a welfare analysis applying a situation ante measure of value); in tort cases where part of the injury is to a “consumptive” rather than a productive interest; in many land use decisions; and in decisions articulating safety standards.

An example may clarify how measuring value in terms of willingness and ability to pay given the existing distribution favors the richer consumptive claimant. Assume that a city is deciding whether to use an open space for high intensity recreation (e.g. basketball courts, swimming area) favored by poor youth or for a fee-charging golf course favored by rich.\(^{27}\) Assume that the total cost to the city of either use is the same and that there are no negotiation costs (or other transaction costs). Then if the rich were willing to offer the city $5,000 to make a golf course but that the poor youth could only scrape together $4,500 for their offer, would “value” be increased by using the land as a golf course? Presumably, Posner would say yes. But if granted the right to have the land used for high intensity recreation, the poor youth might not give up the right for less than $7,000 while the rich, whose wealth would be little changed by being granted the right to have the land used for golf, would be willing to sell the right for a little more than $5,000. Adopting the situation post perspective clearly favors the poor for whom the right constitutes a larger proportionate addition of wealth. Alternatively, Posner’s situation ante approach favors the rich—and, thus, illustrates Proposition II. It must be emphasized that both the situation ante and the situation post approach to defining value involve a bias, at least until the favoritism implicit in the adopted definition is justified. Neither definition is objectively accurate. Neither indicates how, in fact, human satisfaction would be maximized. More importantly, the specification of the concept of value is not merely an economic problem.

The foregoing discussion has explained and illustrated the first two propositions—namely, that the situation ante definition of value favors the productive user and the richer consumption claimant. Il-

\(^{27}\) This example is a modification of one used by Mishan, “Welfare Criteria,” pp. 603–609.
Illustrations of these propositions in the context of legal disputes and judicial rule-making are plentiful.\textsuperscript{28} However, several examples in the context of legislative decision-making may clarify the argument.

The military draft (assuming the right to “buy” out by paying for a replacement) illustrates both propositions. For the drafting unit, which wants labor (productive use),\textsuperscript{29} the value of the right to draft should equal the amount possessing the right reduces its costs for achieving its goals (e.g. military protection). Consider two people, one rich and the other poor who are certain of being drafted if the draft exists, who are of equal value to the drafting agency and whose earnings would be equally affected by being drafted. Both have a consumptive desire not to be drafted. (The consumptive desire may be due to a preference for other employment or a dislike of regimentation, a desire for personal freedom or a dislike of the values implicit in military involvement.) The amount either would pay to avoid draft liability would be some amount less than the amount he would require for giving up a right to be free from the draft (assuming he had such a right). The individual is wealthier if he initially has a right to be free from the draft and thus is better able to stay out, illustrating Proposition i. The draft situation also illustrates Proposition ii, a general bias in favor of the rich as compared with the poor consumptive claimant. When the maximum each is willing to pay to avoid liability is the same, that amount typically represents a greater concern for freedom from draft liability for the poor person than for the rich person. The rich claimant who would only pay $500 not to be regimented would normally require only a little more than $500 to accept the regimentation. However, the poor claimant who could scrape together only $500 to escape regimentation may require $1,000 before he would “voluntarily” accept it. Assuming nonpossession prejudices the poor more than the rich.

\textsuperscript{28}Mishan suggests that the outstanding diseconomies resulting from permissive laws are “air and water pollution, noise, visual disturbance, [and] destruction of natural beauty.” Mishan, “Pareto Optimality,” p. 278.

\textsuperscript{29}“Productive” from the perspective of the drafting agency. Always, a productive use eventually creates something of consumptive use. The entire military product is of consumptive value for society. Assuming a given budget, the amount for which the drafting agency would pay for or sell the power to draft should converge.
Likewise, the assumption about initial entitlements affects the analysis in virtually all areas of social concern. For example, given that education is valued in part as a consumptive good, a salable or redeemable right to education given to everyone would result in a greater amount of education than if education were distributed on the basis of willingness (and ability) to pay (illustrating Proposition I). The group for whom consumption of education would increase the most is the poor—because the increase in the "value" of the consumptive good, education, due to the assignment of the right (and the corresponding increase in their wealth), is greater for the poor than the rich (illustrating Proposition II).

Corollaries A and B should seem obvious once Propositions I and II are understood, since both relate to the cumulative effect of the operation of the basic propositions. Instead of illustrating these corollaries, I invite the reader to consider how, by favoring both the rich and the productive claimants, Posner's *situation ante* definition of value would correlate with the ideological needs of a rising bourgeois. For example, if lands had been used in common by peasants, but some claim to title was held by the rich and large landowners, and title was contested and was to be assigned so as to maximize value, then the poor peasants would be disadvantaged if (1) the *situation ante* definition of value were used, and (2) part of the value of the land to the peasants was as a consumptive good—that is, if they valued a style

30. The activity of education is not only immediately enjoyed by many (present consumption good) but also is undertaken to increase or improve future pleasures, making education an investment in future consumption. Of course, the consumptive component of education differs for different consumers; moreover, different curricula are generally valued more (e.g. humanities) or less (possibly business, engineering) as a consumptive good. An additional hypothesis would be that (1) the poor generally choose more productive and less consumptive education than the rich and (2) that this disparity would be decreased if education were a matter of right or were freely available.

31. That is, salable, including the possibility of turning in the right for the money equivalent of the societal resources saved from decreasing the amount of education.

32. This result is obviously counter to the Coase theorem that the allocation of resources would not be affected by initial assignment of rights.

33. This is merely an example to show how ideology—e.g. economic definitions and policies—may reflect power relations. There is no claim here that a goal of maximizing value would in fact be determinative of the assignment.
of life and/or a set of personal and community relationships which would be disrupted by losing the land. If the peasant’s claim failed and, now even poorer, he moved to the city, application of Posner’s definition of value would continue to be to his disadvantage. To take only one example, in determining the liability or limits that could be placed on pollution and assuming that most of the people affected are poor urban laborers, since freedom from pollution is of only consumptive value but freedom to pollute is of productive value, the poor laborers would again be disadvantaged by the situation ante or “willingness to pay given the existing distribution” notion of value.

Posner’s Examples

Conclusions follow from the method of analysis adopted, its application, and the empirical “facts” on which the method is applied. Above, the concern has been to show the analytically identifiable biases in Posner’s method. However, often much can be learned about a theorist’s perspectives and commitments by looking at the misapplication of an analysis or the use of questionable facts. The reader should be attentive to the use of empirical suppositions by Posner to see if they support arguments establishing rights for the wealthy, or exploitative interests, or provide a basis for criticizing programs designed to aid the poor. Below, however, cases where I believe Posner’s analysis is flawed on its own terms will be noted. Two tendencies can be observed: (1) to make mistakes that extend the favoritism implicit in the methodology or, occasionally, (2) to adopt a more commonsense notion of value than his approach allows.

Is Imposing Costs like Imposing an Excise Tax? At several points Posner appears to object to imposing the pollution costs on the polluting factory, at least assuming “that much, if not most, pollution is . . . cost justified,” because imposing this cost is like imposing an excise tax.34 If this comparison is accurate, it supports the productive user’s

34. Posner, pp. 160–161. If the cost is imposed by a tax, the “tax is in the nature of an excise tax . . . [and] excise taxes are regressive.” When he discusses imposing the cost by liability rules, and objects to the economic effects of the liability rule, he cites the chapter on excise taxes to show the effect (pp. 37–38). See also p. 263: “A liability rule is like an excise tax.”
objections to imposing the costs on him since an excise tax is wasteful (inefficient) (p. 224) and often regressive (pp. 161, 225–226, 263).

Inefficiency occurs when the excise tax causes an industry to charge a "higher price (which) induces some consumers to shift to other products that now seem cheaper, although in fact they are either more costly to produce . . . or inferior (in quality)" (p. 224). Of course, when the cost of using any factor of production, e.g. labor or raw materials, is imposed on a producer or when, for other reasons, his costs increase, he must correspondingly increase the amount he charges.\(^{35}\) Inefficiency results only when the increase in price does not relate to the costs of production. When an excise tax is criticized, the inefficiency claim is that the increased cost does not reflect the costs of production. An excise tax imposes an added cost which does not reflect a use of resources—or an injury to anybody—and thus may cause inefficiency; the opposite occurs when the costs of pollution are imposed on the factory. A wasteful amount of production occurs unless these costs are imposed (even if only as opportunity costs). In respect to efficiency, not imposing these costs is most analogous in effect to an excise tax. The difference between imposing a cost related, and a cost unrelated, to any use of resources is crucial.

In a section in which he suggests that making the factory liable may cause economic effects prejudicial to the poor, Posner gives as his example a situation where not imposing liability, or not taxing pollution, would lead to an inefficient result (p. 37). Suppose that firm A uses old machinery that pollutes and firm B uses new machinery that does not. Both have the same direct operating costs. Making the firms liable for pollution, as Posner correctly points out, may force firm A to close down (p. 37). However, efficiency requires precisely this result—liability or a pollution tax prevents (unlike the excise tax, which may cause) (p. 224) goods which are more costly to produce from appearing to be as cheap as less expensive goods.\(^{36}\)

\(^{35}\) Cf. the liability for pollution with the requirement of paying workers for their labor. The rule could go either way, but would Posner suggest that it is undesirable to require wage payments because they increase costs and result in lower production?

\(^{36}\) Posner suggests that "in principle" pollution should be allowed "if the benefit from continuing to pollute exceeded the cost to the victims of either tolerating or eliminating it, whichever was cheaper" (pp. 26, 25). The com-
The Basis of Land for Tax Purposes. Posner's discussion of setting the proper basis of land values for property tax purposes provides a rare example in which the misapplication of his own analysis favors the nonproductive use of the right. In the case Posner describes, B uses his land, worth $100, for farming. A developer offers B $200, but because of his sentimental attachment to the land, B will not sell (assume B would not sell for less than $250). On what basis should this land be assessed for real estate tax purposes? Following Posner, who consistently separates the "economic" goal of efficiency and value maximization from distributive concerns, the economic goals would presumably be: (1) to encourage ownership by the party whose use is most valuable and (2) to encourage that party to use the property in the most efficient manner. If the land were taxed on the basis of its income-producing capacity in its current use, the tax would subsidize the farmer's use, which is inefficient, and would make a change to the more valuable use comparatively less of a gain, thus discouraging transfer of the land to its most valued use. If the land

parison is between (1) the cost to the factory of eliminating the pollution and (2) the cheaper cost to the clean-air consumer of eliminating or tolerating the pollution. We can assume a specific cost to eliminate. However, the cost of tolerating depends in part on the wealth of those tolerating (see pp. 14–15 above). Cost to eliminate suggests adopting a situation ante perspective. However, if a situation post perspective were adopted, i.e. if value was figured assuming that the claimant possessed the right, then (1) the cheapest-cost avoider may change from being the clean-air consumer to the factory and (2) a situation may arise where, even assuming no transaction costs, if the clean consumers do not have a legal right to the clean air, they might tolerate pollution even though eliminating it is cheaper. Moreover, the analogy to the concern over excise taxes and imposing only real costs of production would require imposing the opportunity cost of pollution on the factory even if the pollution were allowed to continue. See Mishan, "Pareto Optimality," pp. 276–280, for interesting additional arguments as to why placing liability on pollutor has a positive effect on both efficiency and equality.

37. Whether or not Posner's recommendation favors the rich would require considerable empirical information. The benefits go to the person who owns and wants to hold agricultural or undeveloped land valuable for commercial or industrial or residential development. This will normally be land on the fringes of an urban area. Some information as to who are the main owners of this land would be needed to determine if Posner's recommendation favors the rich.

38. Posner, p. 229. The numerical aspects of the example are added.

39. Assuming a 5 percent tax, if B receives a return of $100 from productive use of land and a return of $100 for consumptive use (sentimental value) and
were taxed on the basis of its most valued use, the tax would discour-age the most efficient user from making it even more efficient (be-cause some of the gain would be taxed away). Although not without efficiency problems,\textsuperscript{40} a rule that fixed the basis at its highest value to any user other than the current user would (1) encourage transfers if someone else could use the land more efficiently (2) without dis-couraging the present owner from making the most efficient possible use of the property. This rule, of course, sets the basis equal to market value. Nevertheless, Posner claims such a rule “systematically ex-tinguishes land values in excess of the market value” (p. 229). In the example above, Posner argues that making the basis the $200 which the developer offered would induce $B$ to sell, extinguishing the extra $50 of value that $B$ placed on the land. But if $B$ values the land at $250$, he would not sell for $200$—the tax does not have the “same effect . . . as eminent domain” (p. 229). The central feature of emi-nent domain is the possible lack of voluntariness on the part of the seller. $B$ could and would refuse to sell to the developer as long as the sum of his productive and consumptive return from ownership ex-ceeds the amount offered by the developer. However, the value $B$ places on land as a consumptive good depends on his wealth and income. If he had a large independent source of income, the tax would have little effect on his valuation for sentimental or consump-tive reasons.\textsuperscript{41} The higher tax may affect $B$’s wealth and income and, particularly if he is poor, may result in his not being able to con-sumptively “value” the land as much. But unless a certain distribution is to be preferred—and Posner finds no economic reason for prefer-ence—$B$’s ability to value the land is irrelevant from the standpoint of efficiency or value. The tax does not force a transfer to a less valued

\textsuperscript{40} Although I am not using Posner’s argument at this point, any tax on improvements (justified by my rule) would lead to an undervaluation of the gain from that investment as compared to other uses of resources (investments) which are not taxed. This consideration is the basis for arguments for taxing only “economic rents”—an argument unconvincing in the final analysis for reasons which would lead us away from the discussion in this paper.

\textsuperscript{41} Cf. Proposition II. The tax would affect the productive return—e.g. in the example in fn. 39, it would induce a transfer to the higher valued use.
use, does not of itself extinguish land values, and does not have the same effect as eminent domain. Posner's assertion to the contrary requires his rejection of his own definition of value and a reversion to a common-sense notion of value which is not tied to the criterion of "willingness to pay." Possibly, in this case, he saw through the bias of his definition of value and adopted a more popular (and possibly less objectionable) definition.42

The Progressive Income Tax. Posner argues that the "progressive income tax will sometimes increase rather than reduce income inequalities" (p. 239). But the example he gives to demonstrate this proposition, the existence of a charitable deduction, neither supports his argument nor is it an essential feature of a progressive tax-scheme. All the charitable deduction can do is reduce the tax's reduction of inequality. Although, as Posner notes, charitable deductions are "cheaper" for the richer taxpayer, they are only cheaper because and in the amount that inequality would be reduced by the progressive tax if the taxpayer had not contributed. A $1,000 donation is $300 cheaper for a person in the 50 percent tax bracket than for one in the 20 percent bracket, but the $300 cost advantage equals the $300 by which the progressive tax would reduce inequality between the two in the absence of the donation. Thus, inequalities of wealth are in no way increased but, at best, are not reduced by as much because of the existence of charitable deductions.43

Public or Private Relief of Poverty. After suggesting that possibly the market rather than the government ought to reduce poverty, since people could contribute the amount to eliminate poverty that they think poverty is costing them, Posner argues that there is no free-rider problem (p. 253). He argues that the reduction brought about by my contribution is unaffected by the contribution of others (p. 254). If a further reduction of $1.00 is worth $1.00 to me, I con-

42. Less objectionable rather than correct because any category choice produces characteristic distortions. What needs to be exposed is the lack of neutrality and the types of distortion involved so that the desirability of the approach can be assessed.

43. By reducing the "cost" of charitable deductions for the rich, the exemption should cause the rich to have a distorted preference (greater demand) for this type of expenditure—an effect which the poor usually would not regret.
tribute; if not, then there is no reason why I should contribute further. However, his analysis fails to note the most common case. Say that a further reduction of $100 is worth $1.00 to me and to each of 100 other people, but that a further reduction of $1.00 is worth only 1¢ to me (and to each of the other 100 “rich” people). In this case, my contribution of $1.00 produces a gain of $1.01—e.g. it is worth 1¢ to each of the 101 people who dislike poverty—but I would not make the contribution because it was only worth 1¢ to me. However, I would vote for a $1.00 levy on each of the 101 rich people in order to reduce poverty by $101. The use of government to enforce contributions and prevent free riders seems to be the only practical way to handle this “market failure” and to achieve an “efficient” amount of poverty relief.

In analyzing the basic biases implicit in Posner’s approach and in suggesting why they are not more often recognized, we have observed (1) that, even in the frictionless world of perfect markets, the initial assignment would affect the final resource use and (2) that the traditional formulas for making the initial assignment involve characteristic types of favoritism. An examination of some of Posner’s applications of his own approach has shown that, in selected cases, he appears to make mistakes which generally favor the same groups which his general methodology favors. Next, the assumption crucial for his analysis will be taken up: that there is no theoretical or economic reason to believe that welfare would be increased by a distribution of wealth more equal than that of the status quo.

III

Efficiency is important because of its presumed relation to welfare—more is better than less and employing what we have in its most “valuable” use is better than employing it in a less valuable use. Posner’s claim that the “economic” recommendation concerning welfare is to increase efficiency requires the proposition that no alternative or competing “economic” criterion for human satisfaction or well-

44. Statements to the effect that the “economic test” or the “economic principle” or the “economic function” or the concern from the “economic viewpoint” is directed toward increasing efficiency fill the book. See, e.g., Posner, pp. 18, 43, 58, 69, 78, 84.
being exists. In cases of conflict, the existence of another criterion would prevent the economist from making a clear recommendation—unless means of relating the various criteria were found.  

Other than a Pareto notion of efficiency, the most frequently suggested economic criteria for welfare (or for maximizing value) have focused on distribution, e.g. suggesting that value or welfare would be increased by moving closer to equal distribution. As he must, Posner argues that “income equality is not a criterion, like efficiency, that is linked logically to the economic concept of value” (p. 216) or to “welfare” (p. 215). He argues that “there is no theoretical basis for the conclusion . . . that a transfer of money from a wealthy man to a poor one is likely to increase the sum of the two men’s total utilities . . .” (p. 216, emphasis mine).

The usual economic argument for equalizing incomes is based on the principle of diminishing marginal utility. As even Bentham recognized, given that for an individual the utility of the first dollar is greater than that of the second, the second greater than the third, and so on, if everyone had the same utility function, that is, received the same satisfaction from the same income, then an equal division of a given amount of wealth would maximize utility. Lerner advanced this argument by showing that even (realistically) assuming that people’s utility functions differ and assuming that comparisons be-

45. If another criterion not based on willingness to pay given the existing distribution were logically related to increasing human satisfaction, then increasing value and efficiency (as Posner defines them on p. 4) may conflict with increasing human satisfaction. “Value” strictly defined and human satisfaction would not be equivalent. Alternatively, the discovery of another relevant criterion related to human satisfaction could be taken to show that Posner’s definition of efficiency and value are misleading—are inaccurate and insufficient for their normal policy or informative uses.

46. Because of the assumption that individuals have a diminishing marginal utility for wealth, Bentham concluded that welfare would be increased by increasing equality if the steps taken did not decrease production. Bentham, Theory of Legislation, pp. 98–109. This generally accepted conclusion has been given its most systematic formulation by Abba P. Lerner, Economics of Control (1949), pp. 20–40, whose approach will be generally followed below. See also C. Edwin Baker, “Utility and Rights: Two Justifications for State Action Increasing Equality,” Yale Law Journal 84 (1974): 39.

47. Posner appears to use “value,” “welfare,” “utility,” and “human satisfaction” interchangeably.
tween individuals can not be made, an equal distribution of a given sum maximizes total probable utility. Complete lack of knowledge about the utility functions of specific individuals or the inability to make interpersonal comparisons is equivalent to thinking there is an equal probability that, if there are equalizing transfers, a person with any utility curve C_i will receive or give up X. Given the assumption that the marginal utility of wealth decreases, the utility gain from the receipt of X (for a poor person with utility curve C_i) is larger than the utility loss from giving up X (for a rich person with a utility curve, C_i), since the marginal utility for wealth is higher when one is poor. Over a number of cases such transfers must be expected to result in a utility gain and thus equalization would maximize total probable utility.

Posner does not dispute the basic assumption of this argument, the principle of diminishing marginal utility. Both Posner and Lerner would agree that the exact welfare maximizing distribution cannot be determined as long as the shape and height of people's utility curves are unknown. Further, both seem to agree that it is unknowable. But Lerner demonstrates that in the static case "the maximization of probable total satisfaction is obtained by an equal division of income." Thus, a transfer of money from a wealthy man to a poor one is likely to increase the sum of the two men's utilities.

Posner's response to the type of argument made by Lerner fails on two grounds. First, his application of the assumption that "people's marginal utility curves are unknown, and probably unknowable" (p. 217) is incorrect. Posner argues that specific (though different) factual premises are necessary in order to show either (1) "that at-

49. Lerner and Posner use almost identical diagrams to reach apparently different conclusions. Posner, p. 217; Lerner, p. 30. The difference in analysis is that Posner considers only one of two equally likely possibilities—a transfer from one with a higher to one with a lower utility curve. Lerner takes into account the fact that both types of transfer can be expected to occur with equal frequency.
50. If the utility functions were known, then maximization would require equalization of everyone's marginal utility obtained from his last unit of wealth (assuming that this process of equalization were costless). See Lerner, p. 28.
51. Lerner, p. 29.
taining the line of equality would increase economic welfare,” or (2) “that equalizing income would reduce total utility” (pp. 217–218). From his (and Lerner’s) assumption of lack of knowledge Posner concludes that neither factual premise can be made and therefore that the economist can say nothing about the effect of equalizing incomes. Posner may be correct in believing that the premise needed for the second possibility cannot be proven. However, he is wrong in arguing that a specific factual premise is required to provide a theoretical basis for concluding that attaining the line of equality is likely to increase economic welfare. No specific factual premise is needed; merely the lack of knowledge—which Posner takes for granted. As long as Posner assumes that a diminishing marginal utility applies to individual utility functions, probable total satisfaction will be increased by moving toward equality if either (1) utility functions are randomly distributed in relation to individual income (factual premise) or (2) we have no reason to believe that the ability to derive utility from income is more likely to be positively than either negatively correlated or not correlated with total income (conclusions which could result from either lack of knowledge, e.g. from not making interpersonal comparisons, or from specific factual knowledge). Unless specific factual premises and specific individual comparisons—e.g. that the rich are inherently better able to derive satisfaction from wealth than are other people—are believed, the proposition that increasing equality would increase probable total utility must be accepted (absent dynamic effects).

Lerner argues that the specific factual beliefs required by the position Posner takes could only be defended on the basis of “Nazi biology” and the “belief in racial superiorities.” Nevertheless, Posner does not even try to defend the proposition his argument requires—e.g. that more probably than not, the rich are inherently more

52. More precisely, that the economist can say nothing about the static case. Actual intervention to reallocate wealth, as Posner notes on p. 218, may be costly and the economist can point this out. The implications of the dynamic case are discussed in Baker, “Utility and Rights.”

53. If it is not an inherent ability, then presumably increasing the wealth of the poor would increase their ability to derive satisfaction from wealth; at most, if the capacity is not inherent but acquired through experience, we have an argument for equalizing income gradually. Lerner, Economics of Control, p. 34.
capable of deriving utility from wealth than are the poor. Indeed, Posner's position is paradoxical. On the one hand, "willingness to pay" as a measure of value is usually taken to involve no comparisons of individual capacity for enjoyment, in which case Posner cannot assume that the rich generally derive more utility from a given amount of wealth than the poor (have higher utility curves). We should, therefore, conclude that increasing equality would be the maximizing policy. On the other hand, assuming "willingness to pay" to be a correct measure of consumer satisfaction implies that, given the existing distribution of income, the marginal utility of the last unit of wealth is the same for everyone. No such proposition has ever been advanced. Moreover, if it were true, any change in the status quo distribution, by increasing for some and decreasing for others the utility of their last unit of wealth, would necessarily reduce total satisfaction since some people would now possess wealth which would provide more satisfaction if possessed by others. Thus, in any case where a right was not clearly allocated under the status quo, any assignment presumably would change the status quo and cause inefficiency. The first interpretation of "willingness to pay" as a criterion of value implies that increasing or maximizing value is not equivalent to promoting or maximizing economic welfare or total utility—that the strict definition of "efficiency" embodies a favoritism for the rich rather than as a standard of human satisfaction; the second interpretation is implausible. Removing the paradox requires a rejection of the status quo bias, implicit in using "willingness to pay" as a measure of human satisfaction and, instead, an evaluation of the welfare effects involved in the assignment of rights. Since increasing equality has been shown to be "logically linked" to increasing or maximizing consumer satisfaction or welfare, absent other (e.g. dynamic) effects, an assignment of rights which moves toward greater general equality would increase probable total welfare by an undetermined amount. Thus, increasing efficiency (as defined by Posner and most economists) is (1) not unambiguously related to increasing satisfaction or welfare and (2) has no clear or consistent claim to be the economic goal of law.

Posner's methodology requires that no economic argument could demonstrate that a movement toward increased equality would in-
crease utility or welfare. However, in at least one situation he adopts contrary assumptions. In considering the effect of meagerly compensated jury duty on people with high and low incomes (pp. 353–354), Posner ignores his own argument that there is "no theoretical basis" for the conclusion that the "loss of a dollar hurts the millionaire less than the gain of a dollar helps the pauper" (p. 216). Instead, he concludes that the "loss of $45 may be more painful to [the $15-a-day-dishwasher] than the loss of $470 is to the $25,000-a-year man" (pp. 353–354). For the reasons noted in the discussion of Posner's "theoretical" argument, very few would disagree with his statement about the dishwasher and the man whose income is $25,000 a year. Nevertheless, the jury duty-dishwasher examples must be viewed as a lapse or mistake in Posner's consistently biased, economic analysis, which requires that the proper implications of declining marginal utility be ignored in value maximization analysis.

IV

On one level, Posner's analysis purports merely to describe the allocative effects of legal rules and institutions. But both in his choice of categories\(^54\) and in his continual recommendations of policies intended to simulate the results of a costless\(^55\) market, Posner has adopted a market model as the ideal for both allocative and distributive purposes.\(^56\) The market model assumes the sovereignty of the consumer,

\(^54\) A point of view, a limiting of vision, and, of necessity, value decisions are all implied in any adoption of categories of analysis. Although this situation should be recognized, it is not in itself grounds for rejection of all categorization—thought may be dependent on language, and, therefore, on categorization.

\(^55\) By "costless" is meant that there are no transaction costs or impediments to bargaining.

\(^56\) Cf. Guido Calabresi, "Transaction Costs, Resource Allocation, and Liability Rules—A Comment," *Journal of Law and Economics* **11**: 67. Calabresi argues that the conclusion is correct, though tautological, that in a costless market, "all misallocations of resources would be fully cured in the market by bargains" (p. 68). He also appears to accept the Coase theorem criticized above: "the same allocation of resources will come about regardless of which of two joint cost causes is initially charged with the cost . . ." (p. 67). However, Calabresi has made clear that he intended "an optimal" rather than "the same" allocation in the quoted statement (see, e.g. p. 68, n. 4). But Calabresi's statement quoted here is both more consistent with Coase and more consistent with the usual interpretation of the "Coase theorem."
which means that the consumers’ choices must be accepted. Interference with the individual’s orientations, desires, and economic power is rejected. Consumer sovereignty and Posner’s definition of value are rooted in the status quo in the same way (and for the same reasons): in accepting as the proper standard willingness and ability to pay, both accept existing orientations or desires and the existing distribution. 57 Most defenses of the consumer-sovereignty market ideal fall into two categories. First, some defenses maintain that under ideal conditions a market maximizes something worth maximizing—e.g. welfare or satisfaction or utility; these are essentially “utilitarian” defenses. Second are defenses which challenge any non-neutral government interference with individual freedom and equate distributive justice with the results of market transactions among property holders. Such defenses are based on ideas of freedom and justice. 58

The analysis in Part II demonstrated how Posner’s market definition of value systematically favored certain groups. Then, using the most plausible interpretation of his own assumptions, it was demonstrated in Part III that maximizing “value” does not maximize consumer satisfaction—a conclusion which contradicts the basic postulate on which the policy significance of the economic analysis is asserted. However, at most this analysis was merely an unmasking. No alternative concept of value and no method of defining value were suggested. Some criticisms of the two defenses of the market model now will be sketched in order to discover whether any positive, alternative concept of value can be found. If so, the sufficiency of the alternative can be tested by investigating its success in transcending the failings of the market concept of value.

The utilitarian or maximizing defense takes either a vacuous analytic or semi-empirical form. The analytic version claims that “value” is optimized when no more trades would be made in a free, costless market. However, “value” is defined as subjective desire for

57. Posner agrees that economists “usually take tastes as given” (p. 299). But his concepts of value and efficiency preclude all other possibilities.

which a person is willing and able to pay to satisfy, i.e. is defined in terms of what trades people would make in a costless market. Since value is defined by the same behavior which the economist praises for creating value, no policy significance can be attributed to the creation of value without an independent defense of the behavior. However, the independent defense either turns into a combined empirical-ethical argument which equates economic "value" with a desirable (possibly the only?) goal of human institutions—welfare or human satisfaction—or turns into an ethical defense of consumer sovereignty.

Even if human satisfaction were accepted as the only goal of human institutions, the attempt to make an empirical argument is doomed. Consumer sovereignty based on any existing, nonegalitarian distribution systematically fails to maximize human satisfaction (see Part III). Likewise, there is no evidence to indicate that people's existing orientations are those most conducive to their greatest happiness or greatest satisfaction. The necessary demonstration would require the same type of (interpersonal) comparisons which the economists will not make. With the recognition that desires are not static but that the market itself influences the changes, comparisons between the satisfactions resulting from tastes generated by market and by alternative nonmarket processes become necessary. Moreover, any nontautological defense of the market as a value maximizer must claim that, at least in principle, all goods or values can be handled by the market.

A "social value"—"any experience or state of affairs whose definition makes essential reference to reciprocal states of awareness among two or more persons"—is an example of a good which even the ideal

59. A principle is needed to determine whether the maximum satisfaction goal means satisfying the maximum number of desires or the maximum percentage of desires. If a market system stimulates ever-new desires, the market may be a relatively effective means to accomplish the former but be very ineffective at the latter. Of course, if we could just find a base for judgment we would like to reject both interpretations of the maximum satisfaction goal and instead aim at satisfying something we might call "human" or "freely chosen" or "moral" or "higher" desires—and prefer a system which stimulated such desires.

60. The inquiry is: do goods exist which are not even theoretically susceptible to correct handling by a market? Public goods, for example, can "in principle" be handled by the market—the problem of market failure merely requires the government to attempt to duplicate the results of the market if it did not fail.
market could not handle. Work, collective decision-making, and personal relations are among the processes of interaction which present situations in which people can and do value the mutual awareness of each other's participation and each other's concerns and needs. Not merely outcomes but also the process and form of interaction are crucial aspects of social values. Hence, the processes or structures of interaction in which social values exist have more than instrumental value.

In a market transaction, what is bought or sold must be an object, a commodity. The buyer or seller (the subject) relates only to an object: all orientations are subject-object, never subject-subject. In a market transaction, everything is treated as a "private value"—an object of interest involving the consciousness in only one person—and everything is reduced to an "object" or "commodity." A market "efficiently" allocates "goods" among "want centers" (individuals)—but how can it allocate processes whose value does not lie in satisfying an individual "want" but in making connections in consciousness between different people's "wants" and "aspirations" and "being"? No optimum production or distribution of these values can be expected as a direct result of market transactions since such values can not be encapsulated in a market transaction.

The market theorist counters that only as a single person can one "value" (receive satisfaction from) a "social value." If various social values develop within certain structures of interaction, ignoring probably insurmountable public goods and transaction costs problems, individuals could purchase nonmarket structures within which these values exist.

But how can the existing distribution of resources and the existing tastes be expected to provide for the choice of value-maximizing amounts of nonmarket forms of interaction? In fact, the existence of forms of interaction whose value is based in part on their independence from market treatment suggests that the market criteria of existing


62. Lawrence Tribe, "Policy Science: Analysis or Ideology," Philosophy & Public Affairs 2, No. 1: 65, 79–84, makes a similar point. He shows how the policy sciences, with their economic heritage, collapse process into result and thus ignore important process values.
distribution and existing tastes are properly bypassed in decisions as to how much "production" of these forms of interaction is desirable. For example, an important social value exists in the political realm in which people interact on the basis of their recognized equality as persons while making decisions about mutual goals, the structure of common activities, and, implicitly, their concept of man. Should the choice of boundaries for this political realm be based on any existing distribution of wealth? Or, on the contrary, should the boundaries and rules of the market be determined by the decisions of a political collective based on equality? This question merely reformulates the earlier problem of finding criteria for comparing and evaluating the welfare effects of different distributions. No empirical grounds indicate whether satisfaction would be greater when value decisions use willingness-to-pay criteria or represent political choice based on equality in participation rights (formally equal distribution). The simple claim that the market maximizes value begs the question; it fails to justify the way or amount an individual's evaluation is weighted in determining value. Furthermore, existing tastes often reflect the structural requirements of a given system. When tastes are molded by the needs of the capitalist market system—e.g. only choices compatible with the secure control by the capitalists or managers are made available—evaluation from the perspective of consumer sovereignty merely sanctifies the status quo. From this market perspective, social values characteristically would be valued less than from certain alternative perspectives. Again, however, no Archimedean point appears from which to judge what tastes or what structures should be

63. H. Gintis, "Consumer Behavior and the Concept of Sovereignty: Explanations of Social Decay," American Economic Review; Papers, Proceedings and Supplement (1972) 62: 267, persuasively argues that in a capitalist system many alternatives are excluded because they are incompatible with continued control by the capitalists or managers (p. 270). Thus, freedom is limited. He also points out that the contribution of an activity to a person's welfare depends on (1) the personal capacities he has developed, (2) the social context of the activity, and (3) the instruments (often commodities) available to the person for carrying out the activity (See p. 273). But clearly, the form of economic organization will effect the social context of activities, the decisions as to what personal capacities can most beneficially be developed, and what instruments are available. The conclusion he draws is that consumer sovereignty as it exists in a capitalist system neither indicates the existence of freedom nor can be expected to promote welfare.
assumed as a starting point. For this reason, although the empirical defense of the market perspective appears ungrounded, no preferable alternative emerges.

Compared with the utilitarian defense which tries to evaluate "results," an ethical defense of the market as a "process" appears more promising. Since no objectively correct values exist, the state has no basis for promoting one set of values over another. The choice is left to the individual who realizes his own subjective values to the extent possible within a market—the market being the paradigm of voluntary, noncoerced interchange. Freedom is maximized because no constraints are placed on an individual except that no one is allowed to interfere coercively with others. Interference by the state constitutes a denial of individual freedom. (The implication is that without this interference, the individual is free.) Thus, interference requires a special justification—the most important justifiable interferences being (1) to protect the system and (2) to simulate the results of the market when it breaks down.

Objections to this ethical defense are too numerous to discuss. However, one line of attack will be developed in order to find how it suggests an alternative to the market notion of value.

The starkest failure of the ethical defense results from its necessary assumption of the neutrality of the market vis-à-vis individual values. The supposed freedom exists only if all choices are made by individuals while the structure imposes no values. However, no structure is value-neutral; all social structures affect both what people get and also how they interact; that is, affect both end-results and processes. Any structure, but more specifically the market and consumer sovereignty, shapes tastes and distributions, organizes the processes of realizing values, and embodies a concept of value and of man.

Clearly, people's tastes are to a great extent formed within their social setting. Advertising and the availability of goods (and past consumption habits) clearly affect people's desires. The economic analysis concerned with value and efficiency may take tastes as given, but business, as it tries to increase sales (selling people more of what they are willing to pay more for), attempts to mold people's tastes. The dynamic resulting from the business goal of increasing sales (and profits) is integral to the free market model of allocating to the most
"valuable" use. The structurally created dynamic also influences tastes. For example, while trying to increase sales and profits, a business enterprise will want to create tastes that are (1) cheapest to develop or stimulate and (2) for which palliatives can be produced, but (3) which are never completely satisfied and do not cause other desires to be satiated. The business goal of increasing "value" through increasing sales requires the creation of these tastes; only by molding people to be willing to pay for more commodities can business increase sales, profits, and "value." As long as value is measured by willingness to pay, a system structured to increase value necessarily results in the stimulation of this taste for commodities.

Accepting this market definition of value and the goal of increasing or maximizing value requires the controversial judgment that a certain type of man—one who is oriented toward certain types of desires—should be created and is desirable. The model leaves no room for most people to consider and approve the judgment that these tastes—and the corresponding type of man—should be created. Clearly, the market structure and Posner's concept of "value" are anything but value-neutral.

Likewise, a market structure patterns the unequal distribution in certain ways—e.g. on the basis of who "happens" to have the skills and resources needed as palliatives for the desires created. This pattern is neither neutral nor justified. A radical critic would argue that the pattern of rewards (distributions) is unjustifiable and also, given a separation of labor from resource ownership, that the process systematically exploits certain groups and systematically underproduces certain values (e.g. social values—the relative absence of which is often described as a form of alienation). The critic also notes that if freedom means self-determination, such freedom exists only within the constraints and the opportunities generated and allowed by the market—but the most important social facts are determined by that structure. If freedom is identified with a person's power or ability to exercise his human capacities, the critic will argue that the patterns and, more importantly, the conditions of distribution within a capitalist market system are inconsistent with such developmental freedom.

64. This discussion below draws on C. B. Macpherson, Democratic Theory: Essays in Retrieval (1973); and on Gintis, "Consumer Behavior."
Nevertheless, even if correct, this specific criticism does not suffice. After demonstrating that the market system, consumer sovereignty, and the corresponding notion of value are not neutral structures or concepts, this critique fails to provide an alternative standard for evaluation.

As used here, a right exists when a person is justified in making a claim, either to a specific entitlement or to a feature of the collective framework of interaction, which should be satisfied irrespective of whether he could or would satisfy the claim by purchases on the market. Rights, like "social values," would be incomprehensible if not for man's joining together in communities. A right implies a justifiable claim. In making a claim a person asserts some relationship with those to whom the claim and the justification is addressed; and the content of the relationship forms an integral part of the commonality in which the appeal must be rooted. Modern western moral and political philosophy asserts, and our most basic and most praised political and legal practices embody, the assumption of the equality in moral worth of human beings. Even attempted justifications of Benthamite utilitarianism (or "value" maximization) and of the ethical defense of the market were predicated on the supremacy of the rights of liberty and equal treatment; this defense argued that the market criteria of value were the necessary result of recognizing the centrality of those rights. When the assumption of a natural inequality of moral worth is rejected as a satisfactory basis for human interaction, any attempt to justify legal or political obligation almost inevitably requires the recognition of individual rights. For example, before an individual can be expected to accept the legitimacy of community decisions regarding the advancement of the general welfare, that community must respect his autonomy and dignity as a free and equal moral agent. The historically evolving requirements implicit in respecting this autonomy and dignity of the individual define the present content of specific rights.

This notion of rights provides a vital key in the search for criteria with which to judge alternative conceptions of value. In addition to the integrity of the body, freedom of speech, equality under law, etc., any proposed list of individual rights would probably be headed by a right to participate in the collective choices which inevitably shape one's being. The most lofty claim made in behalf of the market is that the market protects individual choice and self-determination. However, that exalted claim rings hollow when one realizes that the market structure of interaction itself embodies a specific concept of value and influences the opportunities for, the inclinations of, and the concept of the self. A right to define and determine one's being must include equal and real opportunities to participate in collective constitutive decisions as well as certain liberties pertaining to individual development and expression. From the perspective of the collectivity—the group to which the economic analysis of law is addressed—value must not have an a priori technical economic meaning but must be defined within the political arena on the basis of equality.

The failure to find an analytic or empirical basis for judging the adequacy of Posner's concept of value could have been expected. Criteria of judgment grow out of practices which we accept. The grammar of judgment is rooted in agreement in forms of life. Recognition of man's equality—everyone counts as one—and freedom as a moral agent underlie our various competing political theories and our most praised political and legal practices. Accepting these premises, the authority of criteria used in our collective judgments is strengthened as the criteria are grounded in forms of interaction which increasingly manifest human equality and human freedom and decreasingly embody structures of domination. Recognition of rights, and more relevantly, the right to participate in collective constitutive choices is an important practice which exemplifies this form of interaction. (Once the market may have represented at least a formal advance in equality and freedom over previous forms of interaction. However, as we saw, in the market, choices were not based on equality and freedom did not extend to the realm of possibly man's most important, constitutive decisions.) Not the ideal market but the ideal polity manifests individual equality and freedom to choose a "valued"
world. Any failure of the actual polity to have these characteristics does not mean that the market properly maximizes (or defines) value or provides for freedom but merely indicates that our judgments and notions of value are presently inescapably arbitrary—arbitrary to an extent precisely proportional to the extent of the failure of the polity to allow choice on the basis of equality and freedom. However, the constantly sought vantage point from which to judge between competing criteria of value must be found in the collective practices and choices of a political sphere based on equality.

V

A last example will illustrate some of the failings of the economic analysis of law. Posner claims the "economic content of legal theory is nowhere clearer than in the rationale of criminal punishment" (p. 357). He is certainly correct that criminal punishment was one of the first and has been one of the most persistent legal subjects to be examined by economic analysis. Nevertheless, when Posner attempts to make good his claim, confusion, rather than clarity, results.

Punishment is merely a method of imposing an economic cost on the violator and, Posner suggests, at least in theory, the amount of punishment cost that should be imposed can be determined (pp. 362, 358). Punishment should equal "the costs to the victim plus the difference between the costs of the market transaction and a legal transaction in the particular activity involved" (p. 358). (Presumably this would be divided by the chances of being caught and successfully prosecuted, see p. 360.) According to the apparent rationale of this formula, punishment should deter nonvalue maximizing crime by forcing the criminal to bear both the cost of the crime to the victim and the increased costs of the transaction due to the expense of legal intervention. The second cost, the cost created by avoiding the market, is imposed in order to induce the would-be criminal to make use of the market because the market can determine more accurately and cheaply than can the legal process whether the criminally created reallocation is efficient. By imposing both costs, the potential criminal is induced to adopt value-maximizing behavior. In principle, both
costs can be measured in dollar amounts, the sum of which should equal the punishment. (Of course, efficiency may be increased by using standardized approximations.)

Posner objects to "the Supreme Court . . . view that a sentence which imposes a fine but provides for imprisonment if the defendant cannot or will not pay the fine discriminates against the poor . . . since fines and imprisonments are simply different ways of imposing economic costs on violators" (p. 362). He urges that there is "no inherent discrimination" (pp. 362–363). However, his position becomes confused. First, he points out that any given individual has a rate of exchange between dollars and days in jail (p. 363). Since the punishment was to impose a cost, presumably of dollar amount (p. 363, n. 144), Posner must be suggesting that a person should have a choice between a specific fine and a varying prison term, depending on his exchange rate.66

Imposing a varying prison term as the alternative is the only way the "proper" cost can be imposed on all offenders. Presumably the exchange rate is based on what the person would pay to be out of prison.67 Then, assuming that a sufficiently rich person would pay $1,000 to stay out of prison for one day and a very poor person may be able to pay only $1.00 to stay out for one day, the rich person would be offered a choice of $1,000 or one day and the poor person would be offered a choice of $1,000 or three years (1,000 days).68 From Posner's economic perspective this may not be discriminatory, but

66. The Court had considered a case where the monetary fine was basic and "time" was the alternative. However, given Posner's analysis, imposing a monetary cost should be the general case. The goal of punishment is to impose a specific economic cost on the violator determined by the cost inflicted on victim, plus the cost of using legal transactions; therefore, this punishment should be of the same monetary amount for all defendants.

67. The amount a person would pay to stay out would normally be smaller than the amount he would require to be paid to go in because initially possessing the right to stay out makes him wealthier. Generally, the difference in amount will be proportionately greater the poorer the defendant. However, since it is intended that the violator be liable, we should assume that the exchange is based on what the violator would pay to stay out. Since the exchange rate is based on "willingness to pay" (presumably it could not be a set rate but must vary with each defender), the rich are favored, since freedom is treated here as a consumptive good (see Part III).

68. To simplify the example, I assume a constant exchange rate for any one individual.
many would object. (This result would be much worse for the poor than the practice which the Supreme Court struck down.) The objections could take many different forms. As a minimum, a constitutional perspective provides a deeply embedded presumption that a person's basic rights, including his liberty, should be treated by the state as of equal "value" with other persons' rights and liberties. If one day for the rich and three years for the poor is the economic value-maximizing solution, perhaps the economic goal should be rejected in favor of a recognition of individual rights (see Part IV).

The objectionable solution of one day for the rich man, three years for the poor man could be varied at two points. First, rather than replacing the fine with time at a rate based on how much the person would pay to be free, the rate could be based on how much a person would require before exchanging his liberty for the jail term. Second, a fixed rate of an exchange could be adopted. Although Posner appears to adopt the second solution, neither alternative would be generally acceptable and both are disquieting from the perspective of Posner's economic analysis.

Since a person would require more as the price for his liberty than he would pay to obtain it (he is wealthier to the extent that he already has liberty), the first variance would require a shorter prison term than the original analysis. The poor person may require $50.00 a day before giving up liberty, and thus the choice would be between a fine of $1,000 and 20 days rather than 1,000 days. Although such a variable rate of exchange would still typically require longer terms for the poor than the rich, the difference would be less. And the paradox of a person committing a crime that "costs" more than he can afford is eliminated. For example, a person without money to pay for a new car could not pay the "costs" of a crime, e.g. a $10,000 fine. On the willingness-to-pay criterion, more than life imprisonment would be required if he could not pay $10,000 in exchange for release. But if the criterion was the "amount of money he would require before giving up freedom," then he might require $10,000 before accepting a year in prison. By using this criterion, he has "wealth" unrecognized in the economic model and for the first time can pay the "costs" (plus expenses of using a nonmarket transaction) of a new car. This method of viewing liberty as the basic value seems appealing. (The courts
may prefer such a measure of value; their decisions are more consistent with this concept of value than with the others sketched herein.) Using this criterion, the potential, calculating criminal no longer compares the desirability of committing the crime with the disutility of paying the value loss of the victim plus the costs of using the legal process, but instead compares the desirability of the criminal act with the consequential loss of a certain amount of his liberty. Liberty becomes the basic value; he can "pay for" the crime even though his liberty is worthless to all but himself (unlike the monetary fine which is of equal "value" to everyone). However, adopting liberty as the standard of value must be rejected by the market economist for it undermines the criteria of value on which the market is based: money and willingness to pay.

Posner suggests that "the Court's objection is that most criminal statutes establish a rate of exchange highly favorable to people who have assets . . . [that had] the Court held that the rate of exchange must be realistic, there could be little quarrel with its decisions" (p. 363). Posner appears to recommend a fixed rate of exchange but one more favorable to those who "choose" incarceration than the choice of $500 or 100 days offered in Illinois—say, an exchange of $500 or 10 days. Nevertheless, the systematic implications of any policy of fixed exchange rates (which law has used) are objectionable from the efficiency standpoint and disconcerting if we accept the economic model for behavioral insights. In the economic theory of punishment, the cost of the crime for the criminal should be made equal to the cost to the victim plus an amount representing the cost difference between using private transactions and legal proceedings for making the allocation. So if the "costs" of the crime were $500, thus justifying a punishment of $500, any punishment less than $500 would produce an "inefficient" punishment and too much uneconomic crime. If the state adopted an exchange rate of $500 or 10 days, the efficient "cost" would not be imposed on anyone who would pay less than $500 to stay out of jail for 10 days. A person who would pay only $100 to stay out of jail for 10 days would commit a crime which "costs" $500 even though it is only worth $101 to him. Since the fixed rate would be an "incentive" to commit "inefficient" crimes, the economist must object.
As the “value” of staying out of jail decreases—e.g. as one becomes poorer—a point is reached where the value gained by committing the crime is greater than the value lost by incarceration, even though the crime is inefficient in the economic sense. Crime would often be “rational” for poor people. Thus to the extent poor people are rational and behave in accord with Posner’s notion of value, they would commit more crimes than rich people. Not only is “income redistribution . . . a possible instrument of crime control” (p. 365), but crime would be an expected, although inefficient, means of income redistribution. Although many people will not find this conclusion surprising, it may appear unjust to make an activity rational, and then punish and morally condemn a person for acting rationally.  

In the “clear case” of the theory of criminal punishment, Posner could be suggesting one of three conflicting approaches to allowing tradeoffs between paying fines and “working off” fines by spending time in jail: (1) a varying rate of exchange between the fixed-dollar punishment and the prison term depending on the amount one would pay to stay out of jail; (2) a varying rate of exchange depending on the amount one would require to be paid before giving up a part of one’s liberty; and (3) a fixed rate of exchange between money and time in jail. The first approach, which attempts to make the fixed fine and the jail term equally undesirable for the criminal, implies the unacceptable conclusion that the poorer the person, the greater should be the jail time required to work off a specific fine. Both the second and third approach confront the potential criminal with the opportunity of exchanging his liberty for something he desires but, because of his lack of wealth, cannot obtain through an exchange. Thus, both approaches allow for liberty to replace money as the basic currency and encourage the commission of inefficient crimes—inefficient, that

69. Here the criminal activity is inefficient but rational. Posner admits that sometimes it might be both efficient and rational, and suggests it be tolerated in those cases (pp. 358–359). He does not say whether he means tolerated after the criminal has suffered punishment (e.g. we should punish but not condemn him) or whether he should not be punished at all. But his theory requires no punishment—e.g. “the legal right should be assigned the party who would buy it” (p. 18). To the extent that the punishment involves costs without benefits, it is wasteful.
is, from the perspective of market criteria of value. Possibly, the source of these problems is not in Posner’s explanation but in the economic analysis itself.

Although the threat of sanctions and the subsequent imposition of them plays a role in most all municipal legal systems, many legal philosophers argue that legal norms, independent of any sanctions, provide standards for critically appraising behavior.⁷⁰ A tax on conduct and a punishment for crime differ in that a crime is a violation of a rule set up as a standard to judge and guide conduct.⁷¹ To the extent that a person has an obligation to obey the law, then the existence of a valid law is a reason for that person obeying.⁷² But, in fact, the law is frequently used as a guide to, or motive for, conduct independently of any sanction or cost attached.⁷³ Thus, the economic theory which argues that the function of criminal law is to impose economic costs on the violator provides an inadequate explanation of role of the law. Not only does the economic perspective fail to recognize the significance of law from the internal point of view, but it also tends to blind one to the normative presuppositions of the legitimate exercise of power by the state. For example, viewing criminal procedure solely in terms of its efficiency in making criminal punishment a deterrent ignores important but noneconomic claims that the treatment of individuals by the state must meet certain standards and must recognize certain rights.⁷⁴ Although different individuals may not be equally willing and able to pay for their freedom, from the perspective of state action their freedom should be treated as having equal value (e.g. the state should not treat the poor as valuing freedom less than the rich). Efficiency analysis is an inadequate and improper guide to the punishment of criminal behavior.

⁷¹ Hart, p. 39.
⁷² Hart seems to argue that obligation is implicit in the existence of a legal system which is in turn based on the acceptance of a primary rule of recognition. I have argued elsewhere that this obligation is legitimate only if the society recognizes certain individual rights. See Baker, “Utility and Rights.”
VI

Three arguments have been made in this review of Posner's economic analysis. First, in Part II, Posner's methodology was analyzed to show that, when used for critical legal or policy purposes, it is biased in favor of the rich and the productive, exploitative claimants. Second, in Part III, after noting that Posner's method of analysis makes sense only if the existing distribution is accepted as proper, it was shown that, using Posner's own assumptions, a more equal distribution increases welfare. Therefore, it follows that increasing efficiency is not necessarily the most effective means of increasing welfare. Following the recommendation of Posner's efficiency analysis, which favors the rich, might very well decrease welfare. Finally, in Part IV, the relevance of both the market and of Posner's market criteria of value for the goal of promoting either welfare or freedom was questioned. Given a concern for either welfare or freedom (the meaning of which cannot be determined by technical economic analysis), the content of analytic categories and the proper scope of the market were shown to present problems properly answered in the public or political realm.

Thus, it seems that economic efficiency is not an adequate basis from which to assess and make suggestions concerning the law. 75 However, economic analysis clearly is a powerful tool for showing the internal logic of the common law, although modern regulatory law does not appear so rational. 76 An obvious question is, Why has an analysis with which so much fault has been found been so effective in allowing us to understand the law? Kessler's point, with which we started—that our common sense will be our best guide in legal disputes—gives a possible answer. The economic analysis, although a

75. Posner has also used economic analysis to show the effect—in terms of what went where—which resulted from taking some action. This use, when handled accurately, should not be criticized. Only when his analysis suggested are implications of what was seen—e.g. when it promoted economic efficiency and value maximization—were objections raised.

76. Still, many accept the economic critique of regulatory law, perhaps because there are, in fact, many problems with it and some of those problems may properly relate to its wasteful aspects. Given both the problems and the readily available economic analysis, many may grasp the economic critique as an explanation of, and solution to, the problems.
failure as a guide to either welfare or freedom, may codify the biases and dominant ideology, the common sense, of the historical period in which common law developed. As increased awareness and better understanding of "that" common sense leads us to the conclusion that sometimes it is nonsense, we need to develop a new understanding as to how law can be used to structure the social arena in a way that promotes human welfare and human sovereignty.