

RUSSELL HARDIN

THE MORALITY OF LAW AND ECONOMICS*

ABSTRACT. The moral heart of normative law and economics is efficiency, especially dynamic efficiency that takes incentive effects into account. In the economic theory, justificatory argument is inherently at the institutional- or rule-level, not at the individual- or case-level. In *Markets, Morals, and the Law* Jules Coleman argues against the efficiency theory on normative grounds. Although he strongly asserts the need to view law institutionally, he frequently grounds his criticisms of law and economics in arguments from little more than direct moral intuition about individual cases. He evidently holds that consent provides a better normative basis for law than does efficiency and he uses consent arguments to attack recommendations from scholars in law and economics. His own chief contribution, however, is to law and economics rather than to any alternative theory.

I. INTRODUCTION

Debates on morality and law in the fifties and sixties between H. L. A. Hart and Lon Fuller¹ and between Hart and Lord Devlin² have been revived and taken in interesting new directions. The second of these, the Hart-Devlin debate, focused on the question whether a society can survive without enforcement of a particular prevailing moral code, such as a code on sexual behavior that prohibits homosexual relations. Neither Hart nor Devlin was particularly qualified to make relevant sociological arguments, so that their debate does little more than

¹ H. L. A. Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review* (1958) 71: 593-629; Lon L. Fuller, 'Positivism and Fidelity to Law', *ibid.*, 630-72; Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969).

² H. L. A. Hart, *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963); Patrick [later Lord] Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965).

establish positions, with Devlin supporting laws to regulate victimless crimes and Hart opposing them. It may be that the sociological questions at issue cannot be answered. Certainly we cannot run society both ways to test whether Devlin's regulations are necessary for social survival. What we can do is make varied marginal assessments of what difference it makes to intervene in particular cases. But Hart and Devlin were debating what difference it makes to institutionalize a full-blown regime of intervening if the regime is based on a widely accepted moral theory. A related debate has recently opened over feminist claims that, for example, pornography and prostitution have broad systemic effects that make their legal protection far more than a mere matter of consumers' civil liberties.

The earlier Hart-Fuller debate concerned whether law is inherently moral. Is there a minimal moral content to any legal system? Fuller thought the answer was obviously yes. For example, if law fails to serve the coordination function that he thought underlies all successful law, then it is likely to fail in application. If victimless crimes, such as consensual prostitution, for example, are punished, there may be a tendency for criminal organization of them by those capable of operating outside the law. When it operates under legal prohibition, prostitution may spawn many other harms and crimes that are not at all victimless.³ Laws that protect persons and property — criminal laws against theft, murder, and so forth, and contract and tort laws — help us to coordinate on leading richer lives as we see fit. Laws against prostitution, Fuller supposed, do nothing of the sort. Indeed, their evident intent is to block some people from coordinating.⁴

³ See, e.g., David E. Sisk, 'Police Corruption and Criminal Monopoly: Victimless Crimes', *Journal of Legal Studies* (1982) 11: 395–403.

⁴ Lon L. Fuller, 'Human Interaction and the Law', pp. 211–46 in Kenneth I. Winston, ed., *The Principles of Social Order* (Durham, N. C.: Duke University Press, 1981; essay first pub. 1969), pp. 232–33. Against Fuller's view, some contemporary feminists argue that, in fact, prostitution does have coercive, harmful side effects, such as causing women to be treated scornfully and unequally in other arenas. This would be an argument against his simple factual claims on whether laws against prostitution impede coordination. It would leave the task of assessing whether the good effects of relatively free coordination are trumped by those of legal regulation.

Several of the essays in Jules Coleman's collection *Markets, Morals and the Law* recall the first of these debates. There is not a consistent thesis in these essays, as Fuller's insistence on the coordination function of law was a consistent thesis for him or as Hart's insistence on core defining elements of a legal system was a consistent thesis for him. But there are elements of a thesis that Fuller and Hart might both have found acceptable. Coleman says his own view of rights is a "kind of utilitarian theory of rights" (p. 347, n. 10).⁵ He also frequently refers to the institutional nature of law and to what he seems to think is the necessity of justifying particular laws or actions under law by inference from the justification of the larger institutional system (e.g., p. 200). Unfortunately, there are also arguments and stances taken through the course of these essays in which Coleman seems to opt for a remarkably eclectic grab-bag of moral groundings for different laws, including perhaps bald intuitions about direct individual rights that are independent of institutional considerations. He says the economic analysis, with its narrow focus on efficiency, fails to appeal to other moral concerns and is therefore morally impoverished (p. 162).⁶

A general theory of law would include legislative statute law and administrative rules along with the decisions of courts. Much of the normative economic analysis of law focuses on court cases rather than on legislative law. We might justify that partial focus by noting that there are specific moral principles that should apply to judges and juries, principles that need not be identical to those governing legislative actions. I will generally focus on courts, not merely because the literature does, but because I think it plausible to argue — it may be wrong, but it is at least plausible — that the courts should attend to efficiency considerations in the application of case and statutory law. It is much less plausible to argue that legislative enactments should meet efficiency criteria to the same extent. A legislature can reasonably and morally choose to adopt policies that are redistributive rather than efficient.

As will become clearer in the discussion of the institutional focus of

⁵ Earlier, Coleman says utilitarianism is ultimately wrongheaded (p. 97).

⁶ I will discuss this point further below, under section VI, Criminal law, which is the context in which Coleman makes this criticism. Also see Coleman, 189.

law and economics, however, judges should not in all cases look to efficiency. Most judges most of the time should simply look to settled law for the cases before them. This conclusion itself follows from efficiency considerations. But when settled law seems incomplete, vague, or ambiguous or when conditions (such as technological or demographic conditions) have changed in ways that generally seem to render inefficient what might once have been efficient, judges should turn to first principles from which the law is to be developed. In some of these cases — those in which the law is unclear — judges may have no choice but to make ex post facto law to govern a particular class of interactions under civil law. At that point and in the common law practice of dealing with changed conditions, judges should, on the economic theory, look to efficiency considerations.

II. FOUNDATIONAL MORAL PRINCIPLES

The economic analysis of law includes both positive and normative contributions, the latter especially in the work of Guido Calabresi, (now Judge) Richard Posner, and later writers. The chief normative contribution is to propose that the moral purpose law should serve is some variant of efficiency. Hence, in judging extant or proposed law we may look to its likely effect on efficiency. We might be concerned with Pareto efficiency, wealth maximization, or utility maximization. Focusing on efficiency as our measure highlights concern with incentives for actions. Independently of whether efficiency is the right moral standard to apply, it is at least a consistent standard that seems to yield strong conclusions in many contexts and, more generally, a remarkably coherent theory of law. Coleman agrees with this positive assessment⁷ even while he seems quite dissatisfied with efficiency as the moral core of the law. Perhaps we should be dissatisfied with the morality of efficiency as the moral core of the law. Perhaps we should be dissatisfied with the morality of efficiency, but I will argue that

⁷ Jules Coleman, 'The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's *The Economics of Justice*', *Stanford Law Review* (1982) 34: 1105–31, opening remarks.

Coleman's reasons for dissatisfaction are not compelling. I think welfare is the only compelling general principle, although it has serious, unresolved problems.⁸ Efficiency faces similar problems with, for example, interpersonal comparison and aggregation. Indeed, in much of the neoclassical economic use of Pareto efficiency, there is an implicit (but very unparetian) aggregation of welfare.⁹ Depending on how these problems are resolved, efficiency might be fully consistent with welfare.

Pareto Efficiency

Figure 1 represents the basic Pareto efficiency criteria. Suppose your valuation of your allocation of our combined goods is represented along the horizontal-axis, 0—b, and mine along the vertical-axis, 0—a, and our present allocation puts us at point q. The two axes do not represent quantities of goods but only our respective ordinal valuations of the goods we have. These valuations need not be comparable. Through some pattern of voluntary exchanges of our respective holdings we can move to any point within or on the curve a—b. There is no possible reallocation of our goods between us that would put us beyond the curve a—b, which is the *Pareto frontier*. We can move to any point on this frontier that lies in the segment labeled Q without reducing the allocation to either of us while increasing the allocation to at least one of us. Similarly, if we are at point p, we can move to any point in the segment labeled P while benefiting at least one of us without harming either of us. Such a move is *Pareto efficient* and the points in P are *Pareto superior* to p. Clearly, a move from p to q or vice versa makes one of us worse off while making the other better off. Hence, the allocations represented by these two points are *Pareto noncomparable*. Even if we know nothing about the comparison

⁸ On its problems, see Russell Hardin, *Morality within the Limits of Reason* (Chicago: University of Chicago Press, 1988), chapter 5; John Broome, *Weighing Goods* (Oxford: Basil Blackwell, 1991); James Griffin, *Well-Being: Its Meaning, Measurement, and Moral Importance* (Oxford: Oxford University Press, 1986).

⁹ Richard A. Posner, *The Economics of Justice* (Cambridge, Mass.: Harvard University Press, 1981), pp. 91–92.

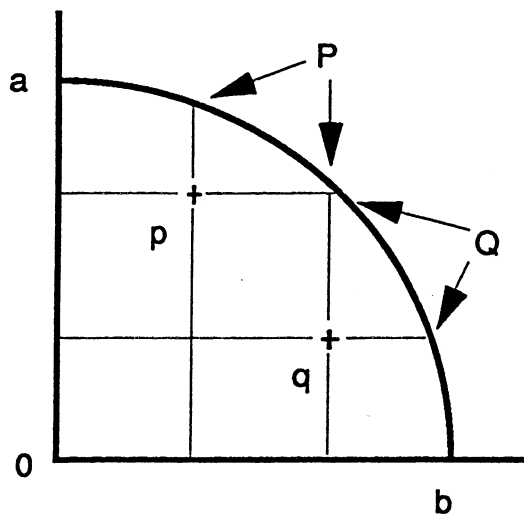


Fig. 1. Pareto frontier and two interior points, p and q.

between your evaluation of your position and my evaluation of mine we can still make at least these ordinal claims.

Static and Dynamic Efficiency

Let us divide efficiency notions into two categories that are not the usual categories of law and economics. Much of economics is concerned with *static efficiency*. We have achieved static efficiency if there is no further possibility of mutually beneficial exchanges of current holdings. Static efficiency is about allocation of what we have rather than about production of what we may have to allocate. There are contexts in which the only issue is allocation of what already exists. We can be at an inferior state (inside the frontier) from which trade would lead us to better results. Much of the discussion of the Pareto criteria is about such static contexts.¹⁰

¹⁰ Russell Hardin, 'Difficulties in the Notion of Economic Rationality', *Social Science Information* 23 (1984): 453-67.

Hobbes's central concern in *Leviathan* and the concern of much of law and economics is with *dynamic efficiency*.¹¹ This is achieved through protection of individuals' interests to give them reason to think their productive efforts will bear fruit for them and by enabling them to be productive.¹² Because we are differently capable of producing valued goods, the allocation of resources for production may finally affect the level and content of our total product. We could as well speak here of productive efficiency, but that term tends to provoke images of material production. What we want to protect, however, includes such things as the wonders of family life and the enjoyment of cultural achievements. If a person cannot read Proust, what's the point?

Bruce Ackerman's theory of distributive justice is static in this sense: It is about the allocation of a good (manna from heaven) that is already available without further effort from those who are to consume it.¹³ John Rawls's theory of justice is dynamic: It accommodates the problem of incentives for productivity that might make all better off but that might lead to inegalitarian distribution.¹⁴ One might suppose we could work out a theory for the static case and then bring in dynamic considerations as a corrective. But the effect of the latter may be so great as to make it pointless or even perverse to think statically at all. Indeed, our frequent problem is to escape the tendency

¹¹ Thomas Hobbes, *Leviathan* (Harmondsworth: Penguin, 1968; page nos. in brackets are to first edition, 1651); Russell Hardin, 'Hobbesian Political Order', *Political Theory* 19 (1991): 156–80. Hobbes's choice was efficiency but this consideration did not narrow the choice to one best form of government. There might be many "best" forms in the sense that they would all be Pareto noncomparable to each other while each would be Pareto superior to the state of nature.

¹² As Posner notes, use of this dynamic notion of efficiency in the justification of property rights long predates the application of static efficiency analysis to property rights. Richard A. Posner, *Economic Analysis of Law*, 3rd edition (Boston: Little, Brown, 1986), pp. 30–31.

¹³ Bruce A. Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980).

¹⁴ John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).

to reason statically even when we are dealing with dynamic problems. As will be noted below,¹⁵ much of Coleman's discussion of consent seems to suffer from this tendency.

Dynamic efficiency is itself a strong moral principle, although economists and writers in law and economics sometimes seem to treat it as a morally neutral notion, as if it were only a positive criterion. It can be a purely descriptive, positive notion in a theory that posits self-interest as the central motivator. But if we go further and say or imply, as writers in law and economics commonly do, that people ought to act from self interest or that we ought to design institutions to achieve efficient results, we moralize the notion. I will generally use the moralized notion of dynamic efficiency. It is the heart of the morality of law and economics.

Dynamic efficiency is at once a very appealing and a very distressing moral principle. It is appealing because, in general, we should be pleased to achieve greater productive efficiency. It is distressing because it is likely to be woefully indeterminate in the contexts that interest us. Consider two quite different states of affairs. First, an economic distribution that gives most of a society's resources to a tiny fraction of its population while all others work at the edge of subsistence; and second, a distribution that is very nearly egalitarian. Each of these may be maximally productively efficient with respect to the pattern of goods and services it produces. But they might produce quite different patterns. We can now compare these two by the criterion of productive efficiency only if we can somehow evaluate the total production of each.

The problem here is not the simple one that we cannot expect to get universal agreement on moving from one state to the other. It is that we cannot even judge which state is more productively efficient. Not merely the normative but also the positive notion of dynamic efficiency is indeterminately defined. We may be able to say of some marginal change that it will lead to greater production because it will entail producing more of some things without producing less of any

¹⁵ Under "Institutional- vs. individual-level justifications."

others. And we may occasionally even be able to compare radically different states if in one of them there is more of everything desirable than in the other.¹⁶ In many cases, however, we cannot say which of two states is productively more efficient. They are Pareto non-comparable. (Every state at the Pareto frontier, from which no change can be made without harming the interest of at least one person, is non-comparable to every other such state. Many pairs of states at or below the Pareto frontier will typically be non-comparable, as are points p and q in Figure 1.) Unless we make Hobbes's very grand move from disorder in the state of nature to order under a powerful sovereign, we may generally suppose we can make compelling efficiency claims only at the margins. A minor change in the way we do something may seem, *ex ante*, clearly beneficial or neutral to all concerned. A larger change, such as introducing a major new technology or changing the grounds of tort responsibility from fault to strict liability in some context, may not be Pareto comparable to the status quo.

There is a general problem with the terminology of 'efficiency' for our purpose. We are concerned with beneficial actions and interactions in general, not merely with market transactions. It may be typically beneficial to protect lives, family relations, and various aspects of autonomy as well. Hence, contrary to occasional usage in law and economics, we wish to include considerations that do not typically have price tags as, for example, Posner does. Economists and others may give convincing arguments that these things nevertheless have *de facto* prices.

Hobbes is one of the earliest advocates of the economic analysis of law. Although he also discussed particular laws, he focused most urgently on the dynamic or productive efficiency of having government and a legal system at all. His first concern was protection against being killed in the war of all against all in a state without government.

¹⁶ Hobbes makes such a grand comparison. He supposes that life in a state of anarchy is dramatically inferior to life in a state with a powerful sovereign who can maintain order. Hobbes, *Leviathan*, chap. 18, p. 238 [94].

This is not a concern we normally associate with efficiency. But clearly it is such a concern in Hobbes's view. He supposed one would exhaust oneself in being wary of others — one might even preemptively kill some of them — and therefore would have a nasty and brutish existence without time and security to create better material and social conditions. Hobbes thought humans have such a terrible fear of death that they would suffer manifold losses of other things while diverting their efforts to mere survival. Creating government to secure protection against each other is therefore a mutually beneficial move that we can call efficient in a broad sense. It is, of course, dynamically, not merely statically, efficient.

Critics of law and economics commonly cite some category of actual law as clearly contrary to considerations of efficiency. Coleman mentions the criminalization of prostitution (p. 162). Given feminist claims that even legalized prostitution has substantial external effects, one might sooner mention homosexual relationships in this context. The judgment in *Bowers v. Hardwick* in the 1986 Georgia homosexual sodomy case allows some to impose their moral views on others.¹⁷ From such evidence we might conclude that efficiency is a bad positive theory of actual law. We might nevertheless still hold it out as a good normative theory. But such evidence may not even tell very strongly against the positive theory. The odd category, such as the criminalization of prostitution or homosexual sodomy, might merely be parasitic upon the existence of the legal system, which can be used by judges and legislatures to intrude particular moral concerns, as Devlin advocated.

The real test of law and economics as positive theory must eventually turn on a larger explanatory framework for how efficiency comes to prevail over inefficiency. One might think it implausible that the theory is a recent development but that it was somehow long followed deliberately by judges and others. Indeed, an important part of the modern tort theory is enterprise liability. George Priest argues that enterprise liability was essentially invented and finally adopted as

¹⁷ 106 S. Ct. 2841 (1986).

a principle by the courts only after extensive intellectual debate.¹⁸ But markets preceded good theories of them and we might suppose efficiency was at work long before it was well understood. With a background theory of how efficiency comes to prevail in the law, the economic analyst might have little difficulty encompassing parasitic actions in the law, such as Georgia's sodomy statute and the Supreme Court's judgment in *Bowers*.

Much of economic analysis of law merely posits efficiency or a related principle. There are some arguments about how, for example, common law litigation or legislation should tend toward efficient rules in the long run. Why? Because an inefficient rule gives greater incentive to go back to court or to appeal for legislative relief for the parties on the wrong side of the inefficiency than for the parties on the other side. Virtually by definition of an inefficient rule, there are greater gains to be made in toto from a more efficient rule. This is not a knock-down argument.¹⁹ But it is an interesting attempt to generate collective efficiency from individual self-interest. Among other objections, support for a particular tort rule may be highly biased in the ways the so-called group system in democratic politics is biased by the logic of collective action. Concentrated interests are much better at organizing to influence legislation than are diffuse interests. Hence, certain kinds of externalities that are imposed on large communities — even the global community — may not provoke successful collective action.²⁰ Similarly, firms may have strategic advantages over classes of individuals. For example, a firm subject to liability claims from defec-

¹⁸ George L. Priest, 'The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law', *Journal of Legal Studies* (1985) 14: 461–527.

¹⁹ William M. Landes and Richard A. Posner, 'Adjudication As a Private Good', *Journal of Legal Studies* (1979) 8: 235–84, esp. pp. 259–84; see also Steven Shavell, 'The Social versus the Private Incentive to Bring Suit in a Costly Legal System', *Journal of Legal Studies* (1982) 11: 333–39.

²⁰ Mancur Olson, Jr., *The Logic of Collective Action* (Cambridge, Mass.: Harvard University Press, 1965); Russell Hardin, *Collective Action* (Baltimore, Md.: Johns Hopkins University Press for Resources for the Future, 1982).

tive products may have much more reason to litigate than do individual victims of its products because the firm may have a much greater interest in establishing a precedent for future cases with other individuals.

Absent a general theory of how efficiency comes to prevail, efficiency must seem much less a positive than a normative concern in law and economics. In this respect, law and economics is very different from much of neoclassical economic theory, in which considerations of efficiency yield strong predictions of behavior that is grounded in self-interest.

The Coase Theorem

An argument of Ronald Coase, generally known as the Coase theorem, is one of the central tenets of law and economics. The theorem says that, absent transaction costs, the final use of a property will be a function only of productive efficiency, not of rights assignments. Land, for example, will be put to its highest use independent of who owns it. Initial rights assignments will therefore only affect how the profits from the land use will be allocated. When transaction costs are significant, we may have to specify a particular rights assignment if we are to expect to achieve productive efficiency.²¹

Plausibly the most effective way to explicate and motivate the Coase theorem is through Coase's instructive example of the neighboring rancher and farmer. The rancher would like to be able to have her cattle roam freely even at the risk that they perhaps occasionally trample some of the farmer's crops. The farmer would like to fence out the cattle. If the law allows the cattle free range, the farmer may strike a bargain with the rancher to reduce her herd and thereby to reduce the amount of crop loss. This should happen if the farmer's crop losses from the current practice are greater than the rancher's gains from having the larger number of cattle, with both gains and losses as determined by market prices for the crops and cattle. If the

²¹ R. H. Coase, 'The Problem of Social Cost', in Coase, *The Firm, the Market, and the Law* (Chicago: University of Chicago Press, 1988), pp. 95–156, esp. 96–104.

law allows the farmer to recover losses from the rancher, the rancher may bargain to pay the farmer more than the value of his lost crops on condition that her herd not be reduced. This should happen if the rancher's market gains from not reducing her herd are more than enough to compensate the farmer for his losses. The Coase theorem simply says that in such interactions, the parties should bargain to the most efficient solution, as measured in market productivity. Again, however, Coase notes there are usually transaction costs, which may outweigh the apparent benefits from a successful bargain.

The Coase theorem is perhaps the most novel and powerful recent application of simple ordinal efficiency theory to a major problem. Its novelty lies in its successful bridging of conflicting interests between two parties by looking to the market resolution of the conflict of interest. The move is not foundationalist, as it might seem to be. It is inherently marginalist because it depends on market prices. It is because there are many buyers and sellers of various goods that it does not matter what tastes the farmer or the rancher happens to have. If the rancher gets all the profit from using the land at issue, then the rancher will have more to spend than the farmer.

The Coase theorem may make good sense when applied to two parties in a larger market society (as in Coase's rancher-farmer example). But when the property rule we have affects many people and not merely the two parties in the current case, the aggregate demand schedule for the society may change as a function of who gets the profit from land-use rights. Why? Because those people may have different patterns of consumption as a function of their income than do others in the society. This problem is crucial for an institutionalist claim for the greater productive efficiency of one tort regime over another. If the pattern of production and consumption under one regime is different from that under the other, the two regimes may not be Pareto comparable.

One might suppose the differences in tastes for consumption would average out for two groups on either side of a tort rule, so that Coase's marginalist result might still apply even in the face of sweeping redefinitions of rights. That this need not happen should be evident

from the following discussion of a final welfarist principle for the law.²²

Wealth Maximization

Richard Posner argues that the particular form of efficiency the law should promote is wealth maximization. Although Posner is perhaps the most influential scholar in the law and economics movement, especially in the normative turn of that enterprise, his principle of wealth maximization has not been well received. Coleman and others have criticized it persistently and sometimes persuasively.²³ Coleman's criticism is based on his reading of Posner's earlier statements of how wealth maximization would work,²⁴ but it does not fit Posner's more extensive views.²⁵ Coleman's understanding appears to be as follows. Dynamic efficiency is a close cousin of aggregate welfare or utility. Often it can be approximately measured in market prices and one might then use such a measure as a rough proxy for welfare, or at least for marginal changes in welfare. Coleman supposes Posner is content to measure wealth at current prices, to elevate this proxy measure into the direct measure of what we want. It is a trick of the price system to convert preferences into wealth as measured in current prices.

On this view, the principle of wealth maximization would be similar to Coase's theorem: It would be strictly marginalist and would work only against the background of market prices, as Coleman notes (pp. 110–11). If it were true, as it might well be in some large and important context, that wealthy entrepreneurs could more produc-

²² For further discussion, see Russell Hardin, 'Efficiency', in Robert E. Goodin and Philip Pettit, eds., *A Companion to Contemporary Political Philosophy* (Oxford: Basil Blackwell, forthcoming).

²³ Among other critics are Ronald Dworkin, 'Why Efficiency?: A Response to Calabresi and Posner', *Hofstra Law Review* (1980) 8: 563–90; and Jeffrie G. Murphy, 'The Justice of Economics', *Philosophical Topics* (1986) 14: 195–210.

²⁴ Richard Posner, 'Utilitarianism, Economics, and Legal Theory', *Journal of Legal Studies* (1979) 8: 103–40, esp. pp. 119–27.

²⁵ Posner, *Economics of Justice*, pp. 60–76.

tively put some kind of asset to use, wealth maximization would tend to redistribute upwards. But it would simultaneously undercut the market pricing structure without which its use could not be justified. It would do so if, as seems plausible, the wealthy entrepreneurs would use their profits in ways quite different from the patterns of expenditure of the alternative holders of rights to the relevant assets. Utility, welfare, and dynamic efficiency are not monetary notions, as they are sometimes characterized by critics, but their cousin wealth maximization, conceived as a function of current prices, is strictly monetary.

Coleman's understanding of Posner's view, however, seems to be wrong, perhaps because Posner's view is quite complex. Although it is related to welfarist notions, wealth maximization seems to be a *mélange* of resourcist and welfarist notions. As it is for Adam Smith in *The Wealth of Nations*, wealth for Posner is a broad notion. It includes such considerations as consumer surplus, which is the additional amount one would be willing to pay for something beyond its price. It even includes leisure, for which it might be very hard to estimate a market price.²⁶ The economist George Stigler simply equates efficiency and wealth maximization, presumably in Smith's very broad sense of wealth.²⁷ Unfortunately, wealth so conceived sounds very much like utility and it loses one of its superficial attractions, which is its ready measurability. If wealth is merely utility, wealth maximization is merely utilitarianism. But Posner proposed wealth maximization as a superior alternative to utilitarianism as the underlying moral theory for law.

The core implication of wealth maximization in the law is the adoption of legal rules whose effect is to produce the greatest total wealth in aggregate. Where there are significant transaction costs, this entails assigning rights to the most efficient producers in order to save on unproductive transaction costs. How does this work?

Suppose the right to certain uses of some property is currently yours. I wish to have that right in order to use the property in my

²⁶ Posner, *Economic Analysis of Law*, p. 15.

²⁷ George J. Stigler, 'Wealth, and Possibly Liberty', *Journal of Law and Economics* (1978) 7: 213-17, at p. 217.

productive enterprise. I can make sufficiently productive use of the property to be able to buy or lease the right to use it and still be in a state I prefer to the status quo. For example, I might make a net profit after paying the purchase or lease costs. Without transaction costs, presumably I would buy or lease the property. Transaction costs, however, reduce net benefits to you and me if we still make a deal, or they block our deal-making altogether. In the latter case, the right gets in the way of production. Posner would avoid the waste of transacting over such a right by assigning it to the party who can make most productive use of it. Coleman argues against this move that it does not do what a tort settlement normally would do; it does not even require compensation for the court-determined taking. This is just Kaldor-Hicks efficiency as measured in current market prices and turned into legal principle (pp. 108–11).²⁸ If the transfer of A's resource to B allows B to profit enough to compensate A for A's loss and still leave B with a profit, then the transfer is Kaldor-Hicks efficient irrespective of whether the compensation is actually paid.

The Kaldor-Hicks rule is subject to strong moral criticism. It suffers from the Scitovsky paradox in certain cases — a particular transfer and the reverse transfer may both be Kaldor-Hicks efficient. If the test is performed entirely with the use of market prices, we have wealth maximization without Scitovsky paradoxes. But we may get very odd results. For example, a monopolist may produce and sell less than competitive producers would but might be able to charge enough to make a greater total income. Hence, the monopolist maximizes wealth as measured by market value of the product but does not maximize production. In essence, the monopolist converts consumer surplus into money in the market. Burroughs-Wellcome had a monopoly on production of AZT when it was thought to be the most effective drug against AIDS. Evidently Burroughs-Wellcome thought its profit would be greater if it sold less AZT at a very high price than if it sold more

²⁸ There are discussions of Kaldor-Hicks and other notions of efficiency in other essays. Lack of an index deters the critical reader from comparing these. See also Posner, *Economic Analysis of Law*, pp. 12–14.

for less or licensed others to manufacture more. Whether monopolistic or competitive pricing is Kaldor-Hicks efficient or wealth maximizing will turn on how prices compare in different regimes. Only by bringing in nonmarket considerations, such as consumer surplus and the valuations of those excluded by monopoly prices from purchasing AZT, do we get a plausible account of the broadly conceived wealth effects of the AZT monopoly.²⁹ But, again, those moves take us very far toward additive utilitarian assessment.

One, perhaps the chief, traditional notion of efficiency is about means, not about ends. We want efficiency in the production of one thing in order to leave as much as possible of our resources for other activities. Efficiency leads to greater overall consumption and enjoyment of what we want. Doing things efficiently is therefore like holding some resources back for future activities. Hence, it is concerned with resources and only indirectly with welfare. Of course, resources are valued not per se but only because they contribute to welfare or some substantive good. Because it includes money, wealth is inherently resourcist. But when he includes consumer surplus in it, Posner makes wealth in part welfarist, in part resourcist. When I buy something at a market price well below what I would be willing to pay for it, my welfare from the purchase is enhanced by the value of my consumer surplus. But in buying the item for less than I would have been willing to pay, it is as though I were keeping part of my money in the bank for other activities — hence, I am conserving resources. More generally, Posner's notion is in part directly welfarist, because it measures not only the resources available to me but also my consumption. My Posnerian wealth is a function of what resources I have and have had and also of how well I have put them to use. Hence, Posner's wealth maximization is not based entirely on market prices, so that it is not the simplistic, market-price variant of the Kaldor-Hicks criterion, and it does not generally recommend monopoly.

²⁹ Posner presents an account of how monopoly violates wealth maximization in *Economic Analysis of Law*, pp. 254–59.

Among the great objections to various utilitarian value theories is that they require making objective measures of very different subjective experiences. That objection is also telling against wealth maximization, which is similarly pervaded by subjective assessments. When wealth is defined in terms of prices only, it is objective because the prices are outside the choosing subject. When it includes my full valuation of what I have — its price plus my consumer surplus and the opportunity costs to me — it is subjective. For a welfarist, the move to subjective measures may be entirely appropriate. A frequent claim of resourcist theorists, however, is that they escape the burden of including the varied psychologies under which different individuals convert resources into pleasure or welfare. Resourcists can stick with objective measures of money and opportunity. Despite its resourcist sound, Posner's wealth maximization must include more than objective measures; it must be subjective.

Ronald Dworkin, one of the leading resourcists in legal and political theory, has oddly argued against the morality of efficiency in the law³⁰ but for resourcism as the core concern of distributive justice.³¹ If efficiency is a strictly resourcist notion, as it is taken to be in much law and economics writing, Dworkin's complaint seems to betray a fundamental misunderstanding. Indeed, one might expect a lawyer to be especially inclined to opt for resourcism as the basis of a theory of distributive justice. A lawyer who thinks of the legal system as a system for achieving justice might naturally think of law as a means rather than as an end. It is a means of protecting us and regulating our access to other means.

Despite the resourcist tinge of much argument in law and economics, the efficiency notions currently abroad are largely welfarist. For example, the Pareto concepts are about the distributions of goods we already have before us, about redistributions that would benefit some without harming any. It seems most perspicuous to view this as

³⁰ Ronald Dworkin, 'Why Efficiency?'

³¹ Ronald Dworkin, 'What Is Equality?', Part 1: 'Equality of Welfare,' and Part 2: 'Equality of Resources', *Philosophy and Public Affairs* (1981) 10: 185–246 and 283–345.

merely a matter of getting more welfare out of what we have rather than as a matter of changing our resources. When we bring production into our efficiency measures, we bring resources back. But we do not thereby displace paretian welfarist concerns. Hence, our efficiency measures are a mixture of resourcist and welfarist considerations, just as Posner's wealth maximization is. Posner goes further, however, and allows a particular form of aggregation across individuals.

Law may be a means without being only about means. For example, we might have a welfarist conception of the law and we might derive all law from welfare considerations. But if we do think of law as a means, we may think it plausible that arguments for or about law — its institutions and rules — should themselves often be arguments about means such as resources rather than about ends such as welfare. Clearly, this claim wants argument. As it stands, it may be no more compelling than a claim from analogy or alliteration.

III. INSTITUTIONAL- VS. INDIVIDUAL-LEVEL JUSTIFICATIONS

We may justify court decisions in two quite different ways in the abstract. First, we might justify them by direct reference to some moral principle. For example, we may say a judgment is fair and is therefore right. Alternatively, we may justify court decisions by their fidelity to extant law and only indirectly by reference to any moral principle. We may simply say a judgment is correctly made from what the law requires. To reach a fuller assessment of the morality of the judgment, we must further justify the law or legal system itself. In general, I think we must justify actions in the law — as by lawyers, judges, and jurors as well as by police and others — derivatively from our background justification of the law. But there may be moral theories, such as natural rights theory, that stipulate direct justification.³²

³² The best contemporary statement of this issue is John Rawls, 'Two Concepts of Rules', *Philosophical Review* (1955) 64: 3–32. See also, Hardin, *Morality within the Limits of Reason*, pp. 100–05; Russell Hardin, 'The Artificial Duties of Contemporary Professionals', *Social Service Review* (1991) 64: 528–41.

In economics and law there are two classes of reasons for insisting on institutional-level justifications: practical and conceptual. Practical considerations are typically of concern in any consequentialist theory, that is, any theory that bases normative assessments of actions on the results of the actions. Focusing an economic analysis on immediate decisions in courts runs against many practical obstacles. First, it is implausible that many judges can do the relevant economic analysis on the spot. The larger system of law, with legislative enactments, *stare decisis*, and courts of appeal, can embody far more knowledge about the efficiency considerations in various contexts than typical judges, even very good judges, could plausibly have under their control.

If we have a general policy on, say, some aspect of distributive justice, we can expect to use the courts to help enforce the policy, although much of the enforcement or implementation might be better handled by an administrative agency. If we do not have such a policy, with all the apparatus for general enforcement, the courts may have very limited effect. Indeed, it is plausible that piecemeal efforts would sometimes be more harmful than helpful. Suppose, for example, there is widespread racial discrimination and no policy to correct it. Suppose a court decision relies on the judge's or jury's moral views without statutory law to back the decision in a particular case. The judgment might meet resistance even from those who share the moral view of the court. These people, who might be unwilling to face the personal costs of bucking local conventions, would be enabled to act morally if the general law were on their side. A moral convention can prevail even though moral views have generally changed against it.³³ Ad hoc, somewhat random actions against the convention might eventually break it, but they might also fail for a generation or more when a general law would succeed.³⁴

³³ For example, John Howard Griffin wrote in 1960 that "the average Southern white is more properly disposed [toward blacks] than he dares allow his neighbor to see, that he is more afraid of his fellow white racist than he is of the Negro", in Griffin, *Black Like Me* (New York: New American Library, 1976), p. 153. There may generally be difficulties in the way of collective action against a disapproved norm (Hardin, *Morality within the Limits of Reason*, pp. 89–96).

³⁴ Gerald Rosenberg claims that, contrary to popular views of *Brown v. the Board*,

Now turn to conceptual reasons for institutional-level justification in the law. It is true that the moral rightness or wrongness of many actions is a matter of institutional determination. For a trivially easy example, it is neither wrong nor right simply to drive on the right or on the left. But in North America it is wrong to drive on the left just because we have institutionalized driving on the right. One might immediately retort that many laws are enacted specifically to achieve moral purposes. For example, laws and rules against computer fraud might be seen as mere extensions to new technological possibilities of standard moral principles governing theft. But even for such laws, there is a background institutional account of what counts as property and what therefore can count as theft. More generally, we may suppose *stare decisis* is not merely a practical device. It is a principle of adjudication that flows from the productive efficiency of establishing expectational incentives.

For similar conceptual reasons any form of utilitarianism or welfarism must be institutionalist in its legal justifications.³⁵ One might suppose that part of law in any moral theory of law must be to guide people in their actions. To the extent law is facilitative or coordinative, guidance is its purpose. The theory that gave law no such purpose would be exceedingly odd. A moral rights theorist might insist that rights are prior to law and might refuse to countenance what Robert Nozick calls a utilitarianism of rights, in which the goal is to minimize rights violations.³⁶ Even such a theorist would presumably concede that much of the law in modern states is facilitative and ought to be — much of the content of law must go well beyond that of any moral rights theory. Moral theory in the twentieth century has been plagued

courts played a minor role in changing U.S. policies and practices of racial discrimination. See his *The Hollow Hope: Can Courts Bring about Social Change?* (Chicago: University of Chicago Press, 1991). Brown's catch phrase, "with all deliberate speed", has become a comic euphemism for intergenerationally slow.

³⁵ I argue for "institutional utilitarianism" in Hardin, *Morality within the Limits of Reason*, chapters 3 and 4.

³⁶ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 28.

by the frequent failure to recognize the relationship between institutional or indirect justification and brute, direct justification of specific actions.

The central move in many of Coleman's arguments is to the level of institutional justification (p. 133). Indeed, among legal philosophers he is almost uniquely alert to this issue. Coleman says constitutionalists think that individual events have meaning only within an institutional framework (p. 135). This is a rhetorically exaggerated way of saying roughly what I have just said about conceptual reasons for institutional justification. Yet Coleman says the economic analysis of law is teleological but not consensualist and not institutional.³⁷ It is directed at specific events, such as particular exchanges, torts, and crimes (p. 135). The latter half of this general claim is wrong. The economics of law follows from a central organizing justification, which is efficiency somehow defined. The efficiency at issue is a collective, not an individual notion. It is not a matter of whether I put my resources efficiently to use but whether we jointly put resources to their most efficient use. Much of the economic analysis of law is concerned with the efficiency of a particular regime for handling some class of cases. That is an institutional focus. Arguments may be made from actual cases, but the arguments being made are commonly about the generalizable tendencies of such cases.

There is a lot of careless argument, and even misunderstanding, in law and economics that merits Coleman's criticism, but the structure of the enterprise can be and often is strictly institutional.³⁸ It is also

³⁷ In contrast to the economic analyst, Coleman poses what he calls the constitutionalist. As he uses the term, a constitutionalist is clearly a contractarian or consensualist. This is perverse. In ordinary use, the economic analyst who specifies institutional arrangements for dealing with social interactions is surely a constitutionalist. One of the greatest of nineteenth-century constitutionalists was the teleologist utilitarian Jeremy Bentham.

³⁸ The institutional focus is often clearly stated, as in, for example, Donald Wittman, 'First Come, First Served: An Economic Analysis of "Coming to the Nuisance"', *Journal of Legal Studies* (1980) 9: 557-68; and it is often pervasive even if not always explicit, as in A. Mitchell Polinsky, *An Introduction to Law and*

teleological, as Coleman says, in that it is directed at the end of efficiency. But this teleological purpose conceptually requires institutional resolution. Teleological and institutional concerns are analytically joined, not contrary.³⁹ While Coleman's criticism of the supposedly non-institutional focus of law and economics is wrong, his purpose in emphasizing the institutional focus of justificatory argument is compelling. One may hope that Coleman's forceful advocacy of this focus will challenge careless reasoning in law and economics and in law more generally.

Moreover, economic analysis virtually requires an institutional approach in that it can often only be argued *ex ante*. We can justify rule P because it has certain incentive effects that enhance productive efficiency. Because of incentive effects, we cannot plausibly apply economic arguments to some cases as single events — we must have an *ex ante* rule. For example, we cannot argue why it is right for me to compensate you for a harm in an ad hoc case without a prior account of how our actions might more generally contribute to our well-being or whatever. I may harm you by stealing from you, by attacking you, by accidentally injuring you while otherwise doing good things, or by competing with you in the market. In the last case, we might generally all benefit from enhanced market competition, so that my harm to you should go uncompensated lest competition be suppressed. In the other three cases, to varying degrees, my actions might be affected for the better by relevant legal rules imposing punishment or liability, that is, by institutionalizing relevant incentives. In all these cases, argument should turn on which rule would be dynamically most efficient, that is, most productively efficient, not on which judgment in the instant case would be statically more efficient. In unusual cases this might mean overturning precedent and establishing a new rule or, as in

Economics, 2nd edition, (Boston: Little, Brown, 1989). Wittman and Polinsky are both economists, not lawyers or philosophers, who well represent normative law and economics.

³⁹ Here Coleman's great talent for seeing fine distinctions fails him. There is neither conceptual nor logical nor causal connection between institutionalism and consensualism.

courts of appeals, it might mean clarifying murky law or even establishing law where there was none and applying it *ex post* to the case under review.

Coleman's institutionalism is perhaps best seen in his claims for what various transaction rules are. These include property rules, liability rules, and inalienability rules. According to Coleman, a standard view of these rules is that they secure rights. On the contrary, he argues, the transaction rules define rights; they are not tools or means to secure rights (pp. 39, 61). This is the preeminent institutionalist move. Here he plumps for Hobbes's view of rights against Locke's view. Hobbes held that there are no rights without a sovereign to enforce them.⁴⁰ The state and law are prior; rights are among the positive creations of the state and law. Locke supposed there are natural rights of property, which it is the function of government and law to protect.⁴¹ Rights are prior; it is toward the end of securing them that we created the state.

Justifying Tort Law

Again, Coleman sides with Hobbes on this issue; he is an institutionalist. But he is a reluctant or backsliding institutionalist. He often recurs to direct moral justifications of particular events or transactions.⁴² For example, he debates whether compensation paid under the liability rules of tort law retrospectively legitimates a tortious taking.

⁴⁰ Hobbes, *Leviathan*, chap. 15, p. 203 [72]. This is one sense Hume intends when he says many of our moral duties in a society are "artificial." Hume, *A Treatise of Human Nature* (Oxford: Oxford University Press, 1978), ed. by L. A. Selby-Bigge and P. H. Nidditch, book 3.

⁴¹ John Locke, *The Second Treatise of Government* (Cambridge: Cambridge University Press, 1960), ed. by Peter Laslett, especially §§87–89.

⁴² In arguing against the use of settlement in mutual preference to going to trial (in a paper written with Charles Silver), Coleman argues that settlement in a particular case is likely to be unjust because it will be a compromise on the legally correct outcome (pp. 205–07). But Coleman the institutionalist has no footing to make such a claim if he cannot give us a background moral theory that is to back the law. Efficiency considerations, as Coleman recognizes, must play some role in any background moral theory for the law simply because the

The only consistent way for an institutionalist to address this question is to distinguish between legitimating the tort rules themselves — a moral issue — and legitimating a particular tortious transaction — a matter of positive law that is a moral issue only indirectly by inference from the moral justification of the tort system or some relevant part of it. Coleman blurs these two distinctions in much of his discussion. He asserts that some scholars in the economic analysis of law hold that compensation legitimates tortious actions against the property rights of others (pp. 53ff). Some of their writing is loose enough to read these scholars as Coleman does. But even if 'legitimates' is merely a positive legal term, this conclusion may not follow unobjectionably. What is legitimated by compensation after the final court decision is our status of independence from one another with respect to the tortious action. We are legally free to go on with our lives without further responsibility to one another over the tort.

Ex ante, not even my expectation of my paying compensation may legitimate my tortious action, although it can do so. If I intend to collide with your car and then compensate you, my collision might reasonably be criminal, not merely tortious. Our tort incentive has failed to deter deliberately harmful action.⁴³ If 'legitimates' is a moral term with a meaning largely independent of the positive law, as it seems to be in Coleman's usage (he cites moral rights theorists Joel Feinberg and Judith Jarvis Thomson [p. 44]), the conclusion that expecting to pay compensation legitimates need not follow at all. Indeed, economists and scholars in the economic analysis of law are

use of law is expensive and its use to the point of perfection would bankrupt and destroy society. Without some effort by Coleman to give us his foundational moral theory for the law, his criticism of deductions from a principle of efficiency on the claim that the principle leads to injustice is empty. Like a woefully under-specified contract, it should be ruled out of court as too vague to defend.

⁴³ The case is even more complex. The structure of tort incentives is typically intended to work on both parties, both the potential tortfeasor and the potential victim. That is, the potential victims must face some loss from tort interactions if they are to have incentive to avoid them. In the typical tort, therefore, the victim may expect to lose even after compensation. Hence, there is need for an additional incentive to deter certain classes of deliberate torts.

unlikely even to use a moralized notion of legitimacy. Unfortunately, one who thinks the compensation provided in positive law in a particular case is morally inadequate can do little more than scream about the moral wrong. (One has a vision of Coleman shouting down the judge and the tortfeasor: "It is wrong! MORALLY wrong!")

I said my expectation of paying compensation could legitimate my tortious taking. Consider the analogous development in contract law. Under contract law, many parties evidently treat available remedies as part of the contractual agreement and feel bound to do no more than what is best for them under the range of remedies and strict fulfillment. If the expected cost of fulfillment rises above that of remedy, they default. At some point, as this becomes the general practice, we might even suppose that is all a contractual agreement does morally (as well as legally) mean or obligate anyone to do.

This is apparently how Coleman views property rights — they are what the transaction rules define (p. 39). If we similarly argue that the compensation rules are part of the definition of relevant rights, we might then think it generally beneficial in the positive law to strengthen the remedies in order to secure more extensively the good of successful arrangements. We might still wish to add to the definition of rights certain punishment rules for transgressors and certain limits of resources and information available to the legal system (for example, I may have no right of protection of my property against minor depredations that cannot easily be monitored). For a moral rights theorist, who need have no concern for the real world, my legal right to the ownership of, say, my home may be a pathetic bundle of considerations when, damn it, we all know I should have a full right. Until the moral rights theorist can convert that full moral right into a legal right defensible by a real legal system, however, there is little more to discuss.

What does the positive law legitimate in my tort of colliding with your car and inflicting great damage? It legitimates the practice of driving under specific conditions (among others, that I am sober, licensed, and insured for liability). Because it is unavoidable that there will be some accidents from normal driving, the law of torts covers my responsibility for harms I might do or, alternatively, it covers the

general responsibility for harms that might be done (as when it requires liability insurance coverage at some level for all drivers). The law of torts now merely defines the legal outcomes of such interactions as my collision with you. It legitimates positively. It legitimates morally only if the positive law can be morally defended. Without first giving a moral defense of the tort system, Coleman the institutionalist can say nothing about the morality of the settlement involving you, my insurer, and me. He can argue, as he often does, that efficiency is the wrong institutional principle or that it is only one of several principles. But for him that argument must be put at the higher level of the institution of tort law, not at the level of our unfortunate interaction on the road.

Spur Industries

To exemplify the distinction between institutional- and individual- (or case-) level justifications in law and economics, consider the case of *Spur Industries v. Del E. Webb Development Company*,⁴⁴ a 1972 case before the Supreme Court of Arizona. Spur had run a cattle feed lot outside Phoenix from a time well before Webb developed Sun City in a location near the feedlot and often downwind from it. Those who bought retirement homes in Sun City suffered from the stench and Webb brought suit to enjoin Spur from further operation. Webb won the injunction and Spur appealed. The court ruled that Spur must desist but that Webb must pay Spur's relocation costs. The reason for Webb's paying indemnity was that, when it bought the land, it presumably got it at reduced value because of the Spur feedlot. It now wanted to make up that reduced value at Spur's expense.

The Arizona court quoted precedents that read like straight law and economics analyses. In particular, in justifying the violation of the usual spirit of decisions that one who "comes to the nuisance" cannot then turn to law to get the nuisance suppressed, the court recognized that there can be no rigid rule of nuisance to be applied to all cases. A business that was once not a nuisance may become one as a result

⁴⁴ 108 Ariz. 178, 494 P. 2d 700.

of encroachment of the population. Finally, from *Stevens v. Rockport Granite Co.*, a 1914 Massachusetts case, the court quoted the core concern with dynamic efficiency: "In a commonwealth like this, which depends for its material prosperity so largely on the continued growth and enlargement of manufacturing of diverse varieties, 'extreme rights' cannot be enforced."⁴⁵

Spur clearly argues for dynamic or productive efficiency, not merely static efficiency. It is dynamic efficiency for both parties and for owners of Webb homes, or, better stated, for both classes of parties and the larger public. Spur Industries, Inc. and similar concerns are encouraged to suppose their investments will not be turned to nought by demographic changes that force them to relocate or close. And Del E. Webb Development Co. and similar developers are encouraged to think they can get reasonably inexpensive protection against nuisances that they come to. Both parties in such potential interactions are given to understand that they have little to gain by going to court, because from a court they will get only an economically reasonable and not an especially favorable settlement. On all three counts and the limited evidence in the court record, dynamic efficiency seems to have been well served. One might even suppose the decision was little more than giving court assistance to stubbornly failed bargaining. However, in the face of actual law at the time, both parties might have had expectations of prevailing in court. The court concluded that Spur was required to move not because it had done anything wrong — it had not — but only out of regard to the greater interests of the public of Sun City.⁴⁶

IV. LAW AND JUSTICE

It is a source of frequent confusion that 'justice' has at least two quite distinct and not fully compatible meanings. We speak of the justice of laws that are fairly applied and of the whole system of justice in the

⁴⁵ 216 Mass. 486, 488, 104 N.E. 371, 373 (1914); quoted in 108 Ariz. 178, 494 P. 2d 700, 701 (1972).

⁴⁶ P. 708.

courts. And we speak of the justice of our organization of society, especially of the distribution of goods and resources. Most of the major works in traditional political and legal philosophy are about justice in the first sense. In a criticism of Hume, Henry Sidgwick derisively noted that what Hume called justice, he, Sidgwick, would call merely order. We may compromise and call it *justice as order*.⁴⁷ In the past few decades, especially since the publication of Rawls's theory of justice, work has frequently focused on *distributive justice*. Work in law and economics is primarily about justice as order, not about distributive justice.⁴⁵

There is a sense in which we might reasonably separate legal and political philosophy. Legal philosophy is primarily about justice as order. Political philosophy must take up the concern with larger distributive issues (and many others). On this thesis, justice as order is the proper province of law and the legal system. Distributive justice should not be handled case by case at law but by general policy. Indeed, distributive justice is likely to raise issues of gross redistribution of resources or wealth, which might best be achieved by progressive taxation on income, wealth, consumption, or some combination of these coupled with something like Scandinavian welfare programs to equalize health care, educational opportunities, housing, and so forth. Attempting to achieve such redistribution by, say, allowing bigger tort awards from those with deep pockets seems unlikely to be very effective. It might even create radically unproductive incentives as though the issue were merely that of static distribution. Less trivially, if we are to achieve a different standard of distributive justice, we will surely have to do it through well organized administrative agencies. The courts cannot administer even a single prison very well, much less a general program for social welfare.

This may sound odd. Do we really want one set of moral principles for some parts of public life and another set for other parts? Yes, we

⁴⁷ Henry Sidgwick, *The Methods of Ethics*, 7th ed. (London: Macmillan, 1907), p. 440. Also see Hardin, *Morality within the Limits of Reason*, pp. 44–47.

⁴⁵ Rawls seems to suppose he can derive the latter from the former. For discussion, see Hardin, *Morality within the Limits of Reason*, pp. 130–32.

probably do, in the following sense. We may justify all institutions from the same general principles, but then each may have its own rules for action. We may want entrepreneurs to act on the motive of personal gain within certain constraints that prevent their externalizing their costs, even though this will produce inequalities. We may want universities to qualify doctors and others on the merits, even though this may also produce inequalities. And an advocate of law and economics may well conclude that the legal system is well suited to maintaining order and poorly suited to achieving a more just distribution. This is the comparative advantage of courts, while achieving justice is the comparative advantage of the legislature.⁴⁶ Indeed, in each of these cases, we may suppose that serving the function of profit, merit, or order is likely to put us, as a society, in the best possible position for doing much about distributive justice or other moral purposes. All of these functions lead to greater resources for dealing with other issues. Against this claim, one might rightly note that the growth or creation of strong bases of entrepreneurial, professional, and other enterprises may change the political prospects for achieving many programs. At this point, again, we may face the general problem that we cannot make Pareto comparable claims about alternative institutions that are large-scale, pervasive, and fundamental.

If the legal system is run according to moral principles that will serve justice as order, dynamic efficiency has a strong claim to being the moral principle. Certainly, whatever regime we choose, we will want it to be efficient, although we might give up some efficiency for other gains.

⁴⁶ Coleman says the common sense view of these matters is just the reverse: courts are for justice and legislatures for welfare. (See Jeffrie G. Murphy and Jules L. Coleman, *Philosophy of Law* (Boulder, Colo.: Westview, 1990), p. 228. This claim may do little more than trade illicitly on the popular confusion of law and justice and on the standard vocabulary that makes efforts to redistribute "welfare" programs.

V. CONSENT

Despite enormous appeal on its face, consent is among the most troubled and troubling notions in all of political philosophy. Contractarian theory has been based on the supposed moral superiority of consent over other principles for making social arrangements and such theory is a shambles.⁴⁷ On the evidence of Coleman's discussion of it in various contexts, one must conclude that consent is contributing to conceptual corrosion in the economics of law as it has more generally in political philosophy.

It is an obvious feature of tort law in practice that it produces outcomes to which the parties might not consent at all. We might suppose this to be a moral failing in tort law. That would be an odd conclusion, however, because tort law seems particularly addressed to those interactions in which full prior consent to outcomes is not practicable. Must consent theorists therefore object to tort law? No. A consent theorist can be an institutionalist, insisting on the creation of institutions or procedures to which we are then bound without insisting on consent to every action taken under those institutions. This is, indeed, the structure of contractarian legal and political theories, which generally permit majority rule to override minority preferences and also allow coercion in criminal law.

We can imagine consent *ex ante* to the creation of the institution of tort law roughly as it exists in, say, the United States. When I now face you in a tort action, I may strive to get more from the interaction than the tort law might be expected to allow. Whether I consent to getting only what the court awards is, however, morally irrelevant (p. 134). It might suggest arguments for changing the tort law, of course, if we now all consent to changing the law or if we use the procedures previously consented to for changing the law. We might even construct hypothetical consent arguments for making a change in the law that applies *ex post* to our case, as might be done in common law

⁴⁷ Russell Hardin, 'Contractarianism: Wistful Thinking', *Constitutional Political Economy* (1990) 1: 35-52, and 'Political Obligation', in Alan Hamlin and Philip Pettit (eds.), *The Good Polity* (Oxford: Basil Blackwell, 1989), pp. 103-19.

courts. But it is otherwise irrelevant — because out of place — to invoke consent at the point of a particular case in the moral evaluation of the consent theorist's tort system.

Consent theorists may be especially prone to the confusion of institutional-level and individual-level justifications. Consent sounds like a simple individual-level concern. But virtually all of consent theory, including all contractarian theory, is about consent on forms of government, on institutions, not about consent to piecemeal bits of what government does. The latter would be utterly unworkable and silly.⁴⁸ But that means it is unworkable and silly to drag immediate consent into the judgment of a result under the tort law. It is perhaps largely for this reason that consent theories of government and law have been egregiously burdened with the apparent need to give a compelling justification for political and legal obligation. Obligation is needed to trump the failure of instant consent to any particular government action or legal decision — but only for consent theorists.⁴⁹

Although we can imagine universal *ex ante* consent to a regime of tort law, it is only a figment of our imagination, not a realistic hope. On some variant of this point, consent theories generally founder. Some contemporary consent theorists appeal to "reasonable agreement", which seems to be something that can be rationally deduced, for example, by the theorist, and then applied to (or imposed on) the so-called consenters.⁵⁰ As Coleman astutely notes, economists often tend to slide from the fact that a move is Pareto preferred to the status quo to the conclusion that it would be consented to (pp. 135–36). He thinks we often would not consent to Pareto improving moves (p. 137). Of course, he is right. We pass up many opportunities for such moves. Indeed, from a point interior to a Pareto frontier, we would

⁴⁸ As silly as consent theories have sometimes been, they have not usually been that silly.

⁴⁹ Obligation may also be needed in certain religious theories of government.

⁵⁰ T. M. Scanlon, 'Contractualism and Utilitarianism', in Amartya Sen and Bernard Williams (eds.), *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982), 103–28, esp. p. 116; Charles R. Beitz, *Political Equality* (Princeton: Princeton University Press, 1989), pp. 100–07.

typically face many Pareto improving moves. For example, in figure 1 all of the points in the segment Q are Pareto superior to q. It would be perverse to say that we consented to every one of those moves. As between any two of those moves, I prefer one and you prefer the other. We may eventually consent to one of them and we may make it. When we do so we generally deny at least joint consent to other moves, some of which I would prefer to the move we make and some of which you would prefer. But jointly we may only consent to one choice from this perhaps large set.

This is not Coleman's argument. He says, rather, that my preferences over states of affairs are "path independent, whereas which social states one consents to or agrees to is path dependent. Thus, I always prefer the state of affairs in which I have the gold and you do not, although I would not agree to the world in which I have the gold and you do not if the manner by which I secure it involves fraud or theft" (p. 137). To see what is wrong with this way of putting the issue, let us change the vocabulary and speak of my interests rather than my preferences. I have an interest in having the gold. But if I come by it through theft, I may be at risk from the criminal justice system, and my interest in not risking jail may trump my interest in having the gold. It is simply not true in real life, as opposed to artificially contrived philosophical examples, to say that the state of affairs is path independent.⁵¹ Now, if we go back and restate Coleman's argument in preference terms again, but we keep the full states of affairs under comparison, we may find I do not prefer to have the gold, as he eventually concludes (p. 138).

Note, however, that the argument here is largely misplaced for an institutionalist consensualist — recall that Coleman claims these two commitments are inherently joined and that he seems to consider himself an institutionalist consensualist. He should therefore speak of consent to the institutional arrangements for handling torts in general, not to the consent or its lack in resolving a particular case. If Cole-

⁵¹ Could I have an interest in being a thief? Conceivably. Given my own choice of lives and the prospects for successfully leading such a life, I probably have no such interest. But under other circumstances I might have.

man's criticism of the coherence of consent claims for a particular tort has any bite, it must be at the institutional level. And here, indeed, it does have bite if we think consent at that level must be actual. We would not suppose people should be forced to make Pareto efficient moves even against their will. In part, this may be because we typically face many mutually exclusive options each of which would be an improvement over the status quo. But this is Hobbes's resolution of the problem of order. In his contractarian arguments he justifies moving to any government from the state of nature on dynamic efficiency grounds. But this can only be an argument for moving to government, not for moving to any particular government.⁵² On this seemingly obvious distinction, much of contract theory founders. Indeed, Hobbes's genuinely powerful contribution to political philosophy is his arguments for stability of government, not his arguments for contractarian creation of it.⁵³

The criterion of dynamic or productive efficiency not only does not get its normative force from consent, it also does not imply consent (p. 135). Coleman thinks some writers suppose it does imply consent. Or, as he says Posner does, they use 'consent' to mean something different from what it normally means in political philosophy (pp. 52, 118–121).⁵⁴ There are two quite distinct issues in play here. The first is that an economic analysis of torts does not require any role for consent. The second is that consent can have a role, if at all, only at the institutional level, not at the level at which Coleman's discussion is focused. Let us discuss these issues in turn.

Economic Analysis without Consent

If we view tort remedies as de facto permissions for tortious actions, we might suppose the remedy in any particular case must be consented to by the victim. But the remedies are not proxy permissions, they are incentives to reduce the likelihood of tortious actions. They are justified, if at all, by their role in the larger system of legal control

⁵² Hardin, 'Hobbesian Political Order', pp. 168–71.

⁵³ Hardin, 'Hobbesian Political Order', pp. 171–73.

⁵⁴ Posner answers this charge in *The Economics of Justice*, pp. 97–98.

of potentially harmful actions. But that means they must be adopted, and therefore originally evaluated, *ex ante*. (In exceptional cases, a tort rule might be adopted in the common law context of handling a particular case or in the context of judicial review of a novel case. If such cases were commonplace rather than exceptional, the general incentives of tort law would be undercut).

What we do when we judge a rule *ex ante* is assess how it will likely affect the interests, autonomy, or whatever of those subject to it. We may be able to conclude that particular applications of the rule would produce Pareto allocations in the following sense. The tortfeasor's interest in the pattern of action that either directly or stochastically produces the tort is offset by the direct or stochastic value of the remedy. The victim's interest in the harm suffered is offsetting against the victim's interests in the availability of the pattern of action of the tortfeasor and the remedy of compensation. If the tortfeasor's combined interest is positive and the victim's combined interest is positive, the remedy is indeed Pareto improving for them. But our original concern in establishing tort remedies is broader than this.

Would it generally be better for the members of the larger society to have such strict tort remedies that we all act with extreme caution? For example, under a very strict tort regime I might drive when it is nearly a matter of life and death but not when it is merely for the pleasure of going to a movie or dinner. Or perhaps I would give up driving altogether to avoid the huge insurance costs. It is concern with such issues that leads us to prefer a tort system that turns what some might consider rights violations or conflicts of rights into matters of *ex ante* welfare or efficiency.⁵⁵ In the development of the modern products liability doctrine, a central insight was that harms were strategi-

⁵⁵ A further strategic consideration weighs against Coleman's complaint against the Pareto efficiency of remedy of compensation for a harm. Again, he wants consent. But what I will consent to, once I have suffered a harm, may be something much greater than the value of the harm. After reading of jury awards in celebrated tort cases, I may now think this is my opportunity for wealth, and I will not consent to less. I may even assert forcefully that my harm really is valuable at a level that far exceeds usual compensation. A requirement of consent

cally caused by at least two parties: the manufacturer and the user. When there is such plural causation, we cannot apportion responsibility to the two or more parties on the claim that each has just that share of causal effect in bring about the harm. We might reach a conventional standard for apportioning shares of responsibility, but the standard would not be directly grounded in anything we could defensibly call the moral or causal responsibility of either party.⁵⁰

Part of the claim for dynamic efficiency is that there may be external effects — larger systemic effects — on many others if the regime we adopt for handling quasi-coerced exchanges generally affects behavior. The regime in which you get substantial compensation for my harming you is likely to have substantial effects on tortious behavior, including effects on many people not party to our particular tort case. Hence, whether I do or would consent to a harm plus its remedy is not a trumping consideration for our tort regime. Indeed, it may not even be an important consideration. To focus on this issue is to let static considerations overwhelm larger dynamic considerations. Furthermore, our tort regime requires no consent from me anymore than our Constitution, this term's Congressional enactments, or recent Supreme Court precedents do.

If we have to justify everything to every involved individual on the spot in each case, society will not go. If our legal regime is very limited, we may not be able to justify many things but will merely suffer them as they happen to us. If it is much more extensive and articulate in handling our mutually costly interactions, we may justify

would introduce massive strategic action. (If my claims were genuinely true of many tort settlements, that would be grounds for reconsideration of the remedy for such cases.) Coleman recognizes this problem (p. 156).

⁵⁰ The problem of apportioning shares of causal responsibility among plural causes disturbs far more than merely the law of torts — it pervades the sciences. Economists have finally abandoned the question how to allocate back to various inputs (of labor and capital) their causal contribution to the economic value of products. Instead they look only to demand and supply prices for inputs and products. The fault system in torts requires a solution to this problem if fault is to be morally allocated.

the system overall in particular moral terms and still be unable to justify results in specific cases in those same moral terms. The specific results will be justifiable only derivatively and contingently from the justification for the larger system.

The Place of Consent in a Tort Regime

If I freely enter into a risky prospect, and there is nothing wrong with doing so, then there cannot be anything wrong with my getting any of the outcomes. The problem with risks in much of tort law is that they cannot be seen as freely accepted. I have to risk accidental injury from others if I am to have any life at all. I do not merely choose to enter some risky prospects while dodging others. The most I might choose is to live in the modern world, and even that hardly seems like a free choice. It is what is available to me. Coleman complains against Posner that accepting a risk is not tantamount to consenting to the worst that can happen in that prospect. I consent to the risk; I do not consent to the worst outcome in it. He applies the complaint to freely chosen entry in a lottery, saying that I do not consent to losing my dollar when I enter the lottery. All I consent to is the combination of the high probability that I will lose my dollar plus the low probability that I will strike it rich. Even a consent theorist may think Coleman's complaint perverse as applied to this example.

Consider tortious actions (one might sooner call them events when no one intends them). Coleman might well yell at Posner at their accident site on the Dan Ryan Expressway in Chicago that he, Coleman, did most certainly not consent to being smashed with whatever restitution the tort law would provide when he drove onto that road. Or suppose Posner's airplane has crashed into Coleman's home in Connecticut. The same argument might ensue, with as little persuasion. But somewhere between the case of Coleman's misfortune with his house and with his lottery ticket, there seems to have been a subtle change. The lottery ticket seems to come about as close to consenting to the stochastic harm as possible, while the airplane crashing into his house is about as far from such consenting as possible. Perhaps the accident on the Dan Ryan is somewhere in between. Indeed, longtime Chicagoans might dismissively say that, surely,

Coleman very nearly consented to his accident if he knew much about the Dan Ryan.

Where does the tort law come in? At first glance, one might say that, in the case of the lottery ticket, there is a virtual contract of consent to the dollar's loss. In the case of the auto and airplane accidents there is none. It is these latter two which therefore require a tort regime if we are to regulate them in ways that most support dynamic efficiency. One might disagree here and claim there is only a virtual contract in the lottery ticket and as much of one in the accident cases. There is no natural distinction, there are no natural kinds. In all such cases, the law stands where it does and that is what makes one case a matter for tort law and another case a matter for contract law. Libertarians may think, on the contrary, that they know, with certainty, how to determine which cases are contracts with full consent and which are torts without consent.

The problem here, as in other areas of consent theory, is that there are strategic interactions that intervene between our actions or choices and the outcomes we get from them. This is a constitutive claim. There is no meaningful category of the things out in the world that I choose independently of strategic interactions. The great simplifying urge to cut the world up into manageable pieces destroys not only its coherence but also the relevance of our conclusions. As Coleman insists, when I buy a lottery ticket, I consent to paying a dollar for that ticket with all that follows from my owning it. If part of what follows is the 99.999 percent likelihood that the ticket will turn to trash in my pocket tomorrow, that is only part of a larger strategic package to which I consent. From knowledge that I consented to buying the ticket, you can infer nothing about whether I consent to the loss of my dollar, because that loss was not the object of my choice. I consented to the strategic package of losing my dollar plus a slim chance of winning much more. It is misguided to try to trick out a claim about consent to any single piece of that package.

But is it wrong for me to lose my dollar with 99.999 percent likelihood? Here it seems the answer is no. And it seems that the answer follows from the fact of my initial consent to buying the ticket. Is it wrong for Posner to fly his airplane into Coleman's house? That

depends on what the circumstances are. If he is doing everything the law requires to be careful and attentive to the condition of his craft and to weather conditions and is careful while flying, then there may be nothing wrong with his flying as he does and therefore nothing wrong that he does that lands him on Coleman's house. What does Posner actually do? Recall the discussion of consent to a strategically complicated range of possibilities. Posner flies his aircraft from A to B and over Coleman's house along the way. It would be odd to say his flying his aircraft into Coleman's home was an intentional action. It was merely a very low probability outcome of quite other intentional actions. Either it was wrong for Posner to be flying at all, or it was not wrong for him to hit Coleman's home.

There is a loss for poor Coleman, but there is also a loss for poor Posner. If Coleman's property had been an empty field or a runway, Posner might have had no accident. If Posner's aircraft had been airworthy for half a minute longer, Coleman's house would have had no accident. The law might say tough luck to both or it might find for one party against the other. In this case, efficiency considerations might readily seem to commend putting most of the burden on the aircraft owner, who should be able to do more to stay away from houses than homeowners can do to stay away from airplanes and who will therefore be more responsive to tort incentives. These, of course, are contingent matters.

In any case, the institutionalist consent theorist must stop Coleman's arguments at the level of the cases. They are irrelevant to such a theorist. It does not matter whether I consent to the tort settlement that the court awards me or imposes on me. What would matter to the consent theorist is whether I do or hypothetically would consent to the tort regime that produces the settlement. Since constitutional consent does little more than open up a stochastic range of possible outcomes, Coleman would rightly have to say, as in his lottery argument, that I do not ipso facto consent to any particular one of those just because I consent to the constitutional arrangements. But this is no test of constitutional consent. All that a coherent consent theorist will want to claim is that the particular outcomes can be just or right, not that they will specifically be consented to.

VI. CRIMINAL LAW

The central problem for the economic analysis of criminal law is said to be why we have the category of criminal law at all (p. 155).⁵⁷ Why do we go further in dealing with criminal actions than with mere accidents? Why is there a criminal law rather than merely an enlarged tort law? Many theorists would claim there are inherent moral differences. Unfortunately for their theories, some of the differences seem historically to have been only conventional, so that criminal and tortious actions are not categorically different. What is now thought wrong both legally and philosophically may once have been okay or even right. For example, what was once success in a duel or a vendetta is now murder. Insider stock trading became a crime within living memory, as did many other actions that involve conflict between personal and agency interest.⁵⁸

A possible answer to the question of why there exists a criminal law rather than merely a tort law might be that this makes no sense on the economic account. What would a conceptual criterion for a definitive difference between torts and crimes be? We might argue that the criminal violates the autonomy of another while the tortfeasor does not, or, in a variant of this, that the criminal uses coercion while the tortfeasor does not. Or we might attempt an argument roughly as follows. In the case of a tort, we can generally assume that someone was acting out of personal interest that just happens to involve the

⁵⁷ Coleman's attention to this question in 'Crimes, Kickers and Transaction Structures' (pp. 153-65) was originally published as a commentary on Alvin K. Klevorick, 'On the Economic Theory of Crime', pp. 289-309 in J. Roland Pennock and John W. Chapman, *NOMOS 27: Criminal Justice* (1985), pp. 295-304. He also takes up Klevorick's question at pp. 45-56.

⁵⁸ Perhaps the first use of the term "conflict of interest" in a court case in the U.S. was in 1949. (See Neil R. Luebke, 'Conflict of Interest As a Moral Category', *Business and Professional Ethics Journal* (1987) 6: 66-81, at p. 67). We could hardly do without the term today. Despite its apparently recent introduction into the law, many moral and legal philosophers may be inclined to give a priori judgments of the rightness or wrongness of various kinds of actions in contexts of conflict of interest as though they had innate intuitions about such things. Beware such philosophers.

interests of others as well, either directly or stochastically. In the criminal case, there is more going on. The criminal actor's interest is constitutively tied to the interest of the victim. The rapist, burglar, and murderer gain only by harming others, and this is what makes their actions wrong. Unfortunately, the effort to establish categorical differences here seems likely to fail. Criminal and tort law overlap, because crimes commonly are also intentional torts. There may be odd cases for which the category seems clear enough, but the distinction cannot be clear in general. What counts as a crime is a matter of convention and, as with the purely moral theories, history blurs the criminal category.

An Economic Account of Criminal Law

If the question really is why we do not have merely tort law, part of the answer must be that the criminal may typically do harm on a scale that could not plausibly be compensated from the gains of the criminal actions. *Ex ante*, all drivers might arguably be thought to gain enough from being only reasonably (instead of excessively) careful to be able still to come out ahead after they compensate themselves and others for the harms they occasionally inflict. Certainly, this cannot be true of most crimes that can be figured straightforwardly in monetary values. (Crimes without victims will not fit this account.) And if we permit even relatively limited interpersonal comparisons we might easily conclude that most categories of crimes with victims are welfare reducing.

Hence, the institutionalist economic analyst has available a distinctive answer for why criminal law is separate from tort law. The compelling efficiency ground for the tort law is that it is generally efficient overall to act in ways that sometimes bring harm. For example, it is *ex ante* beneficial to be able to drive even at the risk of accidents. The accident, the tort, is constitutively or at least causally tied to the availability of the benefit. Few if any categories of crime could be defended on such an efficiency ground. Indeed, for criminal law efficiency comes in at the level of application of the law, not at the level of the related activities themselves. We ask whether more stringent laws and trials would cost more in mistakes and other costs than they would be

worth in reduced criminal harms. Analogous questions may come up in other areas of the law, but in those areas the questions are peripheral while in the criminal law they are central. And in the criminal law it would hardly occur to us to ask whether the overall benefits of having criminal options available might outweigh the costs of having them available. The question why there is a separate criminal law is not only not a central problem for law and economics, it is in law and economics that there is one of the most natural and fitting answers.

Actual arguments in law and economics are not typically so simple as this. Perhaps the most widely discussed economic explanation of the category of criminal law is due to Guido Calabresi and Douglas Melamed. They argue that the criminal violates not merely another person's legal rights but also the society's determination of the correct transaction structure for various exchanges.⁵⁹ To account for society's interest, we add a kicker to the criminal's punishment. In this view, as Coleman notes, the criminal law is parasitic on tort law (p. 158).

According to Coleman, Posner supposes that "the criminal is someone who chooses a nonmarket solution to a problem when the market solution is available, and the penal sanction is intended to encourage him to opt for the market solution" (p. 158). This is an interpretation of the spirit of Posner's writings on criminal law without specific warrant. Posner says this is not his view.⁶⁰ If we think about the problem from the perspective of the criminal's actual incentives, this view seems wrong. Much of criminal action is by those without resources to use a market solution or to compensate for harms. And almost no one would want to rely on specific performance from, say, a burglar to repair the window or door through which the burglar forcibly entered. Even when a particular criminal action could be compensated by the criminal (Michael Milkin paid staggering fines and many organized criminals have vast resources), what the criminal typically seeks is a gain far beyond what the market costs of gaining it

⁵⁹ Guido Calabresi and A. Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral', *Harvard Law Review* (1972) 85: 1089-28, p. 1126.

⁶⁰ Richard A. Posner, private correspondence (19 August 1991).

are, often by inflicting nonmarket costs that are far greater than the criminal's gain. Adding a sanctioning incentive that is no more than the gain from a crime may therefore be an inadequate disincentive for the potential criminal's action. All of these issues turn on incentives and for theorists of law and economics they turn on the efficiency of various incentives. The concern is, as in Hobbes, to block certain nonmarket actions and to support market transactions.

Punishment, which is not statically Pareto efficient in its particular application, is introduced to get the potential criminal actor to internalize the harm to the victim and others so that inflicting the harm no longer produces an expected gain for the potential criminal. But, on analogy to torts, the harm to the victim is only part of what we want potential criminal actors to internalize. We also want them to internalize the more general harm they do to others in forcing them into unproductive behavior to avoid criminal attack. For example, we want the potential rapist to be deterred up to the full value of the harm from his rape, including the direct harm to his victim and the indirect harm to other women who feel constrained to stay off the streets and otherwise adversely to adjust their behavior.

There is likely to be a curvilinear relationship between scale of punishment and its deterrent effect for a given individual, and a quite different aggregate curvilinear relationship between scale of punishment for a particular class of crimes and the number of crimes committed. What we are after with deterrent law enforcement and penalties is the second, aggregate relationship, not the single-individual relationship. If we view the system of criminal punishment *ex ante*, we might suppose it is efficient if it will reduce the incidence of criminal harms up to some point, but not past that point as the costs of the system continue to rise. Apart from the statistical considerations, this is the simple move of Hobbes in *ex ante* choosing order with coercive power over disorder. Although it may sound odd if it is meant to capture our attitude to current criminal laws, it may seem not at all odd as the explanation for the rise of many of those laws historically.

In tort law, we wish to give some incentive to both parties to a potentially tortious interaction to avoid that interaction. Up to some point, if we all become more careful drivers to reduce the risks of

accidents when we encounter other drivers, we are all better off as a result. In the criminal law, we might conclude similarly that individuals should reduce the ease of crimes against themselves in order to reduce overall losses. But here the lengths to which we might have to go to reduce some risks significantly might be very costly. They are not merely costly in the expenditures we make on security systems for our properties, but also in the restrictions we accept on our activities. Perhaps few costs of such restriction are greater than what women suffer in many communities in which streets and elevators are unsafe for them. Here it is almost surely true that the costs of reducing the harms these women and many others risk is far more readily borne by those who would harm them than by the potential victims.

Coleman's Criticisms of the Economic Analysis

As do many others, Coleman asserts that the criminal law cannot sensibly be seen as concerned with efficiency. He says economic analysts are simply wrong "to think of the criminal law as an enforcer of resource transfers" (p. 161). There is some license in law and economics accounts of the criminal law for this criticism. But the criticism is rhetorically churlish and it does not apply to the enterprise of law and economics per se. Coleman frames his objection with the question: "What . . . do murder and rape have to do with the exchange or transfer of resources?" (p. 162). And he wonders what could be the market equivalent of rape.

Despite the effectiveness of the rhetoric, Coleman's remarks are almost entirely beside the point of an efficiency account of the criminal law. The issue at stake is not simply exchange of resources, because efficiency can be applied to far more than ordinary exchange. The broad notion of efficiency that underlies the law in the visions of Hobbes, Hume, Fuller, and the best work in law and economics is not narrowly about the static efficiency of exchange relations over extant goods. It is about the dynamic efficiency of encouraging and enabling people to lead as productive lives within their capacities as they wish. The woman who constrains her work or other opportunities for fulfillment, growth, or pleasure out of justifiable fear that she risks being raped if she walks the streets at night may have her prospects

severely reduced. That, in the best Scottish Enlightenment and law and economics thinking, is, whatever vocabulary fits the age, plausibly inefficient if criminal law could be used to make her passage through the streets safe.

Recall the standard diagrammatic representation of the Pareto criteria and of the Pareto frontier (e.g., p. 103). The points in those diagrams and along that frontier represent states of affairs, including distribution of goods and services. They do not necessarily represent money or monetary equivalents of states of affairs. They are merely ordinally related states of affairs. Viewed *ex ante*, we may well all be closer to the frontier if we have good police protection than if we do not. That just means good police protection is efficient.

Perhaps efficiency is an objectionable moral principle for the law. But it is not objectionable on the ground that, as Coleman argues, it fits all relations into the paradigm of exchange relations (p. 162). Part of the reason for Coleman's criticism is his claim that there is a tendency in the economic analysis of criminal law to reduce it to the law of theft of property. In such a scheme, we can suppose justice is done when we induce compensation for losses. In an argument that parallels that in the immediately preceding discussion, Coleman thinks this misses too much of what is important in criminal law. If, instead of compensation, we have punishment, as in the laws of murder and rape, he concludes that the criminal law cannot be handled by economic analysis. As far as actual positive law is concerned, this conclusion may be too quick. We may view the criminal law from Hobbes's perspective — Hobbes, after all, was first concerned with what we now call criminal law, the law of protecting each from harm by others, the kind of harm that, absent forceful law, makes life a war of all against all. Punishment in the criminal law is functionally analogous to compensation in tort law in that both provide incentives for good behavior. It is not necessary to conclude, falsely, that punishment is compensation. Nor are penalties prices. But both prices and penalties pose incentives to potential actors. In some cases — for example, fines for minor parking violations — it is not surprising that ordinarily law-abiding people think the formal penalties are merely prices.

Despite the lack of moral or legal permission, I might nevertheless kill or harm. Hence, providing legal incentives to discourage me from doing so is likely to enable you to act with surer expectation of eventually benefiting from your present productive efforts. And that means you are more likely to engage in such productive efforts. Hence, threatening penalties of punishment or compensation against those who would harm others or their enterprises tends to be productively efficient on the whole. But this is merely an economic account of why we would want a regime of punishment for certain actions and compensations for certain others. Such an account need not involve dollars, but it clearly does involve rational expectations and productive efficiency.

There is still a lot of work to be done with empirical accounts of what incentives will provoke what behaviors and whether those are better on the whole than various alternatives. It may require only small compensations or punishments to deter very large harms in some contexts. For example, most of the readers of this journal may not need the threat of capital punishment to keep them from murdering. In other contexts, even very large threatened penalties might not suffice to deter modest *ex ante* harms. For example, drunk driving seems almost undeterrable if the only deterrence is the massive one of punishment and compensation for actual harms wrought rather than for each instance of drunk driving irrespective of whether harm is done.

In general, it will not be true that the value of a harm to the person harmed will match the value of inflicting the harm to the person harming. An effective incentive must trump the second of these. Unfortunately, what will be an effective incentive for some people will be ineffective for others. If we select a level of punishment or compensation that will deter most harms of some particular kind, there can still be many others that are not deterred. (There may be compelling economic explanations of much of this variance.)

There is a major flaw in the efficiency justification of law or a legal system, but it is not at the level of particular cases as Coleman argues against the economic justification of law. It is at the fundamental level of the whole argument from efficiency. One might suppose that the

chief reason for law is to control people of ill will. And one might think that this is merely the Hobbesian view. It is not. Hobbes thought the main function of government and law was to control people of potentially good will so that they might be productive and might prosper. He supposed most people would be reasonable if only they could be sure of each other. On this reading, Fuller is Hobbesian in his claim that law is usually facilitative. Hart, Hume, and many others are similarly Hobbesian. Moreover, I think the economic analysis of law is quintessentially Hobbesian.

So what of the view that law is to control people of ill will? This view supposes some must be suppressed in order to make life better for others. Although law in his theory was not directed at such people, Hobbes did think some people are too destructive to be citizens and must be suppressed or banished. Writing when he did, Hobbes thought those who must be suppressed were fundamentalist believers who were willing to coerce others to share their beliefs, and glory-seeking aristocrats whose glory depended on wreaking mayhem for others. He proposed to suppress them by declaring them outside the law if they acted in such ways.⁶¹ (Those outside the law could be summarily killed by any citizen.) Such suppression cannot be an efficient move for those certain to be losers from it. Hence, *the law and its efficiency justification only come into play once these bad persons are excluded*. This move itself cannot be efficient in any of the senses of efficiency in law and economics. Perhaps the ground move is aggregate welfarist, or perhaps it is deontologically moral. In any case, as its base, the efficiency theory is grounded in a violation of the norm of efficiency.

VII. WHEN LAW RUNS OUT

In the institutionalist vision of law and economics, courts should apply economic reasoning (1) when the conditions governing a past rule or

⁶¹ Hobbes says that the glory-seeker, who, "for the stubbornness of his Passions, cannot be corrected, is to be left, or cast out of society, as cumbersome thereto" (*Leviathan*, p. 209 [76]).

rights allocation have changed in ways that make it no longer efficient or wealth maximizing, and (2) when the law is unclear or incomplete. One might ask at this point: If the common law or appellate court judge should look to a background moral principle when the law seems to have gone awry or seems to have run out, why not look to other moral principles, such as equality or distributive justice at that point? Why only recur to efficiency? Clearly, efficiency has a solid claim on the judge when law has merely gone awry in the sense of violating efficiency considerations. But when the law has run out, perhaps distributive justice or other concerns should come in. For example, in urging reform of products liability law Fleming James essentially argued for distributive justice or protecting the vulnerable through risk spreading, and Friedrich Kessler argued for legal control of corporate power.⁶² David Owen supposes that their views would have prevailed even if they had never written, that the reforms were a response to "a solid social consensus".⁶³

The concerns of James and Kessler might be fully consistent with welfarist justifications for the changes they sought. This could be true if the growth of corporate power that bothered Kessler was causally associated with the power to bias outcomes in relevant areas of tort law in favor of the interests of corporations, and if the risk spreading that James wanted was likely to benefit losers far more than it cost nonlosers, as in Ronald Dworkin's argument for his hypothetical insurance market for distributive justice.⁶⁴ In either case, the connection with aggregate welfare or wealth might be merely contingent. But the concern with corporate power or the implicit lottery for risks is itself a welfarist concern, and it would not be a motivating concern for our reform of the law if it did not have substantial welfare effects.

Nevertheless, we might be independently motivated by the unfair-

⁶² Priest, 'The Intellectual Development of Modern Products Liability Law', 470-80, 484-96.

⁶³ David G. Owen, 'The Intellectual Development of Modern Products Liability Law: A Comment on Priest's View of the Cathedral's Foundations', *Journal of Legal Studies* (1985) 14: 529-33, at p. 531.

⁶⁴ Ronald Dworkin, 'Equality of Resources', pp. 314-23.

ness of the distributions that follow from fault-based systems. Just as we might insist on some aspects of equalizing access to the courts for reasons of fairness or distributive justice, so we might insist on change of past precedents when these produce apparently unfair results. At this point, the absence of constitutional or legislative guidance to the courts might make it very hard for a legal theorist to justify a claim that, when the law runs out, considerations of aggregate welfare or wealth should trump considerations of distributive fairness. This is, indeed, the correct point at which to raise this question of our fundamental moral principle for the law. The constant, usually careless, habit of raising the question at the level of a particular case, isolated from the broader context, is wrong-headed and irrelevant. Although one might push for a strictly moral theory of individual action addressed solely to specific cases, it is almost inconceivable that anyone would seriously push such a position for legal theory, which is inherently theory about institutional resolutions.

Finally, to answer the question of where to turn when the law runs out, we should go back to the original claims for efficiency in general. We would adopt efficiency because we want to enhance general productivity to make it possible to enhance general welfare. Why is efficiency at least a plausible moral principle for the law? Primarily because, as discussed above (under "Wealth maximization"), efficiency is partly about means, not merely about ends. It is about using our resources and opportunities well enough to enable us to get the most from them. Why might efficiency be not merely a plausible but even a good principle to adopt? Perhaps the best answer, and therefore the best defense of law and economics, is roughly as follows. In a liberal society, efficiency is as nearly neutral a legal principle as we could plausibly adopt. It leaves to individuals and groups of individuals the option of filling in the values they wish to pursue. We can decide to seek greater distributive justice, less race or gender discrimination, or any number of other values. And we can give courts part of the task of helping us achieve those values. But where we have not given the courts such a task, either constitutionally or legislatively, they can be sure of helping the larger society and individuals toward whatever goals they may have if the courts invoke efficiency to justify changes

of precedent or extensions of law that has run out. Critics may respond that this argument gives nonneutral preference to the values of efficiency and welfare, letting them trump all other values.

Many appealing values, such as equality, risk-sharing, and distributive fairness, are systemic values that are not perspicuously comprehended at the level of individual cases or interactions. They are, rather, comprehended only at the level of general policy. Securing them may require the creation of particular procedures that may be turned over to courts for their enforcement, just as courts easily handle procedures for regulating property relations. When the property procedures seem to produce inefficient outcomes, the court is plausibly able to see clearly enough how to recur to the ground principle of efficiency rather than to rely stolidly on the previously established law or procedure. While it is not impossible for courts to deal in similar fashion with matters of fairness, many theorists of law and economics think that, for essentially causal reasons, courts will not handle such matters well. Defining and achieving these values requires institutional effort and precision, not judicial brilliance. Hence, they should be handled democratically, legislatively, through administrative agencies.⁶⁵

At this point in the debate, no powerful argument or compelling data analysis has been offered to settle the issue. Indeed, as argued above,⁶⁶ efficiency is itself a systemic value. There may still be some force to the claim that efficiency is analytically and measurably clearer than the other values, and there may even be some evidence that courts can handle the former more readily and consistently than the latter. But it also seems plausible that, when the law has run out in the case immediately before a court, the court could reasonably look to the ground principle of fairness rather than that of efficiency — perhaps on the supposition that the law at issue was deliberately aimed at achieving fairness rather than efficiency.

VIII. CONCLUSION

As it stands, normative law and economics presents us with the most

⁶⁵ For example, see Polinsky, *An Introduction to Law and Economics*, pp. 119–27.

⁶⁶ Under “Institutional- vs. individual-level justifications.”

well-developed and coherent moral theory of the law that we have yet seen. One may object to its moral principles, but one cannot do so by reference to any comparably articulate normative account of law. This achievement may seem odd for a theory that has its roots in the seemingly positive theory of microeconomics. But positive microeconomic theory itself grew out of normative concerns, particularly with welfare. The most striking feature of law and economics, however, is that its moral principle is remarkably limited. The original concern with efficiency was to avoid claims of aggregate welfare. Vilfredo Pareto sought the minimum moral principle all could agree to: A change is good if it helps some and hurts none. In fact, this principle is too limited. It is often indeterminate (it commends a set of moves, not a particular one of these) and it is therefore incomplete in the comparisons it can yield (it cannot say whether point *p* or *q* is better in figure 1). Hence, we often demand more than paretianism. In particular we demand ways of making aggregate judgments, as in Bentham's utilitarianism or in Posner's wealth maximization.

If we have an institutional view of law, so that indirect application of fundamental moral principles to each particular case is ruled out, efficiency is, again, a plausible candidate principle for the internal morality of law despite its narrowness. The central role of the courts in justice-as-order is to secure order — not merely by blocking disorder but also by facilitating mutually beneficial interactions. Implicit in much law and economics, even when it is ostensibly positive rather than normative, is the view that, if we want the courts to do anything beyond securing order, we should make this charge a matter of specific legislation. Then the courts may strive to meet the charge. For example, we may want equal access to some resource even when we could not ground the equality in a claim of efficiency. But here, the use of the courts to accomplish various moral purposes is parasitic upon the fundamental system of justice-as-order without which there might be no possibility of securing such moral purposes.

In criticism of the normative focus on efficiency in the law, a commonplace move is to note that some resolution ignores or violates moral consideration *Q*. If judges follow the tactic of these critics, we will be subjected to an intuitionist's variant of legal realism in the courts. A judge may say this time *Q* is decisive even though it plays no

role in most other cases. Judges may play fast and loose with their own personal substantive moral intuitions,⁶⁷ just as many legal philosophers do.

Just how far can justification from efficiency be pushed? Plausibly very far. Indeed, it might be pushed beyond court decisions and very broadly into legislative law. For example, many programs we tend to think of as welfare programs, as though they served a moral purpose other than efficient coordination or order, might as readily be seen as efficient or facilitative. Public provision of education, health care, and old-age assistance might all contribute generally to productivity. Well-designed programs for education and health care can obviously lead to greater potential productivity. Old-age assistance is a harder case. But one might suppose it gives people incentive to take greater risks, it frees them from the worst level of risk averse planning for the future, and thereby it may lead to greater productivity. At some point we might think these programs would reduce productivity by making the rewards of productive work less. But at some levels, the positive incentives might offset the negative incentives.

The focus on efficiency has led to articulate and coherent accounts and criticisms. Perhaps no moral principle other than utility or welfare — close analytical cousins of efficiency — has done as well. By comparison, traditional and contemporary rights theories seem ad hoc and very limited in their application. Consent theories yield very few substantive results but provoke devastating criticisms. Fairness seems too limited in its range of application to be a general theory. Recent efforts to put autonomy, a sometime cousin of consent, at the moral core of law are not yet sufficiently articulated to yield many results.⁶⁸

⁶⁷ Judge Posner has doubts about the quality of judging. *The Problems of Jurisprudence*, pp. 186–96.

⁶⁸ Representative works include Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988), and Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986). For criticism of arguments from autonomy, see Russell Hardin, 'Autonomy, Identity, and Welfare', in John Christman, ed., *The Inner Citadel: Essays on Individual Autonomy* (New York: Oxford University Press, 1989), pp. 189–99, and 'To Rule in No Matters, To Obey in All: Democracy and Autonomy', *Contemporary Philosophy* 13 (Nov.–Dec. 1991), 1–7.

It will finally take something like a fully fledged theory of autonomy or a quasi-Kantian jurisprudence to compete with efficiency and welfare theories.

At the moment, in lieu of a programmatic articulation of alternative theories, advocates of other views are primarily critical or even dismissive of law and economics. It is no surprise that many of the criticisms and dismissals are familiar from the long history of utilitarianism. Many are about minor twists of argument. Many are little more than appeals to direct personal intuitions, as are distressingly many of Coleman's criticisms (e.g., p. 162). A very large proportion of all the criticisms focus on problems with the underlying economic value theory in its many variants of utility, welfare, wealth, and productive efficiency. Unfortunately, all extant alternative theories are similarly weak or worse in their value theories.⁶⁹

We are privileged to have a rich understanding of the problems of economic value theories just because those theories have been a major focus in the development and articulation of the entire discipline of economics. The theories are a product of centuries of determined and often brilliant debate with many dozens of major contributions. Alternative value theories have had far too few advocates and critics to yield much understanding at all.⁷⁰ That is no argument for the superiority or rightness of any value theory. But it may be a tonic for those who wonder how the only well-articulated class of value theories is so easy to criticize: It has enough content to be subject to extensive and varied criticism.

Ironically, the extensive criticism contributes to the further refinement and de facto empowerment of economic value theories. Indeed, Coleman, who declares himself too "unsympathetic to the economic vision of human affairs and social institutions" to contribute to the economic analysis of property rights (p. 94), has contributed more to the general economic analysis of law than to any alternative approach. To an outsider, he looks, for all his protestations, like an insider.

⁶⁹ See Hardin, *Morality within the Limits of Reason*, chap. 5.

⁷⁰ Unfortunately nothing comparable to the several centuries of talent so far spent on economic theories may be available to elevate alternative theories to real contention in our lifetime.

Advocates of alternative value theories must envy the fortune of having such a critic and, more generally, of having such massive criticism. And they may wonder at the unintended consequence of their own criticisms in prodding the conceptual enrichment of the economic theories.⁷¹

⁷¹ I wish to thank the Northwestern University School of Law, the family of the late Jack N. Pritzker, and the students in my Northwestern seminar, "Ethics, Game Theory, and the Law," spring 1991, for giving me the incentive to work through these issues in a wonderfully challenging and supportive setting. I also thank Dave Hanson, Jack Knight, Judge Richard A. Posner and the participants in the Wednesday evening contemporary theory seminar at the University of Chicago for comments on earlier drafts and the Mellon Foundation for generous general support.