

THE NEW ECONOMIC ANALYSIS OF LAW:  
SCHOLARSHIP, SOPHISTRY, OR  
SELF-INDULGENCE?

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ACCORDING to Professor Richard Posner, one of its leading and most dedicated exponents, the new economic analysis of law is twenty years old this spring.<sup>1</sup> Like so many adolescents it approaches the traditional age of majority with mixed reports about its accomplishments and promise. In the United States, where it is said to have been born, it has been taken up with enthusiasm by young scholars in any number of law and economic faculties, and has been described (rather ruefully) by many an older academic as the only sure guide to promotion and tenure. European scholars after some years of hesitation are now among its leading protagonists. One is not surprised to learn of the creation of a new 'International' Journal of Law and Economics, here in England, designed to fill the gap between America and Europe.<sup>2</sup>

Yet in the last few years the approach has been increasingly and powerfully attacked by distinguished critics. Some of these might describe themselves as Marxists, others as traditionalist conservatives, still others seem to fit the category of the radical chic or Hampstead socialists. But different though their quite openly avowed ideologies are, they unite in their attack, in the nature of their criticism, and in their conclusion that the new economic analysis of law is nothing but nonsense on stilts.<sup>3</sup>

<sup>1</sup> Posner, *Economic Analysis of Law* 16 (2nd edn., 1977). Since this lecture was read, Richard Posner has been appointed to the United States Court of Appeals for the Seventh Circuit. I will, none the less, refer to him as Professor Posner because the ideas expressed by him were all ideas he developed while an academic.

<sup>2</sup> The *International Review of Law and Economics* in its pre-publication announcement describes itself as 'concerned quite explicitly to rectify the imbalance in national emphasis'.

<sup>3</sup> See, e.g., Dworkin, 'Is Wealth a Value?', 9 *J. Legal Studies* 191 (1980); Epstein, 'The Static Conception of the Common Law', *ibid.* 253; Fried, 'The

What then is this new economic analysis of law and why is it causing such a fuss? One lecture allows too short a time to deal adequately with the questions, but an overview of the issues can perhaps be given.

The old economic analysis of law, which became popular in the United States in the 1920s and 1930s and which remains an uncontroversial if limited field of scholarship, restricted itself to situations in which the object of legislation could plausibly be described as the accomplishment of certain fairly well-defined goals. Economic analysis was then used to determine whether specific common-law or legislative sub-rules served to achieve the admitted goals. The classic example was anti-trust. If the object of Congress in passing the anti-trust laws was to foster an efficient allocation of resources (defined in a fairly precise, even narrow, way) then administrative, judicial, and legislative sub-rules could appropriately be criticized if economic analysis indicated that they did not, in fact, serve that goal. In addition, if the enacting legislature sought to achieve goals other than the efficient allocation of resources—like the protection of small competitors—but these goals could be described, on traditional legal grounds, as inappropriate ones for courts to further, then economic analysis could be used to discern whether court-made sub-rules were serving the only legislative goals that were appropriately in the courts' domain.<sup>1</sup> In both examples, the values to be served—though economic ones—were established in ways well known to legal tradition. The only function of economic analysis was the ministerial one of seeing how well these values were being achieved in practice by secondary rules and legislation.

The new law-and-economics was quite different: it sought to use tools derived from economics to analyse, explain, and criticize legal rules which were in no sense self-consciously 'economic' in origin. How well, it asked, does existing tort law serve to minimize (a favourite—if ugly—word among economists)

Laws of Change: The Cunning of Reason in Moral and Legal History', *ibid.* 291; Horwitz, 'Law and Economics: Science or Politics?', 8 *Hofstra L. Rev.* 905 (1980); Kennedy and Michelman, 'Are Property and Contract Efficient?', *ibid.* 711.

It is impossible to give a complete list of critics. There are too many and they keep writing. Those mentioned above are taken from just one volume of each of two law reviews in the same year, 1980. They are, nevertheless, representative, though I shall leave it to the reader to decide the types they represent.

<sup>1</sup> This is the position taken by Professor (now Judge) Robert Bork. See Bork, *The Antitrust Paradox*, 3–89 (1978).

the sum of accident costs and of accident-avoidance costs? How successful is nuisance law in achieving the maximum reduction possible of the costs arising from conflicting uses of land? That these questions were worth asking was taken for granted, for, unlike those posed by the old economic analysis of law, they were not readily deducible from the mandates of any legitimate law-maker. No legislature had ever said that this was what tort law was meant to do—and the common law was, of course, prodigiously opaque as to its goals. The implication of the analysis was inevitably normative—tort law *ought* to be concerned with the reduction of the sum of accident and safety costs even if no ‘source’ of law has ever said so. The examination of how well a current rule of law accomplishes *x* is not of much interest unless *x* has some value in itself or serves some other properly established value.<sup>1</sup>

Some proponents of the new economic analysis of law did, of course, deny a normative intent. They claimed it interesting to see whether areas of law could be explained in terms of a goal (like the reduction of the sum of accident and safety costs) whether that goal was a valid one or not. And properly applied—as a way of flushing out the complex blends of different goals which a field of law has served at various times in history—this ‘positive’ economic analysis remains highly useful.<sup>2</sup> All too often, however, the ‘positive’ analysis became a way of asserting that the ‘economic’ goal, described rather grandiosely as ‘efficiency’ or even ‘wealth-maximization’ was the only value predominantly served by the common law.<sup>3</sup>

This assertion is, as we shall see, nothing but sophistry. But it was a powerful weapon, for it is only a small step from the ‘positive’ claim that the common law has always served wealth-maximization to the normative assertion that the object of the common law ought to be wealth-maximization. After all, if the common law is a legitimate source of law, and if over the centuries it has predominantly served a given goal, it is not silly to assert

<sup>1</sup> One could argue that there is a pure aesthetic interest in such studies. I am bound to say that if there is any such aesthetic interest it is at a pretty low level. The aesthetics of law can hardly compare, it seems to me, with those of art, mathematics, or sex.

<sup>2</sup> As we shall see soon enough, the sorting out of such complex goals is extraordinarily difficult, and the attempt will hardly ever lead to unchallengeable results.

<sup>3</sup> See, e.g., Posner, ‘Some Uses and Abuses of Economics in Law’, 46 *U. Chi. L. Rev.* 281 at 288–95 (1979); Priest, ‘The Common Law Process and the Selection of Efficient Rules’, 6 *J. Legal Studies* 65 (1977); Rubin, ‘Why is the Common Law Efficient?’, *ibid.* 51.

that any judicial failure to serve that goal, unless clearly required by the legislature, is criticizable.<sup>1</sup>

Most early scholars in the field, however, did not bother with the charade of 'positive' analysis. They sought to find a way, through economic analysis, to criticize (or in the end confirm) legal rules. They wished to avoid the conservative tyranny that in law 'what has come to be is just' with its implication that only evolutionary changes are legitimate. They abjured its revolutionary counterpart ('Can't you recognize the injustice around you? You and I know what true justice is. To the barricades!'). And they were uncomfortable with the notion that justice in law is simply the will of a current majority or legislature.<sup>2</sup> They sought in other words to find ways of talking about law and law reform which were rational, open to facts, and which didn't immediately involve ultimates, but through which legal rules, whether common law or legislative, could be criticized—a very worthy aim.

If one can assert or assume that the object of tort law is to minimize the sum of accident costs and safety costs, then any laws—whether court-made or legislative—which do not serve that object are correctly criticized. By reducing the 'object' of law to a simple enough goal, rational criticism was made feasible. An analogous kind of criticism, always based on a pre-set goal which sounded like a minimization of costs or maximization of benefits, was applied to field after field of law.

To the more careful practitioners of the approach it was not necessary that the simple, the economically analysable, goal be the sole object of that area of law. That kind of reductionism did not seem necessary or right. Tort law could serve aims other than optimizing (another economists' word) accident and safety costs. So long as such optimization was an independently meaningful object of the area of law, the analysis justified itself. It permitted the critic to show whether something important and of value was

<sup>1</sup> I, of course, share the view that the common law can be a legitimate source of values. See, e.g., Calabresi, *A Common Law for the Age of Statutes* (1982). Since, however, one object of the new economic analysis of law is to further criticism of those values which have evolved in the common law, there is something more than a bit troublesome in any use of the common law to justify the new economic analysis of law.

<sup>2</sup> It is this fact that makes a traditional move made by economists unavailable to us practitioners of the new economic analysis of law. We cannot say, as a general matter, that we are furthering efficiency or wealth-maximization only 'given' a starting-point or a distributional base appropriately established by the legislature. For we pretend to criticize the legislature no less than the common law.

being well served, and if not, how it could be better served. And this was surely worth doing. Thus, when critics suggested that economic analysis was dubious in anti-trust ('It is appropriate that courts further the legislative aim of protecting small competitors'), suspect in torts ('Surely we wish to have wrongdoers bear the costs of their wrongdoing?'), and absurd in family law ('It is ridiculous to view marriage only as a scheme for allowing specialization of tasks'), the answer came back that the existence of other goals did not matter, for the law in each area was appropriately, if incompletely, criticized if it failed to achieve the perhaps partial but none the less significant 'good' which had been made subject to economic analysis.

Unfortunately, this answer fails. Quite simply, in fact, it fails as completely as does the stronger answer advanced by Professor Richard Posner that, whatever people may say, a 'wealth-maximization' notion of minimizing costs and maximizing benefits is either itself the goal of a just society or serves the (undefined) goals of a just society sufficiently well to require criticism of any law that does not meet its requirements. Tort law *ought* to be concerned only with achieving the reduction of the sum of accidents and safety costs . . . full stop, and if it doesn't accomplish this goal, it deserves to be attacked.<sup>1</sup>

Today, I shall try, very briefly, to outline why both of these answers fail and then see whether what is left for the new law-and-economics to do can qualify as scholarship or must be categorized as sophistry or self-indulgence.<sup>2</sup>

It would seem easy to dismiss the strong answer as nonsense, and simply pass on. After all, who ever believed that wealth-maximization without regard to its distribution could qualify as the goal of law or of a just society? Who would say that the only valid object of tort law was to reduce the sum of accident and safety costs regardless of who bore the burden of such a reduction? Who ever thought that the sole test of the desirability of change

<sup>1</sup> See Posner, 'Utilitarianism, Economics and Legal Theory', 8 *J. Legal Studies* 103 (1979); id., 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication', 8 *Hofstra L. Rev.* 487 (1980).

<sup>2</sup> In doing this I shall in part be synthesizing the arguments also made by others and by me in the past. See, e.g., Dworkin, 'Is Wealth a Value?', 9 *J. Legal Studies* 191 (1980); Kronman, 'Wealth Maximization as a Normative Principle', *ibid.* 227; Coleman, 'Efficiency, Utility and Wealth Maximization', 8 *Hofstra L. Rev.* 509 (1980); Calabresi, 'About Law and Economics', *ibid.* 553; Dworkin, 'Why Efficiency?', *ibid.* 563; Markovitz, 'Legal Analysis and the Economic Analysis of Allocative Efficiency', *ibid.* 811; Baker, 'Starting Points in the Economic Analysis of Law', *ibid.* 939.

was whether those who benefited from it gained more wealth than those who suffered from it lost? Utilitarianism made no such claim—maximum happiness—regardless of its distribution—might be its goal, but not maximum wealth. For maximum wealth, badly distributed, did not lead to maximum happiness. Thus Posner's claim (explicitly based on the desirability of wealth-maximization itself, rather than on utilitarianism)<sup>1</sup> seems absurd on its face. It was, however, buttressed by the assertion that the common law in fact tends to serve, and has quite consistently tended to serve, the wealth-maximization goal. If this last were true or even plausible, one would hesitate cavalierly to dismiss Posner's claim—for, as I said, how could one light-heartedly ignore the force of centuries of common law?

I earlier termed sophistry the assertion that 'positive' analysis demonstrates the wealth-maximization efficiency of the common law. I do not here wish to get into a detailed criticism of the many articles in which, in area after area, Professor Posner and his followers claim to find that the common law is efficient in just this wealth-maximization sense. That can, of course, be done, but there is a deeper problem with the claim, that renders it sophistry. And it is upon that that I shall focus. The reason the assertion is sophistry is the same reason that renders literally meaningless Posner's claim that wealth-maximization is the goal of a just society. What is this wealth that society should maximize, and that the common law is said efficiently to increase? Unless we know what are our starting-points, what are our 'original' entitlements, we cannot know what wealth is. Wealth in any society depends on tastes, on what people want, on what they value. But what they value depends on what they have to begin with. If I have nothing I will value food, if I have food I may wish for sex, if I have both I may lust after law, and if I have law I may desire silence.

Yet starting-points—these definers of wealth—are the essence of law—and of law-making—for the law defines what I own as against what I merely possess. If I am a slave the fact that I possess a magnificent body could be a dreadful disadvantage. So would healthy kidneys or rare blood if those in need of them had a legal right to them.<sup>2</sup> If we adopted as a legal rule the slogan 'from each

<sup>1</sup> See Posner, 'Utilitarianism, Economics and Legal Theory', 8 *J. Legal Studies* 103 (1979).

<sup>2</sup> These examples may seem fanciful, yet recently a suit was brought to compel the plaintiff's cousin to give his bone-marrow to the plaintiff, who needed a transplant. The cousin's bone-marrow was apparently the closest fit to that of the sick plaintiff. The court denied equitable relief to compel the

according to his ability, to each according to his need' ('to each according to his utility functions', the economists might say), most of you here would be far worse off, while some who now suffer would prosper.

Could we then say that wealth was less well 'maximized'? Hardly, for what wealth *is* depends on what people want, and what people want depends on the allocation of starting-points. The wants of the handsome slave are different from those of the handsome free man or woman, and so would what counts as 'wealth' in a slave society. Posner argues that starting-points should be assigned so as to maximize wealth. But there is no way to assign starting-points so that that which can only be defined given starting-points can be maximized.

This much has been said by me and others before,<sup>1</sup> but what is worth emphasizing is that the same fact undermines any positive analysis as well. For to say that the common law maximizes wealth is to ignore the role the common law plays in establishing and constantly changing (for reasons which are necessarily exogenous to wealth-maximization) the starting-points which permit us to define wealth. A legal system shifts from fault liability to strict liability—a starting-point is changed. Does the change increase total wealth? Let us assume that it would—that the winners would gain more wealth than the losers lost—if, that is, all the rest of law stayed the same. Would it if enough other starting-points were changed? Who can say? Why should *it* be changed and the other starting-points be kept constant? Lots of good reasons perhaps, but wealth-maximization—by itself—cannot be one. What does it mean then to say the common law is efficient and wealth-maximization is its goal because it makes such a change, or did in the past? Nothing. The economist knows this and defines 'wealth-maximization' only *given an initial distribution of wealth*. The lawyer, since he knows that any change in law changes this initial distribution, is allowed no such luxury.<sup>2</sup>

The analogous problem does not undermine utilitarianism. If

transplant, but left open the possibility of an action at law for damages. See *McFall v. Shrimp*, 10 D & C. 3d 90 (Pa. Common Pleas 1978).

<sup>1</sup> See, e.g., Calabresi, 'On the General State of Law and Economics Research Today', in *Law and Economics* (ed. G. Skögh, 1978); Calabresi and Bobbitt, *Tragic Choices* (1978); Dworkin, 'Is Wealth A Value?', 9 *J. Legal Studies* 191 (1980); Kronman, 'Wealth Maximization as a Normative Principle', *ibid.* 227; Calabresi, 'About Law and Economics', 8 *Hofstra L. Rev.* 553 (1980); Dworkin, 'Why Efficiency?', *ibid.* 563.

<sup>2</sup> See p. 88, n. 2 above.

one knows what happiness is and can assume that people would desire it regardless of starting-points, then starting-points could be assigned so as to maximize happiness. One could, therefore, if one wished (though I do not), make a logically consistent utilitarian criticism of law. Similarly the claim that the common law has consistently served utilitarian objects would not be *logically* untenable. The same unfortunately is not true for the strong claim made by Professor Posner and his school.

What then of the weaker claim—that wealth-maximization though not the goal of law is one of its goals, and that courts and legislatures can be criticized if they do not take it into account? Is ‘efficiency’ in some sense what Professor Dworkin calls a component of a just society? Yes, but as both he and I have pointed out, only in a trivial sense.<sup>1</sup> For efficiency is an appropriate component of a just society only when it is defined in strict Pareto terms, and not as ‘wealth-maximization’. Under the Pareto definition a law is ‘inefficient’ only if a change in law can improve the lot of some without hurting anyone else. A law like that surely is open to criticism. But such criticism would only lead to change in law when there was unanimous consent, since it only criticizes when—by definition—there is no one who has any objection to the change. I have in fact argued elsewhere that strictly speaking what Dworkin calls ‘the fanatical’ Pareto test is always met, and hence is of no use.<sup>2</sup> Whether I am correct or not, however, is not crucial, for, even were I not correct, the goal of strict Pareto

<sup>1</sup> See, e.g., Calabresi and Bobbitt, *Tragic Choices* 83–7 (1978); Calabresi, ‘On the General State of Law and Economics Research Today’, in *Law and Economics* (ed. G. Skögh, 1978); Dworkin, ‘Why Efficiency?’, 8 *Hofstra L. Rev.* 563 (1980); id., ‘Is Wealth A Value?’, 9 *J. Legal Studies* 191 (1980).

<sup>2</sup> See Dworkin, ‘Why Efficiency?’, 8 *Hofstra L. Rev.* 563 at 580–4 (1980). This is not the place to rehearse the argument that the Pareto test in its ‘fanatical’ sense is always met. An indication of why this is so can, however, be given. The ‘fanatical’ Pareto test is only not met when under the existing technology or state of the art a change in resource allocations exists which will leave literally no one worse off and at least someone better off. Why, one might ask, should we ever fail to make such a change? Why, indeed! The obvious answers are lack of knowledge, or lack of applicable enforcement procedures (as in the Prisoner’s Dilemma). But these impediments to moving to the Pareto frontier, to doing what would be an improvement under a ‘fanatical’ Pareto test, either stem from the existence of some who would lose from adopting the technologies or procedures necessary to making the move (the jailers in the Prisoner’s Dilemma) or are indistinguishable from what is needed to move the Pareto frontier itself, like greater knowledge. See Calabresi, ‘About Law and Economics’, 8 *Hofstra L. Rev.* 553 n. 1 (1980) and works there cited, especially Dahlman, ‘The Problem of Externality’, 22 *J. of Law & Econ.* 141 (1979).



efficiency is too rarely violated—law-change almost inevitably involves losers as well as winners. As a result, the identifying and criticizing of such rare Pareto-faulty laws could hardly justify the existence of the whole law-and-economics industry.

Can we none the less say that a law is incompletely, though appropriately, criticized if a change would increase the wealth of the gainers more than it costs the losers? Can we say that the law is concerned with starting-points and—what is close to the same thing stated differently—with distribution, with who the winners and losers are from legal change, but that it also is concerned with maximizing wealth—or some other good analysable in economic terms—given society's starting-points and distributional aims? In the old law-and-economics a statute, or the common law, could be read as accepting some pre-existing starting-points and some distributional aims, and then simply asking for wealth-maximization efficiency, given these—in a sense regardless of their appropriateness. Cannot the new law-and-economics do something similar? Can we not say that the reduction of the sum of accident and safety costs is something desirable regardless of who bears the burden of bringing about the reduction, and that therefore scholars should point out when a change in law would make such a reduction possible?

Strictly speaking the answer is no. There is nothing in itself desirable in reducing the sum of accident and safety costs if the result is to burden the wrong party. Once one admits that a change in law involves losers and winners, the desirability of the change necessarily involves a judgement as to who ought to win and who ought to lose, as well as how much they win or lose, and the two judgements cannot be separated. If the winners can compensate the losers then, of course, all is well, but then we should be back to a strict Pareto standard. The problem is that such *total* compensation is impossible to achieve. No: as good economists know, giving more to the gainers than the losers lose is only an acceptable basis for changing a law once we have decided, on some distributional theory, that the gainers deserve to gain at least as much as the losers deserve to be kept from loss. Once we admit *that*, we must also admit that we might well prefer existing law to a change in law from which the gainers would gain more than the losers would lose. This is apt to be the case whenever those who would lose from the change are worthier than those who would gain from it.<sup>1</sup> It

<sup>1</sup> The fact that the losers are worthier than the gainers does not, however, necessarily mean the law will not be changed. We may not like it, and we shall often righteously, and perhaps even rightly, deny that it happens, but it is

follows that any criticism of a law whose original goals include such distributional considerations merely because a wealth-maximizing change may be possible is flawed.

Several ways out of this dilemma have been tried by proponents of the new law-and-economics. Most of these involve implicit and unstated distributional theories that entail the conclusion that the 'efficiency' gain achieved by a change in law is also distributionally desirable or at least acceptable. Obviously, this is only sophistry, for such approaches can only give rise to valid criticisms of laws if the distributional theories that they imply are accepted by, or are acceptable to, those institutions in our legal system that can define appropriate distributional norms. Hiding the distributional notions behind the analysis only makes difficult this kind of conversion of new law-and-economics into what would, in effect, be a valid, if newer and broader, old law-and-economics. I shall give an example or two of these 'non-solutions' before turning to the most frequently attempted way out, which I do not think is sophistry, but which is open to the charge of self-indulgence.

It is sometimes stated that a change in law which brings about an efficiency improvement—a bigger pie—involves no distributional judgements if at the time of the change subsequent winners and subsequent losers have an equal chance to be gainers or to be losers. In such a situation cannot one assume that all the parties would, if they were asked, consent to the change since their *expected* returns would be greater? Indeed the proponents of this approach go further and assert that those who lose cannot complain even if they did not consent since they receive what is termed *ex ante* compensation, because they had an equal chance to win a bigger jackpot.<sup>1</sup> There are several problems with the argument.

The underlying analogy is, of course, to a sale or exchange in which both parties think they will gain, and the fact that one party loses, and later regrets the exchange, is frequently ignored in law. But the argument for permitting 'free' exchanges when we do (and we do not by any means always permit them) is not—whatever people foolishly say—that there are no losers as a result of free exchanges. Rather it is that a distributional judgement is made that we do not *care* about the losers enough to deprive the winners

simply not the case that worthy parties are never made to bear a burden 'for the convenience' of a less worthy 'mankind'. Cf. opinion of Bramwell, B., in *Holmes v. Mather*, Law Rep. 10 Exch. 261 (1875), and p. 98, n. 1 below.

<sup>1</sup> See, e.g., Posner, 'Epstein's Tort Theory: A Critique', 8 *J. Legal Studies* 457 at 460, 479 (1979); id., 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication', 8 *Hofstra L. Rev.* 487 at 488–97 (1980).

of their potential gain. Indeed, whenever we do care about the losers we are apt to forbid the exchange. We do it in cases of fraud. We also do it in situations in which a present benefit may be purchased with a loss in the distant future. (Thus we do not often let people sell their pension rights.) And we are apt to forbid the exchange if we believe that the losers in the transaction disproportionately fall into categories, like the poor or the elderly, about whom society has generalized distributional concerns.

I am not, of course, saying that our rules governing when exchanges are to be permitted are the 'right' ones. I am only noting that even in this area the (probably correct) assumption that free exchange gives greater gains to winners than it costs to losers is not enough. Whenever society—rightly or wrongly—is not indifferent between winners and losers the mere fact of such an assumed 'net' gain does not serve to justify the exchange.

The case for *ex ante* compensation is, of course, weaker. In the first place, the actual situations in which the winners (*As*) and losers (*Bs*) are *ex ante* distributionally interchangeable is far less frequent than the proponents would have us believe.<sup>1</sup> Auto victims and auto injurers are not *As* and *Bs* 'randomly' scattered in the population (a move to first-party insurance from third-party insurance does not create random winners and losers).<sup>2</sup> To claim that they are is to ignore characteristics of each, as 'distributionally' irrelevant, simply because, on the *proponent's* distributional theory, they ought not to matter.<sup>3</sup>

In the second place, even if the potential winners and losers

<sup>1</sup> Cf. Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication', 8 *Hofstra L. Rev.* 487 at 499–502. The tendency to describe the winners and losers as *As* and *Bs* goes a long way toward creating the illusion that they are distributionally interchangeable. Why should we fail to benefit an *A* by 10 when it only harms a *B* by 5? The very terminology hides any information which would give us the answer. If instead of calling the parties *As* and *Bs* we called them by real attributes, differences among them would become readily discernible and grounds for preferring one to the other, apart from wealth maximization, might too!

<sup>2</sup> See p. 102, n. 1 below.

<sup>3</sup> The analogous point is often ignored in situations in which actual sales and exchanges take place. There are, of course, losers in such situations too, and they are not random. That the gain to the gainers, the convenience of mankind, often justifies us in letting such losers lose in many instances may well be true. But such a decision represents a distributional judgement which cannot be avoided by saying that the losers consented to the loss by freely entering into the deal. This becomes *a fortiori* the case if the losers (or some of them) were inclined to try to prohibit such exchanges in order to keep themselves from 'freely' entering into exchanges in which they too often lost!

are randomly scattered, they may value the risk of gain and of loss very differently, and that difference may itself reflect distributional disparities about which the society cares. The poor may—by and large—not wish to gamble, even if the expected return on the gamble is greater than the cost of the lottery ticket, because they are averse to the risk of losing. The rich instead may desire to take a ‘good’ gamble—one, that is, where the expected return is greater than the cost—because they are favourable toward the risk or even just risk-neutral. It may be the other way round, or it may not be a difference among rich and poor but among conservatives and entrepreneurs, or young and old. It does not matter who is affected differently. So long as a law imposes an equal risk of loss and gain on groups whose aversion to risk differs, it has significant distributional consequences.<sup>1</sup> It follows that an ‘inefficient’ law that results in randomly chosen losers and winners may none the less be desirable, because it entails a gamble that is more desired by those we wish to favour on distributional grounds. An efficient law may impose a gamble that has the converse effect, and may, for that reason, be undesirable.

Both of these objections to the *ex ante* compensation solution go to the fact that no actual consent to a change in law was given by all concerned. To assume consent in such a situation is implicitly to adopt a distributional theory which deems irrelevant the differences which would keep some people from consenting. This may be a good distributional theory or it may not, but it is a distributional theory, none the less, and its silent adoption cannot be sustained.

Even if actual consent were given, however, we should simply be back to the situation of an exchange. We should not be achieving an improvement according to the strict Pareto standard, for there would be *ex post* losers. Once again we could say that we do not *care* about these losers, just as we sometimes do when we allow exchanges (or for that matter when we forbid them, for there are losers then too). But once again that lack of care implies a distributional theory which has all too conveniently been kept out of sight.

<sup>1</sup> Unless *ex ante* insurance is available at a sufficiently low price so that even the risk-averse can gain by bearing the ‘equal’ risk and insuring against it. There are situations, in other words, in which an *ex ante* compensation approach makes sense, either because the distributional consequences are acceptable or because the existence of insurance reduces them to the point of being acceptable. But this simply underlines the fact that the distributional consequences must be faced here as everywhere else.

Much more should be said about these situations where it is alleged that wealth maximization, or some other 'efficiency' criterion, is distributionally neutral and hence can be applied without more ado. In particular the relationship between these arguments and the startlingly different propositions advanced by Professor Rawls, as to what would occur in a context in which *ex ante* the identity of subsequent winners and losers is unknown, deserves discussion.<sup>1</sup> But this is not the place nor time for it, for I must turn, instead, to what may seem an obvious answer to the problems I have been posing. It is the answer that I, and those associated with me, have been giving since the birth of the new economic analysis of law. It is also, unfortunately, a self-indulgent answer.

If economic analysis is to be used to criticize laws whose legitimate claims are not limited to some fairly clearly defined economic goal (some of us said from the earliest days of the approach), it must be confined to those situations in which the economic or efficiency gain (however defined) either furthers, or at a minimum does not offend, the other, call them distributional, concerns of those laws. In such situations the limited efficiency goals of the law can be served at no cost to the broader goals. One should reduce the sum of accident costs and of accident avoidance costs, of course, but only when the reduction can be achieved by lessening, or at least not increasing, the burdens on those whom we would favour distributionally.<sup>2</sup>

This approach does not *exclude* other grounds for reform. Thus a law which is 'efficient' could be attacked because another 'inefficient' law is preferable for distributional reasons. As to such situations the approach has nothing to say one way or the other.

It none the less seemed to give enough scope for the new economic analysis of law. Proposed changes that would seem to make *many* laws more efficient in meeting limited economic goals seemed also to further broader distributional goals, or at least not to hinder them. Whenever the winners win more than the losers lose from a change in law, and the distributional effects of the change are desirable or even just acceptable, then the lawyer-economist can effectively attack the existing law. Article upon article and book upon book have in the last twenty years been based on this Calabresian proposition.

What then is wrong with it? Nothing much, except that the source of the premiss that the distributional change is an acceptable or a desirable one was never made clear. It was, in fact,

<sup>1</sup> See Rawls, *A Theory of Justice* (1971).

<sup>2</sup> See, e.g., Calabresi, *The Costs of Accidents* (1970).

usually no more than a reflection of the scholar's own values. If the only systemic losers from a reform of accident law are lawyers, and there are many winners, then the change is desirable. But why? Because Calabresi does not believe that lawyers ought to make money out of accidents at the expense of injurers and victims. Calabresi is right, of course, as a citizen, but his *ad hoc* distributional notions do not deserve any special regard simply because he is a scholar.

There was, unfortunately, nothing 'scholarly' about the distributional components used by this school of thought to decide when efficiency-furthering changes were acceptable or desirable. Posner's revenge, I call it—for he could have said: 'You say that I dissemble when I claim that I am doing "positive" analysis or using a distributionally neutral criterion, but is that worse than passing off your own personal values as scholarly simply because you need them to support the analytical side of your work? You say my approach is sophistry, but surely yours is self-indulgence. It is asking for special consideration for your non-scholarly views or opinions for no better reason than that your "scholarly" work cannot stand without them.' The charge—though never made as brutally as I am making it—is not easily answered.

It could, of course, be answered if there were a *scholarly* way to speak about distributional issues. If the critic of a law could marshal (and state) a distributional theory on the basis of which wealth-maximizing changes could also be described as acceptable or desirable for distributional reasons, then Posner's revenge would be countered.<sup>1</sup> That the distributional theory could be

<sup>1</sup> There are those who would say that if we had such a distributional theory there would be no need for an efficiency analysis, for the distributional theory would, by itself, determine the result. Cf. Dworkin, 'Why Efficiency?', 8 *Hofstra L. Rev.* 563 (1980), but cf. Baker, 'Starting Points in *Economic Analysis of Law*', 8 *Hofstra L. Rev.* 939 at 954–7 (1980). But this position cannot stand, for many reasons, only a few of which can be mentioned. First, the distributional theory may, and in practice often will, be of uncertain acceptability—either on theoretical grounds or because of doubts about some empirical premisses. It may be sufficiently believed to support changes in law that, given it, increase 'the size of the pie' and yet not support those changes which would not. Second, the distributional theory may lead to the conclusion that any of several legal rules are equally acceptable. It is easy to see why in such a case one would support the legal rule among these which was wealth-maximizing. Finally, the 'size of the pie' may well affect a society's distributional tastes, just as distributional choices affect whether the pie is in fact bigger. The two, unfortunately, are inextricably linked. If we had a full theory of desert, it would, of course, give us a full answer. But neither distributional nor efficiency notions alone amount to such a theory. Cf. Baker, *loc. cit.*

attacked would not be terribly significant. The criticism of the law would be scholarly so long as the distributional theory advanced—though unacceptable to some—was not simply the individual point of view of the scholar, but derived instead from the use of some skills which the scholar has in greater supply than the ordinary citizen. These skills might be analytical-philosophical ones (leading, for example, to a Rawlsian or to a utilitarian distributional theory), or they might be empirical ones (leading—again for example—to the conclusion that, in a specific area of the law, certain distributional changes were in fact acceptable to a majority—given the assumption that ‘majorities’ can appropriately make distributional decisions).

As I said, the fact that the theory might be rejected is not especially germane. The scholar would have achieved his goal of criticizing a law on scholarly grounds. Whether the law would then be changed would depend: (a) on the correctness of the scholar’s assertion that the law could be made more efficient in meeting the ‘economic’ goal (in reducing the sum of accident and safety costs); and (b) on the acceptability, in the particular context, of the scholar’s distributional theory purporting to demonstrate that the distributional effects of such reduction were acceptable. Such an open, normative, criticism of a law, based on *scholarly* notions about distribution might therefore frequently be rejected, but it would be neither sophistic nor self-indulgent.

Distributional theories of this sort are hard to come by, though I shall return to them shortly. Too often, therefore, the new lawyer-economist of the moderate school allowed himself simply to state his own distributional theories without more ado. Occasionally, however, he did something more. He returned to his law training and sought, in the ‘legal fabric’, to find what was distributionally acceptable in the particular area. Why was it not scholarly for a lawyer to examine how legislatures and courts (yes, of course, courts too) had decided distributional issues in analogous contexts, and from these derive a distributional norm to be applied to the particular legal rule under criticism? Such traditional legal scholarship—for that is what it is—is certainly scholarly, and if it worked would lead to an empirically based distributional theory of the sort I have been suggesting is needed. Unfortunately it cannot help much if the object is to find a distinct distributional norm that could be combined with an economic analysis of the legal rule in order to specify those changes that would foster the ‘efficiency’ goal of the legal rule without causing adverse distributional effects.

The common law, whether on its own or combined with statutes to form a broader legal fabric,<sup>1</sup> does not speak in terms of *distribution*, just as it does not speak in terms of *efficiency*. It speaks, as it always has, in terms of justice, rights, duties, and other such complex terms—‘mixes’, I suppose Professor Dworkin would call them.<sup>2</sup> The scholar who sought from such ‘legal’ decisions to find the *distributional* element currently applicable, which he might then join with his ‘efficiency’ analysis to criticize a rule, would be deceived. For what appeared to be a distributionally based judgement would invariably already include efficiency components in a blend which had made the result seem ‘just’ to court or legislator.

Such blends prove too much or too little. If they suggest that the rule the scholar is examining is out of phase, then the economic analysis is superfluous. Traditional scholarship would already justify the critique. If they do not, they are no help in criticizing, because they leave the scholar with no way of knowing if the judgement—the blend—is based on distributional grounds that make the purported efficiency changes unacceptable, or is instead based in part on an incorrect analysis of what serves the economic goals.

Since the first is always possible, the scholar-critic is checkmated. The object of finding a way to *criticize* common or statutory law, in part on exogenously based economic analysis, is stymied when one has to look back to that same common or statutory law for an essential element in the criticism. Because both common and statutory law give answers that are global and do not separate out the needed element (distributional acceptability), the hopeful scholar tends to be thrown back to his own values as a source of distributional acceptability, to self-indulgence.

Where does this leave the new economic analysis of law? Surprisingly, given that I have charged one of the two principal schools of thought in the movement with sophistry and the other with self-indulgence, not that badly off. Let us first review what it can achieve now, and then consider what it may be able to accomplish if helped by more scholarly work on distributional issues.

The first things that the new law-and-economics can still do lie in the field of positive analysis. If one posits certain starting-points and certain distributional goals, then the new economic analysis of law can come up with quite plausible explanations for some legal doctrines which have otherwise been hard to explain. This is

<sup>1</sup> See Landis, ‘Statutes and the Sources of Law’, in *Harvard Legal Essays* 213 (1934); Calabresi, *A Common Law for the Age of Statutes* (1982).

<sup>2</sup> See Dworkin, ‘Why Efficiency?’, 8 *Hofstra L. Rev.* 563 (1980).



especially valuable in a historical context. An explanation for the inexplicable (according to Oliver Wendell Holmes) persistence of *respondeat superior* and for its many (if changing) limits, exceptions, and sub-exceptions was in fact one of the first results of the new economic analysis of law.<sup>1</sup> Many analogous insights have followed, in tort and in other areas. Often such explanations require the scholar to make empirical assumptions as to complex factual issues (for instance, as to 'knowledge' possessed by the parties). They also require, as I have said, the positing of starting-points and of distributional goals. The more these assumptions seem valid, the better or more plausible will seem the explanations. Because the assumptions are always uncertain, however, the explanations will hardly ever justify the assignment of a purpose grounded in efficiency above all else to the law. Often a contrary result would be equally efficient on only slightly different assumptions. Nevertheless, the analysis, taken together with the distributional preferences that we are apt to assign to certain historical times, often serves to give one possible explanation of why the law was what it was and even why it changed. And that is nothing to sneer at.

The converse is also useful. If one assigns to a law—as an assumption only—the purpose of efficiency in achieving certain economic goals (like the reduction of the sum of accident and safety costs), then the analysis can help to suggest what distributional theories, starting-points, and factual assumptions would have been necessary for legal doctrines of a time to have been, in fact, efficient. This kind of analysis does not in itself imply that the required distributional theories were held, or that the factual assumptions were made. None the less, the analysis can give rise to unexpected hypotheses as to each of these, which can then become appropriate objects for scholarly research.<sup>2</sup>

Let me give just one example. I criticized earlier the use of economic analysis to attack a legal rule through a too easy assumption that all parties affected were the same from a distributional standpoint, were simply *As* and *Bs* without further characteristics, and hence could be assumed *ex ante* to agree to

<sup>1</sup> See Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts', 70 *Yale LJ* 499 (1961).

<sup>2</sup> It can, and in fact frequently will, give rise to more than one distributional theory under each of which the existing laws would have been efficient. But this will only be troublesome to those who somehow believe that for scholarship to be useful or even scholarly it must lead to a single answer, a position too silly to warrant comment. Cf. Horwitz, 'Law and Economics: Science or Politics?', 8 *Hofstra L. Rev.* 905 (1980).

any change in law which would make for a bigger pie, however that pie was to be distributed among them, *ex post*. I did this because such a use of economic analysis assumed away distributional distinctions which might instead be important to society. The 'positive' analysis just described can give rise to interesting suggestions, worthy of further study, as to which differences among *As* and *Bs* may have been treated in the past as irrelevant, and which others, on a hypothetical basis at least, seemed instead to demand different treatment. As such, the analysis may help us inch toward greater knowledge of distributional goals—historically and even currently—which, as we shall soon see, may be of further help to economic analysis of law.

The new economic analysis of law, moreover, need not be limited to this kind of positive analysis. There is, after all, no need to fall into the trap of self-indulgent promotion, or sophistic hiding, of one's distributional preferences. The scholar can analyse a law and point out who would benefit from a change, and how much, as well as who would lose, and how much. Who would gain from a shift from third-party liability to first-party liability systems? Demonstrably the relatively poor and the elderly. Who would lose? The relatively wealthy, the middle-aged, and those with large families.<sup>1</sup> This, together with the efficiency effect—the size of the gain to the poor and the size of the loss to the rich—are things the law-maker decidedly would want to know. If the scholar can refrain from giving only the 'efficiency' effect—the *net* gain or loss—(as if the distributional effect did not exist or were irrelevant),

<sup>1</sup> In third-party liability the size of a car owner-driver's insurance premiums depends primarily on: (a) the actuarial chances of his having an accident, (b) the propensity of his car to injure people *outside* it, (c) the size of foreseeable damages to the third-party victims. In first-party liability the insurance premiums depend primarily on: (a) the actuarial chances of the owner-driver having an accident, (b) the propensity of his car to injure people *in* it (and pedestrians), (c) the size of foreseeable damages to himself and his passengers (and pedestrians). (a) is the same under either plan; we can assume, for the moment, that the difference in (b) does not have distributional significance; the foreseeable damages in (c), however, are much lower for the poor and the aged under a first-party plan than under a third-party plan. In simple terms—a poor person under a first-party plan insures lower than average incomes, and an aged person insures incomes for a shorter than average time; under third-party plans the poor and the aged insure average incomes for an average length of time. The matter is in fact far more complicated than this thumb-nail sketch (one should take into account likelihood of insurance; numbers and ages of passengers carried; likelihood of serious long-term injury as against death or quick recovery, etc.), but in the end the broad statement made in the text remains true.

and also refrain from characterizing that 'efficiency' effect as desirable, undesirable, or neutral (on the basis of his own 'unscholarly' distributional preferences), the scholar will be doing quite a service to those courts or legislatures that in his society can legitimately make law. These last will choose the 'blend', and it may not be the one the scholar would have preferred. But they will be helped by the scholar's analysis of the costs and benefits when it is combined with an analysis and open description of who the winners and losers will be.

This use of economic analysis of law, of course, comes closer to the original aim of providing the scholar with an engine for reform, with a way to criticize what has come to be the law, without forcing him to rely immediately on ultimates. For the scholar to get still closer to that object would require the development of plausible distributional theories that are themselves exogenous to the common law and derive from the application of scholarly skills. If these could be developed the scholar could appropriately go beyond a listing of who would win, who would lose, and how much, from a change in law. He could then state that, given distributional theory  $X$ , such a change would give a net 'efficiency' gain *and* be distributionally desirable or acceptable. Distributional theory  $X$  might not in fact be acceptable to those who ultimately make our law, or they might not think that theory  $X$  properly applied in the particular context even if it might in other areas of law. Finally, they might reject the net gain analysis, for it too is almost always based on empirical assumptions which are uncertain. It would therefore not be for the scholar to make law any more than it is today. But the scholar, by marshalling a combined economic analysis of gains and losses with a distributional theory which speaks to whether a net gain or a net loss is preferable, would be advancing substantially the capacity of law-makers to reform law.

Are such scholarly distributional theories a fantasy? I think not—even though traditionally economists have refused to think much about them and hence to help in developing them, to their and our loss. Let me give some simplistic examples to suggest the directions to which scholars might look in developing such theories. Most scholarly distributional theories would derive either from empirical analysis which purported to show what distributional preferences were in fact dominant in a particular context for the particular society, or from philosophical theories which the law-maker might decide to accept and apply in the given context. Usually these philosophical theories would also

require that some factual assumptions be made in order for them to give guidance on distributional preferences in a specific context.

An example of a philosophical theory that, to the extent adopted, gives rise to distributional insights that need factual assumptions to apply is, of course, utilitarianism. It treats pleasure or happiness as the goal to be maximized. It also does not concern itself (unfortunately, I think) with the distribution of this 'good'. But even if one accepts the utilitarian premiss to some extent (and most, I would submit, do), the use of the theory requires highly complex factual assumptions. What can we say about the 'happiness' effects of a change in law that makes a wealthy *A* poorer by 5, and a poor *B* richer by 6? Economists traditionally have said: 'Nothing', but they have said it for rather odd reasons.

Many economists accept the utilitarian premiss; they also accept the *empirical* assumption of diminishing marginal utility of money—that is that people value their last pound less than their first. (They are apt to state this as though it were universally true, but like most empirical statements it is, at most, only true most of the time.) But since they do accept it, why then don't they conclude that the 'net gain' just described is distributionally desirable (at least for utilitarians)? Because they, quite rightly, point out that the *fact* of diminution doesn't guarantee that the last pound is worth less to the rich *A* than the first is worth to the poor *B*. We all know that there are *bons vivants* who get more pleasure from the last bit of caviare than ascetics get from the first hunk of bread. How can we know that the *A* is not a *bon vivant* and that the *B* is not an ascetic?

As a matter of *theory*, of course we cannot, any more than we can know—as a matter of theory—that in the particular case the marginal utility of money declines at all. But that misses the point. If we *can* say that by and large marginal utility declines, and that by and large most members of a species get roughly similar pleasure from (i.e. desire similarly) the generality of goods (however much they differ as to particular goods), then if we accept the utilitarian philosophical premiss, we have a very powerful distributional theory indeed. Whether it *actually* applies in a given context depends on whether in that context marginal utility in fact declines, and whether the categories of parties at law are ordinary members of the species or are *bons vivants* and ascetics.

That law-makers often have to make 'empirical guesses' as to such facts may be unfortunate, but it does not undermine the usefulness of the underlying theory. Economists would be loath to say that they can say nothing about the efficiency of free

exchanges simply because people do not always know best for themselves. The assumption they are willing to make in that instance is that, in many contexts, most people do know best for themselves. It then remains necessary for the law-makers to decide whether *in the context before them* the assumption holds. And often—as with compulsory, inalienable, pensions—the law-maker decides that it does not. More often, perhaps, the law-maker decides the assumption holds and makes law accordingly.

Simply stated the point is this. A plausible distributional theory is *not* rendered useless in law-making merely because it only gives policy indications on the basis of difficult empirical assumptions. The essence of good law-making, of good government, is to make good guesses. The scholar must present the theory and give what data he has. The law-maker can then respond, by accepting or rejecting the philosophical premisses of the theory, but also by deciding whether in his judgement the theory is applicable *on the facts* to the situation before him.

The example, as I have said, is simplistic, if for no other reason because it is based on the premiss of simple utilitarianism and many would reject that philosophy. As an example, however, it still suffices. It suggests that philosophers should spin out more plausible theories (if they doubt utilitarianism), and that other scholars—economists even—should use these theories to create models that in reasonably common factual contexts can give distributional guidance. Whether the philosophy is acceptable, and whether the facts support its application to a given issue of law reform—these remain questions for those to whom we give the power to make law. But law-makers will be far better placed to resolve the issues because the scholars have done their work—on the distributional as well as on the ‘net wealth gain’ side of the problem.

An example of an empirical attempt to discern what distributional theories are dominant in particular contexts can be seen in some of the work of Professor Jules Coleman.<sup>1</sup> He looks to ordinary language as a guide—exogenous to the common law—to distributional preferences in specific contexts. For a variety of reasons which I won’t go into here, I am not convinced that he actually succeeds in identifying contexts in which *As* are to be preferred over *Bs* solely for distributional reasons. If he did, of course, the scholar could recommend as acceptable those law-changes which led to a ‘net wealth gain’ that favoured the distributionally preferred category whenever the context recurred. Once again, the

<sup>1</sup> See Coleman, ‘Efficiency, Exchange, and Auction’, 68 *Cal. L. Rev.* 221 (1980).

law-maker could question whether the context was in fact the same as that which led Coleman to conclude that 'society' preferred the particular *As* to the particular *Bs*. But once again, the scholar would by his work have greatly aided the process of law reform.

In effect the data adduced by the scholar would convert the new legal and economic analysis into a broader and more powerful version of the old law-and-economics. It would imply that the society had adopted certain starting-points and distributional preferences in certain contexts and that the task that remained was to achieve the greatest possible net wealth gain, given these preferences.

One could go on and give other examples. The two I have chosen are meant to suggest both that scholarly distributional theories, of a weak sort perhaps but sufficient to the enterprise of economic analysis of law, *are* possible, and that we have a long way to go in developing them. Fortunately, there has recently been much more inclination among scholars to think about distributional issues. Among economists, Amartiyah Sen's name comes immediately to mind.<sup>1</sup> Even Richard Posner's work—once stripped of the claim that distributional issues are irrelevant—can be viewed as stating distributional theories, some of which may, in some contexts, be accepted by our societies, or be acceptable to those who are empowered to make laws. I am thinking, for example, of the notion of *ex ante* compensation which in certain situations—far more limited than those which Professor Posner takes for granted—may lead law-makers to treat certain *As* as indifferent from certain *Bs* and hence to accept a 'net wealth gain' as a valid reason for changing laws.<sup>2</sup>

Let me emphasize that I am not suggesting that what is needed or possible is a single dominant, distributional theory—a social welfare function, as it were. Economists, at least since Professor Arrow's work, have abjured such an approach. For somewhat different reasons Philip Bobbitt and I reached the same conclusions in a recent book on *Tragic Choices*.<sup>3</sup> What I think can be done is much more limited and much more attuned to law-making.

<sup>1</sup> See, e.g., Sen, 'Social Choice Theory: A Re-examination', 45 *Econometrica* 53 (1977); id., 'The Welfare Basis of Real Income Comparisons: A Survey', 17 *J. Econ. Literature* 1 (1979); id., 'Utilitarianism and Welfarism', 76 *J. Philosophy* 463 (1979). Among earlier economists I. M. D. Little and A. Lerner deserve special mention. See Little, *A Critique of Welfare Economics* (2nd edn. 1957) and Lerner, *The Economics of Control* 23-40 (1944).

<sup>2</sup> See p. 96, n. 1 above.

<sup>3</sup> See Arrow, *Social Choice and Individual Values* (2nd edn. 1963); Calabresi and Bobbitt, *Tragic Choices* (1978).

Distributional preferences do exist and are essential to any criticism of law. The legal scholar, therefore, cannot act as though they were not there or were none of his business. He must either develop theories that law-makers will decide ought to apply in particular contexts, or he must try to demonstrate what distributional preferences are, in fact, applied by our societies in particular contexts. He must do both from sources exogenous to the fabric of the law if he would use what he has developed or discerned, together with an analysis based on more traditional economics, to cast doubt on or to support some part of that fabric. The development of such theories would, therefore, bring the new lawyer-economist much closer to the aim of the early proponents of the approach—the advancement of rational criticism of legal rules without reliance on the legal tradition itself, on simple majoritarianism, or on direct appeals to unanalysed ultimates.

Perhaps this is too much to hope for; and I hope to have demonstrated that, even then, the new economic analysis of law can be a source of respectable and useful scholarship. I should like, however, to close with a caution of the opposite sort. Even if scholars were able to define distributional theories or to discern distributional norms of the sorts I have described, it does not follow that their criticisms of laws should be adopted. It does not follow for several reasons. The most obvious—and I have already stated it—is that, even if the norms are accurate, and the theories acceptable to law-makers, the facts which would justify their application in a particular legal context may be unavailable or uncertain. In such cases the law-maker may prefer the wisdom of the past (that is, the legal tradition), or the simple will of the present (that is, the pressure of the majority), or even the anguished call of unanalysed ‘justice’, to the empirical guesses he would have to make to contradict these. And who can gainsay him? But beyond that, we cannot be sure that the distributional preferences of the most sophisticated theory available, combined with the most careful analysis of whether a change will lead to a ‘net gain’ to some, at no cost to those whom we would, distributionally, favour, will correspond to that society’s sense of justice. No human theory can take enough into account.

J. S. Mill, in describing Bentham as one of the two seminal minds of the century, said of him that he approached all ideas as a stranger and if they did not meet his test (the test of utility) he dismissed them as ‘vague generalities’. Utilitarian though he was, Mill went on to say that what Bentham did not realize was that in those vague generalities lay the ‘whole unanalysed experience of

the human race'.<sup>1</sup> Mill would never have suggested that only experience and wisdom lay in those vague generalities. Often, what they masked was no more than exploitation, injustice, or simple error—that is, solutions which might have worked well, or fairly, in contexts long since gone. The same can be true of 'the legal tradition', of 'majoritarian desires', and of unanalysed appeals to 'justice'. That is why the normative goal of the new economic analysis of law is well worth pursuing.

To cast doubt on the 'vague generalities' by rational questioning is an essential part of the scholar's task. One cannot even *begin* to cast doubt on 'vague generalities' with tools that are simplistic or ones that ignore important goals of law. That is why any critique of law based on the new economic analysis of law that ignores distributional concerns is fatally flawed. And it is why we need the kinds of scholarly distributional insights for which I have been arguing today. Even with these, however, unless we would be simplistic (as even Bentham was), we must also recognize the profound utility (both conservative and revolutionary) of traditional sources of law, of traditional ways of speaking about legal change, and, *a fortiori*, of the language of unanalysed rights and of justice. These are essential for they serve to question the doubtful empirical guesses and incomplete analyses on which all language of rational reform will be based. As such they may temper pressures for reform, or accelerate them to bring forth wholly new, revolutionary one might say, legal relationships.

But the languages of reform are also needed. They come in many forms and are often attached to a scholarly discipline and to its insights. The new economic analysis of law, combined with distributional analysis, is just one of these languages. But it can be a strong and rigorous language, as well as a useful one. As such it is worthy of scholarly pursuit.

<sup>1</sup> See Mill, *Utilitarianism, On Liberty, Essays on Bentham*, 93–4 (ed. Warnock, 1969).