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Norms and Normativity in the Economic Theory of Law*

Frank I. Michelman**

I.

Certainly for members of the Law and Society Association, mention of Dean Lockhart's name must bring immediately to mind his urgings for lawyers, as he put it, "to make more effective use of the insights and research tools of the social sciences."¹ And one recalls, too, the object lesson he helped provide by his service as Chairman of the United States Commission on Obscenity and Pornography—how, in that capacity, he unswervingly followed his own conviction that facts can liberate, that well-conducted, systematic, convincing, behaviorally focused research can liberate from false sociological belief. As we also see (if only in principle) from that same example, if the false belief concerns the effect and significance of some legal regime, liberation from the false belief may in turn open the way to a second liberation: liberation from dysfunctional or oppressive law.²

Now, in these lectures, I also find myself concerned with a connection between empirical social research and the truth and falsity of belief about law. My thesis is different from Dean Lockhart's, though I do not see it as contradicting his: it is that well-conducted, systematic, convincing, behaviorally focused research can entrap as well as liberate, can help engender as well as dispel false belief about social reality, insofar as it invites the reduction of reality to observed regularities of behavior.

The case I shall study is that of the positive economic theory of law, an enterprise in empirical research that aims at revealing and verifying a clear and pervasive tendency for judge-fashioned law—common law—to exhibit economically efficient properties. My claim will be that the success of this enterprise helps to engender false belief about the motives and meanings of extant law and about the right criteria for forming and appraising the law yet to be made.

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To forestall any possible misunderstanding, I do not intend my claim as an accusation or adverse judgment against positive economic analyses of law, or as a suggestion that the theoretical enterprise they compose ought not to go forward. My aim is to ventilate and illuminate certain intellectual confusions that may lead one who is not on guard against them to draw unjustified normative inferences from positive, descriptive studies. And so, though my objective is rather different from and more modest than Dean Lockhart's duel with the dragon of censorship, I am, like him, embarked on an essay in intellectual liberation.

I am going to spend the better part of this first lecture explaining the problem to which the liberation of which I have so grandiloquently referred is meant to be a solution. In developing my perception of the problem, I shall be talking at first mainly about normative, not positive, economic analyses of law. I shall proceed mainly by discussing a particular, illustrative issue of legal doctrine. I intend this discussion partly as a brief introduction or reintroduction to the style and approach of economics-inspired legal criticism, for those who can use it. To those who will find what I have to say for the next twenty minutes utterly familiar, I can only apologize and try to make the exposition and illustration as brief as possible. I have committed myself to completing this introduction without once using the names of that holy trinity, Coase, Pareto, and Transactions Costs. Perhaps curiosity about whether that can be done will help hold the interest of the initiated.

In the 1960's and early 1970's, judicial and academic gazes fell intently upon the question of liability for costs connected with unsafe and unhealthful conditions in urban dwellings occupied under short-term leases. A tenant might claim indemnification from the landlord for costs of injuries suffered as a result of such conditions, or the claim might be for adjustment of rental obligations to reflect the depressant effect of such conditions on the value of the leasehold occupancy right.

As an example, let us focus for a while on the case of a tenant seeking compensation for injury resulting from a broken floor. To have much assurance of recovery in such cases, tenants needed a rule of rather strict landlords' liability, one that was not too ready to find contributory fault on the tenant's part. Throughout the United States, the acknowledged rule since the country's beginnings had been just the opposite of strict landlords' liability: absent special agreement to the contrary, a landlord was considered to owe her

tenant no duties regarding the physical condition of the leased premises except to disclose nonobvious defects known to the landlord. But, at about the same time as the legal services programs were making their move for reexamination of this caveat lessee doctrine, help was increasingly appearing in the form of municipal housing code ordinances. These ordinances set forth minimum health and safety standards for dwellings, often characterizing them as minimum standards of decency for human habitations and typically branding as a criminal offense (as well as an occasion for administrative sanction) a landlord’s act of marketing housing accommodations not meeting the code standards. While the codes usually said nothing about civil liabilities, their enactment allowed courts to avoid the question of nakedly revising the settled doctrine of caveat lessee by facing, instead, the question whether a strict landlords’ civil tort duty could be inferred from the penally sanctioned housing code.

Many courts found their way, without too much visible difficulty, to what I think is clearly the right answer to that question: yes. Yet that is not an answer that could easily or straightforwardly have been reached by a well-advised and conscientious court acting on the premise that the right legal rule and decision are those most conducive to a social goal of economic efficiency.

Let us begin the economic analysis by setting aside the housing code and asking whether or how it might be argued that efficiency calls for making landlords strictly liable for injuries resulting from malfunctions and hazardous physical conditions in leased dwellings. Given settled law to just the opposite effect, the argument will have to be a good one—good enough to overcome a significant inertial bias against drastic changes in settled law, which are always presumptively inefficient in the absence of fairly compelling counterconsiderations. In the short run, such changes risk waste of resources committed in reliance on the settled law—in our case, costs sunk into setting up shop to market housing at low rentals to low-income consumers (since the imposition of strict landlords’ liability may force withdrawal of the housing from the low-rent market). In the long run, drastic changes in settled law risk impairment of investor confidence and consequent suppression of investment below optimal levels. So in order to justify replacement of caveat lessee with the opposite doctrine of strict landlords’ liability, an efficiency-minded court

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4. Some exceptions were made, which need not concern us here. See generally 1 AMERICAN LAW OF PROPERTY §§ 3.45, .78 (A. Casner ed. 1952).


would need a basis for reasonable confidence—more than just a speculative theory about what might conceivably be the case—that the change in law would promote efficiency.

Now, in one sense it is impossible to speak of inefficiency in legal relations so long as there is formal freedom of contract among interested and affected parties. For “inefficiency” strictly denotes a situation in which—taking the parties as we find them, with their wealth levels and preferences already determined—private values that might be realized are being sacrificed. The only unambiguous case is that in which the legal relations can be altered so that at least one involved person will experience increased satisfaction while none of the others will be less satisfied than before. And the only way of knowing for certain whether that is the case is to watch the parties: if it is the case, they can alter their legal relations by voluntary agreement; and if they do not, who are we to say there is any inefficiency?

So, in our case, to speak of possible inefficiency in the caveat lessee rule is to suggest the possibility of some arrangement under which landlords rather than tenants would bear legal liability for costs of injuries resulting from hazards and malfunctions in leased dwellings, and yet landlords as well as tenants would be at least as satisfied as if tenants bore the risks and costs. That could be so only if tenants were willing to pay the increased rentals that landlords would be willing to accept in exchange for shifting from tenants to landlords the risks and costs in question. And that, in turn, could be so only if for some reason those risks and costs would be more cheaply borne by landlords than by tenants.

In any given case it is entirely possible that landlords can bear the risks and costs more cheaply. Repairing malfunctions and hazardous conditions may cost less than bearing the injuries that repair would avoid. Even if injury costs are less than repair costs, the former may be minimized by health and accident insurance. In either case, landlords may be able to repair or to obtain insurance more cost-effectively than tenants. For example, unit costs of repair or insurance may be lowest when the whole building is taken care of in a single, coordinated operation. In short, any given landlord may be able to avoid the costs in question more cheaply than any given tenant or group of tenants.7

But insofar as that is so, nothing prevents landlords and tenants from negotiating a transfer of the injury risk from the tenants, upon whom it is initially placed by the caveat lessee rule, to the landlord;

7. The notion of the cheapest cost avoider has received its most elaborate development in G. CALABRESI, THE COSTS OF ACCIDENTS (1970).
and if they do not strike such a bargain, then presumptively there is for them no efficient move away from caveat lessee.

Such a sternly behavioristic interpretation of efficiency would leave that notion idle as a criterion for evaluating legal rules and decisions, except for rules and decisions bearing directly on freedom of contract and ancillary matters such as fraud and remedies for breach. But efficiency is thought to have a much more pervasive significance for law, for it is believed that parties often will not practically be able to bargain their way from one given set of legal relations to another set, even though all would be more satisfied under the latter set. Once that possibility is admitted, an efficient set of laws can be defined as one that directly imposes the mutually most satisfying relations insofar as we are confident of what those typically will be and, insofar as we are not, imposes as the prebargaining relations those that will be cheapest for parties to bargain away from or around as necessary.

How may we interpret concretely, for our case, this abstract notion of parties unable to bargain their way from a given set of legal relations to another set that each will find cheaper, more effective, less wasteful? Suppose a building containing fifty dwelling units cooperatively owned by the tenants organized as a corporation, who employ a manager and lease the units to themselves at rentals covering the capital and operating costs of the building. Suppose further a disagreement among the tenants as to whether it is worthwhile to pay the costs of maintaining the building at this or that level of repair, thereby avoiding more or fewer injuries. Unable to agree on any preferred level of repair, they are trapped into letting the building deteriorate to a level that all of them regard as suboptimal.

It seems that in this case an astutely designed, legally imposed standard of repair might rescue the tenants from the toils of their own internal disagreements. But it remains most unlikely that pursuit of efficiency in the strictest sense can justify replacing the caveat lessee rule with a judicially imposed owners' duty to maintain leased dwellings at some designated level of safe repair. The legally defined standard of repair must inevitably be Procrustean. It may have the effect of securing for some, or even most, occupants a level of repair they desire at a cost (in rental increases) they are more than willing to pay. But there will always be some other occupants who, left to free choice, would pay not a dime for more repair—possibly because they do not have a dime to spare. So the effect of the legally imposed repair standard will be to force some tenants to purchase health and safety increments for more than such increments are worth to them. Imposition of the standard, then, is not strictly efficient.

It might, however, be potentially efficient in a significant sense. To use Professor Richard Posner's phrase, it might be "value-
maximizing.” Value maximization (“VM,” as I shall call it) is the somewhat relaxed efficiency criterion that approves all and only those changes in legal relations from which gainers would gain so much that they could fully compensate losers and still have some gains left over. As applied to our case, the VM criterion would justify judicial imposition of a repair standard if, but only if, those tenants whose self-evaluated lot is improved by the resulting mix of repairs and rental increases would be willing to pay (never mind that they do not actually), in exchange for the change in law, a total amount adequate to compensate the dissentient tenants for their losses. VM thus in one aspect reflects a collectivistic or socialistic, as opposed to a strictly individualistic, ethic: it justifies legal interventions so long as the gainers gain more exchange value than the losers lose, so long as the total sum of “value” in society is in that sense increased. The method of valuation under VM remains, of course, strictly individualistic and private. Value is what the affected individual experiences; it is transrational, not amenable to public or intersubjective discussion or determination. Probably VM as an ethical criterion is at bottom felt to be individualistic in orientation: a steadfast practice of maximizing private values, as defined by individual preferences, is thought to promise the maximum attainable long-run satisfaction of everyone’s private preferences, just as a bigger pie promises bigger slices.

At any rate, VM seems to be the criterion most commonly intended when changes in law are judged to be economically efficient or not. The stricter versions of efficiency are just too restrictive to fit actual or likely practice in most situations. From an economic standpoint the whole purpose of defining and allocating legal entitlements is to overcome the bargaining impediments that often prevent value-maximizing exchanges from occurring, and administrative costs would remain too inhibiting if no change in legal relations could be approved until it had been accurately determined just how heavily each individual loser must be bribed and just how heavily each individual gainer might be taxed for each person to be left either better or no worse off.

But even the liberal VM criterion cannot justify judicial replacement of caveat lessee with a strict landlords’ duty of repair. We tried to generate such a justification with a supposed case of tenants stuck in dispute amongst themselves about how much repair to purchase. But, according to economic theory, there should be no need for an externally imposed, Procrustean repair standard so long as there are (or easily could be) entrepreneurs in the business of supplying lease-
hold dwelling units on an open and reasonably competitive market. In such a market, competing lessors will offer as many different housing packages—each consisting of a coupled repair level and rental price—as there are differing consumer preferences for trade-offs between repair costs and injury costs. Only if an individual's preferences were so special that they could not efficiently be satisfied in a multiple dwelling where others' preferences must also be met would that individual be likely to find himself wanting some financially feasible package offered by no landlord. In this world of a free and competitive rental housing market, any legally imposed repair standard would unnecessarily, and therefore inefficiently, restrict the choices of some tenants.

But what if the market is not free and competitive? What if, for some reason, suppliers of lower-rental housing in a given market area are few enough in number and otherwise so situated that they have leeway, within the competitive laws of supply and demand, to restrict their repair offerings to below the socially optimal level? Then, indeed, as the theory of monopoly tells us, it is possible that profit-maximizing, monopolistic suppliers might be motivated to hold the rental price of housing safety and amenity (repair level) above cost, thereby marketing fewer “units” of such safety and amenity than tenants would want to buy if available at a price equal to cost. That situation, if it existed, would be inefficient by the VM criterion because it would mean that somewhere there were ultimate suppliers of the factors used in housing repair—materials, labor, and knowhow—who would be willing to supply them in exchange for what tenants would be willing to pay. Tenants, however, could not practically contract directly with these ultimate suppliers and could not contract with them indirectly, through the landlord, because the monopolistic landlord would lack the profit motivation to facilitate the contract. In that case, a legally imposed repair standard might force the landlord to perform this intermediary function, purchasing repair factors at a price—possibly, though not necessarily, passed on to tenants—that tenants in the aggregate would be happy to pay. If all that were so, imposition of the standard would be not only approved but required by the VM criterion.

Even this monopoly argument, however, fails to provide an economic justification for the judicial intervention we are considering because it is too speculative. There do appear to be some barriers to entry into the slum housing business, and there is some evidence of monopoly profits accruing to some suppliers. But there are also data indicating the competitive conditions and skimpy returns confronting

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9. See generally id. at 206-08.
many suppliers. At any rate, it is safe to say that no court deciding in favor of a strict landlords' repair duty has ever had before it either empirical data or theoretical analyses establishing with any clarity—not to mention clarity sufficient to overcome the basic economic bias against drastic changes in settled law—that the low-income housing supply in the relevant market area was seriously monopolized, and that such monopolization was resulting in suboptimal supply of building repair, and that legal imposition of a repair standard would interact with the existing market forces in a value-maximizing way.

Similarly lacking in respectable empirical support is the idea that judicial imposition of strict landlords' liability may be economically justifiable as a way of dealing with the "spillover" effects of slum housing. Perhaps it is not just a makeweight to see in such housing a source of costly impacts—conflagration and contagion are usually cited—on the surrounding community. Perhaps such housing should also, as some say, be seen as a cause of socially costly behavior on the part of its occupants. And since those who bear such costs cannot practically organize themselves to bargain with building owners for the repair level they think would comport with their own interests, the case may seem ripe for value-maximizing legal intervention. Perhaps landlords, if made strictly liable for costs of injuries resulting from housing defects, would find repair costs to be lower than both injury and insurance costs and so be led to make repairs that would reduce social spillover costs by more than the net costs of repair (after deducting the savings in injury costs). Perhaps; but also, perhaps not. Equally possible, given the kinds of information the courts have had to rely on, are counterproductive results. For example, repairs may be made and rents raised beyond the reach of low-income tenants whose resultant displacement will aggravate their supposed costliness to the rest of society, or housing may be withdrawn from the market altogether, with like consequences.

But does not the housing code itself furnish the answer to this carping about judicial speculation? Granting that it would be insupportably speculative for a court to conclude that imposing a strict repair duty on landlords will have efficient results, a legislature's like conclusion demands judicial respect. An economics-minded court, thus understanding the housing code and judicially noticing its notorious under-enforcement, might reason that shifting liability for in-

10. A well-known and highly regarded study is G. Sternlieb, The Tenement Landlord (1966).
11. See text accompanying note 6 supra.
jury costs to landlords would provide an additional incentive to code compliance; that the shift will thus be supportive of the legislature’s supposed economic objectives in adopting the code; and that the shift is, therefore, in accord with an economic-efficiency criterion for judicial action. 13

But that reasoning too fails to justify the judicial reversal of caveat lessee. The question of implying civil liability for injuries resulting from a code violation arises precisely because the legislature has refrained from stipulating such liability expressly. Moreover, incomplete code enforcement by prosecutors and administrators is in part a reflection of the legislature’s chosen level of budgetary support for enforcement activity and in part a reflection of legislative acquiescence in the actual enforcement practice. On reflection one can easily think of reasons why a legislature might have thought it prudent to leave code enforcement powers, to be discriminatingly deployed, in centralized administrative and prosecutorial hands rather than resort to the broadside method of civil liability. Administrative enforcement can be strategically geared to variations in market conditions, to which civil liability is insensitive, so as to secure as much compliance as is consistent with minimum contraction of low-rent housing supply; administrative enforcement can be coordinated with distribution of rehabilitation subsidy funds; and so forth. So if a legislature says nothing in its housing code about civil liability, the more plausible economic inference is that it meant to leave the settled law intact. 14

But meaning (insofar as actions are construed as aimed at economic rationality) to leave settled law intact is not the same as actually leaving it intact. Whatever ultimate outcome the legislature may have been contemplating, whatever its implicit economic analysis of the situation, the legislature by enacting the code has irretrievably impacted the legal environment in two respects significant for our problem. First, it has given formal expression to a public standard of minimum decency in the habitations of persons in the political community. The code conveys a judgment that no person should be expected to live— and probably no member would choose to live except under circumstances of severely restricted choice— under conditions falling short of that standard. Second, the legislature has branded as criminal the act of marketing substandard dwellings, of


taking advantage in that manner of the severely restricted choice conditions believed to confront some citizens. The code has an apparent purpose of protecting persons against certain consequences of low income.

So the court in our case confronts a problem of the following form: an accidental injury has occurred. Two and only two persons can be identified whose actions contributed significantly and foreseeably enough to the injurious event to make them plausible candidates for bearing the costs. How to share the costs between these two is the question to be decided. It appears that the contributory activity of just one of these persons consisted of criminal conduct, conduct violating a public standard of right behavior.\footnote{Imposition of that standard is naturally and commonly taken to reflect a purpose of protecting a certain class of persons against a certain class of hazards—hazards against which the protected class is believed otherwise relatively defenseless by reason of limited market power. The injury whose costs are to be distributed is an exact realization of just such a hazard to just such a person.}

Once the case is cast into that form, the correct solution, that the landlord compensate the tenant for injury costs, is obvious and irresistible. But the powerful impulse behind that answer cannot be dismissed as mere brute intuition. It is an authentic and articulate legal principle, one that is traditional, unquestioned, and well-known in the common law: when a penal statute or ordinance has an evident purpose of protecting a certain class of persons from a certain class of hazards, a person who culpably violates the statute, so as to cause just such an injury to just such a person, must bear the costs of the resulting injury—unless, of course, the injured person has culpably exposed herself to the hazard. This principle has a number of interesting properties to which I now want to call attention.

First, the principle has exactly nothing to do with economic efficiency. It is not directed to the question of maximizing private values across some social group.\footnote{Otherwise, the principle could not be applied, as it has been, see, e.g., \textit{id.}, to shift to a landlord the costs of injury caused by housing code violations.} Rather, it is directed to a question of corrective justice between two individuals whose specific relational history is such that it has become necessary and relevant to decide how a burden ought to be shared between them.

Second, the solution to the question of corrective justice is not thought to depend on or partake of the private, subjective values of

\footnote{This assumes, contrary to the facts in some cases, that the duty to avoid the occupancy of substandard dwellings is imposed by the housing code on landlords, but not on tenants. An opposite assumption complicates the argument but does not essentially change it. See \textit{Whetzel v. Jess Fisher Management Co.}, 282 F.2d 943 (D.C. Cir. 1960).}
any individual, even those of the two individuals who are immediately involved, and not even if their private values or preferences concern the corrective justice issue itself. The solution, rather, reflects a public value of fair dealing and right relations between fellow members of society encountering one another under circumstances in which they must somehow share a burden. As Judge Bazelon said in one of the decisions giving the right answer to our problem, for the right reason, "[a] penal statute which is imposed for the protection of particular individuals establishes a duty of care based on contemporary community values and ethics. The law of torts can only be out of joint with community standards if it ignores the existence of such duties."

Third, the judicial solution to the corrective justice question is not primarily an interpretation of legislative intent, but is the application of a principle of the judge-fashioned, common law. Insofar as we view legislative acts through the lens of economic, instrumental rationality—insofar, that is, as we take the housing code to have the aim of efficiency, of private value maximization across society—a court may, as we have seen, be working at cross-purposes with that aim when it implies civil liability. But implication of liability is not on that account to be forgone. Of course the legislature's act of adopting the code is a crucial factor in the court's decision insofar as it represents public moral condemnation of the landlord's conduct. The code evidently has a moral as well as an instrumental purpose, and that moral purpose is reflected in the judicial imposition of civil liability. But the legislature's contribution to this result lies in what it did, not in what it willed or intended. What the legislature did was, simply, to make it criminally punishable, as well as administratively sanctionable, for a person to market housing not meeting defined standards of minimum decency. It is the court that now says that when a legislature does that, there must also arise a corresponding civil liability to satisfy the demands of interpersonal justice, of community standards of fair dealing and right relations.

Fourth, the court's action may thus have an effect of disclosing, heightening, even introducing, a dissonance between the legislature's moral purposes and its instrumental rationality. But if so, if the imposition of civil liability is frustrating to the legislature's instrumental design, that is the legislature's problem, not the court's. The court's problem is to resolve the dispute between the parties before it in a manner harmonious with community morality as expressed through deep-rooted common law principles, in a manner, that is, that avoids the out-of-jointness of which Judge Bazelon speaks. In

17. Id. at 946.
18. See text accompanying note 17 supra.
the face of such judicial action, an instrumentally rational legislature is not helpless. Some subsidy, apparently, is needed to reconcile the legislature's moral purposes with economic practicability. The legislature might conclude—or be willing to bet—that housing market conditions are such that the needed subsidy can and will be extracted from landlords' monopoly profits and that the demands of interpersonal justice and the legislature's economic aims are thus not, in this instance, in conflict. If the legislature concludes otherwise, it can resolve the conflict by appropriating public subsidies. It can even try to resolve the conflict in favor of instrumental rationality by expressly directing courts not to impose any civil liabilities, though it might thereby create some confusion among the people.

I hope, now, to have established that judicial imposition of a strict landlords' tort liability for housing code violations is, or may be, right, even though it almost certainly would be wrong if economic efficiency were the chief end of judicial action and private wants and preferences the only sources of social values. The foregoing account of true and false justifications for judicial action, moreover, can be extended to the implication in leases of a broader warranty of habitability—a landlords' duty that withstands all attempts at express disclaimer and that supports a broad array of contract-like remedies for code violation, such as rent-free occupation of leased premises while the rental obligation is offset by the cost or value of legally required repair, or even a mandatory injunction to repair.

Certainly the arguments pro and con concerning an economic justification for judicial imposition of a nonwaivable warranty closely parallel those pertaining to tort liability, leading to the same ultimate failure of justification. It is less obvious and harder to show, however, that imposition of the warranty is required by established principles of interpersonal justice, fair dealing, and right relations than it is in the tort case. We have to call upon a congeries of principles that, in combination, explain much of the warranty, though perhaps not all of it; that are not, individually, all as starkly compelling as the prima facie negligence principle behind the tort liability; and that are not easily tied together by a unifying moral intuition. Depending on the remedial context in which the habitability warranty is invoked, we can relate it to the traditional principle of judicial refusal to assist in the enforcement of illegal or immoral bargains, or even in gaining restitution of benefits conferred under such bargains; or to the basic principle of protecting reasonable expectations, more particularly the implied-in-fact contract doctrine of a duty to perform obligations that you reasonably should have known the other party would reasonably understand to be contained in your contract; or, in the hardest cases, to the less secure and more problematic principles protecting parties against supposed inability to take seriously the formal terms
of a bargain in the face of environmental factors—prominently including, in this case, the housing code—believed likely to generate strong psychological resistance or dissonance. But even in these most extreme and problematic cases of judicial implication of contractual repair duties in leases, there are analogies and precedents for the court to draw upon. So the decisions are, in that formal sense at least, defensible and not disreputable. Still, no finally satisfying moral account of them has been given. We can summon certified common law principles to their defense, but the summoning is dissatisfyingly ad hoc. We cannot—at least I cannot—see through the principles to some underlying, unifying, encompassing, and basic moral notion. And in that awkward posture we shall momentarily leave the warranty-of-habitability doctrine.

If it is true, as I believe and have tried to show, that a judicial act of holding landlords civilly liable for housing code violations is much more persuasively justified by reference to common law principles apparently reflecting a noneconomic community morality than by considerations of economic efficiency, then it is also a striking—to my mind an ominous—fact that much or most (I do not say all) of the significant academic commentary on the judicial dispatch of caveat lessee has assumed or implied that the economic issue and the legal issue are hardly distinguishable. Indeed at least one court, having managed in its pathbreaking opinions establishing the implied tort and warranty liabilities to summon all the right noneconomic principles to the defense of its actions, retrospectively yielded to the scholarly literature's temptation to defend those actions as economically advisable, and so, as far as I can see, became gratuitously hoisted on the wrong petard.

The economization of the landlords' liability question is no isolated case. Economic analysis and criticism of judge-made law are in flower now in the academic groves—partly, I readily admit, because


20. A notable exception is Sax & Hiestand, Slumlordism As a Tort, 65 MICH. L. REV. 869 (1967).


they are so often illuminating, clarifying, and stimulating, as well as
elegant and captivating. Flowers are fine. Dandelions are flowers.
Dandelions are weeds. Flowers are weeds when they take over the
garden and crowd out the rest of life. The economic fashion in legal
criticism has, I believe, a vigorous weedy propensity. In various fields
of law we are being presented with studies—many of them fine ones,
as far as they go—that not only analyze the efficiency properties of
legal doctrines but also contribute—perhaps carelessly or heedlessly,
but also perhaps blindly or bemusedly—to a general sense that the
law is good or bad, right or wrong, true or false, mainly insofar as it
is or is not efficient.

In the field of nuisance law it is argued that injunctive remedies
should normally be withheld because damage awards measured by
market values are more efficient from a societal standpoint. They
recognition is given the possible bearing of preeconomic, moral, dis-
tributional principles such as that of minimum residential amenity
identified by Professor Alan Freeman and shown by him to be a part
of traditional common law and to justify the traditional injunctive
remedies. In contract law, judicial hostility toward bargained-for
penalties and forfeitures is criticized as inconsistent with the effi-
ciency rationale detected in “modern contract theory.” No sustained
attempt is made to grasp or explain what it was that long ago pro-
voked Chancery’s conscience to invent the equity of redemption and
has ever since sustained in the law a strong antiforfeiture doctrine,
in studied disregard, one might say, of the so-called (perhaps mis-
named) “altruistic” strain in our law recently elucidated by Professor
Duncan Kennedy. Legal reform is advocated, on efficiency grounds,
to accommodate an open market in human body parts; and well-
known concerns about how that might affect society’s moral ambi-
ence, while not ignored, are treated as just another term in the effi-
ciency calculus, as reducible to a concern that commercialization in
medicine might lead to inefficient escalation of malpractice litigation
whose costs will be borne in the forms of increased insurance tolls and
defensive medicine. The question whether a person threatened with

24. See Rabin, Nuisance Law: Rethinking Fundamental Assumptions, 63 VA. L.
25. See Freeman, Give and Take: Distributing Local Environmental Control
26. See Goetz & Scott, supra note 19. Those authors do consider duress and
unconscionability, but only with a view to assimilating them to the efficiency rationale
for contract, by reducing them to “bargaining abnormalities” that undermine the
usual presumption of the efficiency of voluntary exchanges. See id. at 591-92.
27. Kennedy, Form and Substance in Private Law Adjudication, 89 HAV. L.
Rev. 1685 (1976).
28. See Note, The Sale of Human Body Parts, 72 MICH. L. REV. 1182, 1237-41,
adverse governmental action should be granted a prior hearing is
treated as primarily an economic trade-off between the social costs
of legal error if there is no hearing and the social costs of the hearing
if there is one. The preeconomic demand for respect for each individ-
ual's personal integrity and humanity—the Kantian injunction to
treat each person as an end and not just as a means—though its
relevance to the problem is painfully obvious, gets secondary, if any,
attention.

I wish to avoid overstating this plaint. The studies to which I
refer do not, typically, assert that efficiency is the only or the neces-
sarily determinative factor. There is plenty of talk about “fairness”
as a competing or coordinate factor, and there are attempts to expli-
cate that notion and its bearing on the particular problem at hand.
But a content-analytical approach would, I believe, show a current
inclination to treat the efficiency question as central and primary, the
other as peripheral and secondary. The main effort and enthusiasm
tend to go into the efficiency analysis. Sometimes it turns out that
the qualifying factors or alternative theories are just economics in
another guise. I can cite as an example my own study of fairness and
utility theories of the law governing takings of property and just
compensation. Sometimes, as in a recent study of the doctrine of
sovereign immunity to tort liability, an elaborate economic analysis
occupies almost the entire length of a study (and certainly absorbs
most of a reader's attention) although, as the study itself argues,
without quite seeming to be aware that it is doing so, the factor of
primary import is an elementary fairness notion and the economic
considerations are distinctly secondary.

Sometimes there is a merely cursory effort to bring in noneco-
nomic considerations whose possible bearing is conceded pro forma.

29. See, e.g., R. Posner, supra note 6, at 430; cf. Mashaw, The Management Side
of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy,
Fairness, and Timeliness in the Adjudication of Social Welfare Claims, 59 CORNELL L.
REV. 772, 776, 807-08 (1974) (suggesting “a management system for adjudication qual-
ity” in the processing of welfare claims might be allowed to supplant hearing rights).
But see Mashaw, The Supreme Court’s Due Process Calculus for Administrative Adju-
dication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value, 44 U.

30. See Michelman, Formal and Associational Aims in Procedural Due Process,
in DUE PROCESS 126 (Nomos XVIII, J. Pennock & J. Chapman eds. 1977); Pincoffs, Due
Process, Fraternity, and a Kantian Injunction, in DUE PROCESS 172 (Nomos XVIII, J.

31. See, e.g., notes 26 & 28 supra and accompanying text.

32. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foun-
dations of “Just Compensation” Law, 80 HARV. L. REV. 1165 (1967).

33. See Note, An Economic Analysis of Sovereign Immunity in Tort, 50 S. CAL.
And sometimes these considerations are just left for others to explore—philosophers, or maybe poets, but not we hard-headed lawyers, not just this minute: we have mastered economics (at least well enough to publish an economic analysis of this problem), but we can not fathom all that other spongy stuff.

It is true that we do not fathom the other stuff very well. We often cannot talk about it very clearly; we do not see precisely how it works or grows; and that, I guess, is one reason why it is just now being crowded out of the garden. Normative economics is a far more polished, a far better articulated, a far more accessible and presentable, a far better systematized body of analytical and critical material, commanding far more internal disciplinary consensus than the rest of moral and political theory. But from the fact that we find it hard to talk clearly about the noneconomic normative bases of law, it does not follow that they are not there or are not fundamental. I do not have a clear idea of the principles underlying the warranty of habitability, though I can adumbrate them clumsily. But I do know that the warranty of habitability is not a joke, is not a fable, is not a law professor’s fantasy or examination question. It is an authentic legal event in the chronicles of the highest courts of too many American jurisdictions—twelve, by count in 1975—to be dismissed as an aberration or a mistake. Clarifying what its motivating principles are seems at least as important for scholars wishing to stay in touch with actual law as demonstrating that economic efficiency is not properly among them.

Those who come to identify law with economics—or good and true law with good and true economics—risk losing touch with much that is constitutive of the law we have now. Here, in a queer sort of way, I echo a theme of Richard Posner’s. He has protested against the tendency to associate economic criticism of law with conservatism in politics. I would go a step further and suggest that those whose calling is to purify law of its uneconomic incrustations can fairly claim to have received from their utilitarian forebears—Smith, Bentham, Mill—the proud banner of radicalism. I am talking now not about the concrete contest over social goods between haves and have-nots, but about conservatism and radicalism as methods, and the point I am driving at is a methodological point. In tomorrow’s lecture I shall argue that methodological conservatism (Burkeanism)—the appeal of the idea that in politics the settled practice of the past is the right guide to the future—plays a part in the gravitation I have noted this evening towards the economization of legal criticism.

34. See Hirsch, Hirsch, & Margolis, supra note 3, at 1099 n.4.  
But have I not just got through linking economic criticism of law with radicalism? So I have. But criticism is not all there is to the economic analysis of law. There is also the positive, the descriptive economic approach to law, whose hypothesis is not that the law we make ideally ought to be above all efficient, but that the law we have inherited—that is the judicial, the common law—is in fact above all efficient. From apparent verification of the latter, descriptive hypothesis one can easily slide into the embrace of the former, prescriptive one. If the actual law is generally but imperfectly efficient, why not make it perfect? If we can perceive an organic economic unity in the corpus juris, detect an inner economic logic coursing through the law, why not tidy up, cast off the excrescences, rationalize the whole, assist the Law in realizing its Idea? Would that be a conservative or a radical program?

That it would not be conservative in any sense that need recommend it to us is what I want to discuss with you tomorrow. First, however, I have just a bit more groundwork to lay.

I have suggested that we need to distinguish between two types of economic studies of law, which I shall call “legal policy studies” and “explanatory studies of law.” The distinction roughly parallels that which others have in mind when they distinguish between “normative” and “positive” studies. By “legal policy studies” I mean those that treat law as an independent or instrumental variable and that use economic theory to elucidate causal interactions between legal doctrines and practices, on the one hand, and on the other, a broad range of other societal conditions, with a view to predicting the (sometimes counterintuitive) results of legal intervention. Good examples of policy studies are those examining the economic impacts of housing codes and implied habitability warranties.

Policy studies do not, as such, attempt any explanation of the development or content of actual law, treating law instead as an instrumental variable to be deliberately selected or fashioned on technical grounds. Studies that do treat law as a dependent variable, as an historically actual development to be itself explained, compose my second category of “explanatory studies of law.” Such studies are “economic”—and here I use the language of Professor Posner, certainly our leading economic explainer of law—insofar as they purport to explain law by exposing a more or less hidden “implicit economic logic” in legal rules and practices or seek “to define and illuminate the basic character of the legal system” by showing that the system “itself—its doctrines, procedures, and institutions—has been strongly influenced by a concern (more often implicit than explicit)

36. R. Posner, supra note 6, at 179.
with promoting economic efficiency.” 38 Thus a datum such as the implied warranty doctrine is related to the explanatory economic approach as evidence to a hypothesis. In this particular instance the doctrine appears to be negative evidence, an “anomal[y]” or “puzzle”; 39 but if it were to turn out, on further examination, that implying the habitability warranty really is (astonishingly) efficient, then the warranty doctrine would become very striking supportive evidence for the positive economic theory of law, the theory that hypothesizes that judges usually reach the same answers as well-versed economists would reach.

In legal policy studies the normative element is overt and primary although the guiding norm, some version of economic efficiency, need not be embraced by the analyst but merely ascribed, perhaps provisionally, to an audience of policymakers. Explanatory studies also must contain a normative element, given that the phenomenon they seek to explain, lawmaking, is intelligible only in purposive terms. At the very least, an economic explanation of law must ascribe to the impersonal system what might be called a pseudonorm of efficiency, though it might then treat the appearance of this pseudonorm as itself the object of interest or concern, the phenomenon that wants explaining or explaining away. 40

Economic efficiency norms, then, are significant elements in all economics-inspired studies of law, explanatory as well as policy studies. But the efficiency norms that typically enter into policy studies are not identical with the one that characterizes the explanatory studies and the positive economic theory of law that those studies document. The difference and a reason for it are what I want to discuss in the time I have remaining this evening.

Recall the efficiency criterion I earlier labeled “value maximization,” or VM—the criterion that approves all and only those changes in legal relations for which gainers would be willing to pay more than losers would demand in exchange for agreeing to the change. VM is not the strictest of efficiency criteria since it tolerates imposed redistributions so long as those are believed to be value-maximizing across the affected group. But VM is a pure efficiency criterion in the sense that the only values it counts are those given by the private wants and preferences of affected individuals, weighted by disposable income.

Now there are also what we may call modified efficiency criteria for changes in law. Observation certainly suggests that while changes

38. Id. at 763-64.
39. E.g., id. at 765.
40. For an example of how the efficiency property detected in common law doctrine might be treated as pseudonorm, see text accompanying note 73 infra.
in law are often motivated or justified by belief in their conformity to the VM criterion, that criterion is incomplete as a description of societal practice—most obviously, but not only, because of its insensitivity to distributional concerns. Some changes may be rejected, despite belief in their conformity to VM, because of disfavored distributional effects. A more complex criterion, one that appraises changes in law according to some (explicit or implicit) social welfare function containing terms for both efficiency and distribution, might be labeled one of Social Welfare Maximization. Such a criterion would approve enactment of a housing code only upon assurance, first, that tenants would gain more from it than landlords would lose and, second, that any resulting redistribution from landlords to tenants would be desirable or at least, as Calabresi and Bobbitt put it, "tolerable." 4

In some cases it might be believed that a change in law would, over time, react upon people's tastes and preferences in such a way as to feed back into the allocational-distributional calculus prescribed by a social welfare function. Housing laws might be expected over time to alter the experience, the imagery or affect, of landlording or tenanting in such a way that the shadow prices for housing laws are altered. A social welfare appraisal of proposed law changes that tried to take such affective feedbacks into account would be using a criterion of Preference-Adjusted Social Welfare Maximization.

It is possible that a proposed housing law would, after all socio-cultural feedbacks had been worked into the calculus, appear to be both value-maximizing and negligibly or tolerably redistributive, and even so be socially unacceptable. Society may think that individuals have rights to lease dwellings on whatever terms they freely choose, so that it would be unjust (even if not distributionally inequitable) to adopt such a law. 42 A criterion for appraising changes in law that combined concerns about specific rights with those about allocation and wealth distribution might be labeled one of Social Justice Maximization. If the criterion also took into account the effects on preferences of proposed law changes (perhaps incorporating ethical judgments about such preference-impacts and the resulting moral ambience of society 43 as well as appraisals of their feedback effects on

41. See G. Calabresi & P. Bobbitt, Tragic Choices 86 (1978). For an attempt to use such a compound criterion in an appraisal of housing code enforcement, see Ackerman, Regulating Slum Housing Markets On Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy, 80 Yale L.J. 1093 (1971).
42. See also R. Dworkin, Taking Rights Seriously 91-93, 169-71 (1977).
shadow prices), the criterion would be one of Preference-Adjusted Social Justice Superiority. Even such an extended criterion could be classed as an "efficiency" criterion insofar as it connoted *provisional* approval or disapproval, subject to consideration of other factors, of law formulations, depending on whether they are value-maximizing in the pure sense of value measured by supposed willingness to pay unadjusted dollars, holding current distribution constant.

Efficiency criteria for law can, then, be dichotomously classified as either "pure" (VM) or "modified" (making some kind of allowance for public values or concerns about things like distribution, rights, and the moral ambience of society). Since we now have in hand two dichotomous classifications—one of economic legal studies ("policy" and "explanatory"), and another of efficiency ("pure" and "modified") — you social scientists will by now be cowering in fear of the world's ten zillionth fourfold taxonomy. But my thought is otherwise. It is that each term in one of these pairs has its opposite number, its natural companion, in one term of the other pair: specifically, that policy studies have a natural affinity for modified efficiency criteria, while explanatory studies are, at least in the present state of the art, restricted to VM, the pure efficiency criterion.

A policy study can always coherently, and usually will expressly, concede the possible relevance of nonefficiency concerns even if the study never itself strays beyond purely economic analysis. Thus one need never impute to such a study the heroic view that efficiency is the only legal virtue worth considering. If the study starts with or centers on a discussion of whether a certain state of law is or would be purely efficient, and why, it may—but need not—then go on to analyze the distributional or other noneconomic attributes of that state of law; it may—but need not—express a judgment about those; or it may just leave it up to policymakers to decide what ought to be done, all things considered. Conversely, a policy study may begin with an acknowledgement that a certain legal doctrine (for example, the implied habitability warranty) apparently responds to some noneconomic notion of equity or right and then undertake to show that the economic consequences are so surprisingly adverse as to warrant reconsideration of the doctrine, again leaving policymakers to decide. In no case is it much of an embarrassment that the study itself cannot credibly offer, as commanding a societal consensus, a neatly structured social justice function with well-defined terms and relations for distribution and substantive rights. All of that, happily, can be left to the philosophers, or the poets, or the political process. As I have already said, I do not mean that policy studies never tackle the noneconomic aspects of the problems they examine. Sometimes they do, and with energy and skill. But, as I have also already said, often they do not, or they do not do so in a way that guarantees that anything but the efficiency analysis will ever be taken seriously.
Now let us turn to the explanatory studies. Consider what goes into an "explanation" of law of the kind apparently sought by explanatory economic theories of law. The theory begins with a mass of microdata, "observables," composed of legal doctrines, practices, and decisions. Recent skeptical jurisprudence has (to overstate the case somewhat) tended to view these data as arbitrary historical artifacts, as multifarious reflections of so many obscure, culturally determined value choices, as compartmentalized in numerous, disrelated groups or areas. This "prescientific" stage is the one marked by Holmesian realist slogans: "[A] page of history is worth a volume of logic"; ""The life of the law has not been logic: it has been experience." The explanatory theorist, denying this logical nihilism, seeks a scientific explanation for the welter of legal microdata, an explanation in the compound form of (1) a descriptive law that can order the data, organize them into an elegant, trenchant, parsimonious macro-pattern, and impart to them an "implicit logic"; and (2) a hypothetical causal model that can account for the patterning so far observed and predict the forms of its extensions into areas or levels of detail not yet filled in.

In such an enterprise, nothing so vague and untestable as the indistinct social justice functions on which policy analysts can fall back will be serviceable. If we were to think of legal microdata—doctrines and decisions—as plotted on some appropriately chosen set of axes, composing a scatter diagram, then the needed descriptive law would appear as a well-defined function that could serve as a convincing regression line for those data. Explanatory economic theorists of law have not proposed—nor would it be reasonable to ask or expect them to propose—any algorithmic formulation of a social justice function (including an axis for distribution, not to mention rights or moral ambience) that could plausibly serve as such an implicit regression line. They use for this purpose, instead, the only well-defined economic criterion available, that of pure efficiency, or VM.

Explanatory theorists, in other words, cannot work into their theory any loosening, any modification, of pure efficiency without voiding the theory of explanatory and predictive power. And for like reasons they must exclude from the calculus of pure efficiency all possibility of private preferences for principles of right or social justice as such. Again, the warranty of habitability can illustrate. Under conventional economic analysis, implication of the warranty is evidently not efficient. But courts do in fact imply it, so it looks as though efficiency concerns have in this case been subordinated to

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noneconomic concerns about fairness, or justice, or whatever, and the case is thus potentially a telling counterexample against the positive economic theory of adjudication.

But must we really so regard it? After all, justice as a social state (or fair dealing, or right relations) may itself be viewed as a micro-economic good, a possible object of private preference. Like environmental states generally, social justice would be a "public good," one so heavily fraught with externalities of consumption that it will be undersupplied except by collectivized means. Now if the justice wrought by implying a warranty is simply another sort of possible object of private preference, we have to be prepared for the possibility that many members of society might be willing to pay plenty for it. If so, the implied warranty doctrine could, in the final analysis, well be consistent with the pure efficiency criterion of VM.

Professor Guido Calabresi has perceived enough significance in this class of public goods arising out of putative individual tastes for distributive or relational states to give them both a special name—he calls them "moralisms"—and special treatment within the economic theory of law. While Calabresi seems at one time to have been tempted by the thought of summoning the "moralism" concept to the defense of the economic explanation of law, using it to provide an economic rationalization for legal doctrines, like the unenforceability of enslavement contracts, that would otherwise have seemed economically defective, he has apparently had second thoughts.

Professor Posner, meanwhile, has properly spurned the temptation. In his oeuvre, economically dubious legal doctrines are "anomalies," or "puzzle[s]," or perhaps mistakes, but they are not judicial revelations of values placed by individuals on social morality. Posner's stance is clearly and strikingly expressed when he says, "No court would enforce [a wife's] contract [to immolate herself on her husband's funeral pyre]. No court would enforce Shylock's contract with Antonio. No court would enforce a voluntary contract to become another's slave... These examples are puzzling from an economic standpoint..."

Posner's abstinence from the moralism gambit is understanda-

47. See Calabresi & Melamed, supra note 46, at 1111-12.
48. See G. CALABRESI & P. BOBBITT, supra note 41, at 32-33.
49. E.g., Posner, supra note 35, at 765.
50. R. POSNER, supra note 6, at 187.
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ble, given his aim of producing a descriptive law of legal development having significant predictive and explanatory power. If moralisms were admitted into the realm of cognizable economic values, then, confronted with any legal doctrine whatsoever, no matter how economically bizarre, the theorist could begin with the hypothesis that judicial decisions are always efficient and deduce from that premise that the members of society (as the judges are presumptively able to divine) must value highly whatever consequences the doctrine in question actually has, or perhaps they just value the existence of the doctrine itself. The result, of course, would be a descriptive law that was strictly nonfalsifiable, consistent with any possible legal event and, accordingly, explanatory of none. 51

"Moralisms," like complex modified efficiency criteria, are devices for softening the rigors of a pure efficiency norm. "Moralisms" work by broadening the notion of efficiency itself to make it sensitive to people's supposed private concerns about distributional and relational states, while modified, compound efficiency criteria work by introducing such concerns as societal aims, to be combined in some appropriate way with the sometimes conflicting societal aim of maximizing the sum of private values. Neither device can be admitted into explanatory economic theories of law because, while softening the rigors of the pure efficiency criterion, they would also threaten to soften the theory's empirical projections into useless mush.

II.

Last evening I offered the view that much of contemporary legal criticism exhibits a kind of mild obsession with economic efficiency. By this, I do not mean to suggest that the possible bearing of non-economic norms is usually denied or ignored, but that such norms are often treated as peripheral or secondary, or they are left for someone else to explicate and defend, or an impression is somehow conveyed that they are less interesting or less real than economics, perhaps out of a suspicion that when all is finally understood non-economic norms can be dispensed with either because they will turn out to be mere derivations from efficiency or because, in the cool light of reason, they will fall before the latter's claims.

I also suggested last evening one possible reason for such a receptivity to economics in legal criticism—that is, its current clear comparative advantage over other modes of normative analysis in elegance, articulateness, and professional consensus. Today I want to

explore with you a different sort of inducement to overcommitment
to economics in legal criticism, one that stems from the striking suc-
cesses achieved by the positive economic theory of law in showing a
pervasive tendency for law—judicial, common law—to regress on a
norm of pure efficiency.

I do think that striking successes have been achieved, though it
should be noted that the economic regularity detected in law is by
no means so transparent, so beautifully simple, as the locution “pure
efficiency” might suggest. The efficiency criterion for law, in the
course of adapting itself to the raw legal microdata, has elaborated
itself into a number of different types of variables: the comparative
private valuations of interacting activities; the costs of errors in judi-
cial attempts to estimate these private valuations; the comparative
administrative (or process) costs of particularized inquiry under
broad principles and categorical application of more specific rules;
the costs of risk; and the costs of legal instability. Because the eco-
nomic theory of law has not yet arrived at a well-defined, neatly
structured set of relations among these sorts of variables, it displays
a certain flaccidity, a tincture of nonfalsifiability, despite its assidu-
ous and praiseworthy abstinence from the “moralisms” gambit of
which I spoke last evening. But that is a story for another day, on
which I cannot now dwell.

There is, at any rate, an appearance of striking descriptive suc-
cess, nurtured by claims for such success that are (with certain excep-
tions I shall be noting) reasonably moderate and fairly supportable.
Nothing more is required to feed my own thesis that the emergence
of pure efficiency as a descriptive ordering principle for law, as an
intellectual device for making the mass of legal microdata fall roughly
into line, contributes towards the sense that any given formulation
of law is true or false, right or wrong, good or bad, according to
whether or not it is efficient.

Before going further I want to say that I do not suppose it is
ultimately the intention of the positive economic theorists—Professor
Posner chief among them—to make or defend the claim that the only
good or right or true law is efficient law (though I also do not see them
repudiating that idea). Agreeing as they do in spirit with so much else
of Hume and Mill, they cannot easily be seen as repudiating the
empiricist legacy by purporting to leap from “Is” to “Ought.” Yet I
hasten to add that the positive theorists have not always been as
careful as one might wish to avoid inviting others to make the leap.
Professor Posner, for example, does not quite steer clear of the use of
judgmental language when discussing judicial doctrines or decisions.
Those regarded as economically unsatisfactory are sometimes called

52. See text accompanying notes 46-51 supra.
such names as "unsound,"53 or "peculiarly mechanical," or "conceptual," or "legalistic," or "specious,"54 while those believed to accord with good economics are called "proper,"55 or "correct."56 But these may be mere editorial lapses, of which one ought not make too much. More telling and disturbing is the appearance of essentialist and reductionist propositions, which it seems can only be meant to suggest the possibility that pure efficiency really is l'esprit des lois. I have already alluded to Professor Posner's claim of an "implicit economic logic"57 in the common law and to his purporting through economics to "define and illuminate the basic character of the legal system"58 or, as he says in the same place, to persuade that "the logic of the law is really economics."59 So much for essentialism. As for reductionism, consider the claim that "there are far more conceptual pigeonholes in the law of torts . . . than there are useful distinctions" and that the economic approach is a good one because it can "effect a drastic and necessary simplification of doctrine and . . . place the law . . . on a more functional basis,"60 or the claim that "[m]oral principles . . . serve in general to promote efficiency,"61 that insofar as the law incorporates such principles it tends to be efficient, that insofar as the law stops short of moral absolutism that too (as any marginalist could tell you) tends to be efficient—that, in short, "the relationship between law and morals" tends to be "economic" in "nature."62 Or consider the fact that positive analyses of law are often presented in a spirit of unmasking legal formulations that affect moralistic concerns (for example, fault,63 duress,64 procedural fairness,65 unjust enrichment,66 "the transcendent value of human life"67) so as to reveal them in their true guise of devices tending towards pure

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54. Posner, Killing or Wounding to Protect a Property Interest, 14 J.L. & ECON. 201, 221, 222 (1971).
57. R. Posner, supra note 6, at 179.
59. Id.
60. Posner, supra note 54, at 227.
61. R. Posner, supra note 6, at 185.
62. See id. at 185-87.
64. See R. Posner, supra note 6, at 80.
65. See id. at 430.
66. See id. at 97-98.
efficiency. Consider, finally, this manifesto near the beginning of Economic Analysis of Law:

[T]he true grounds of legal decision are often concealed rather than illuminated by the characteristic rhetoric of judicial opinions. . . . Indeed, legal education consists primarily of learning to dig beneath the rhetorical surface to find those grounds. It is an advantage of economic analysis as a tool of legal study rather than a drawback that it does not analyze cases in the conceptual modes employed in the opinions themselves. 68

Well, yes, one sees what he means. But you can carry a good thing, press an advantage, too far. You can sharpen minds by narrowing them, but you can also narrow minds by sharpening them; and you can mislead and confuse impressionable people by telling them that what a judge or anyone else says (or thinks) he is doing does not really constitute a part of what he is doing.

I pause for almost the last time to state what my thesis is not. I do not think that Professor Posner by main force of such statements persuades—as I do not suppose he ultimately seeks to persuade—anyone of that which we all reflectively know to be false: that you can infer “Ought” from “Is,” that you can step lightly from pragmatism to Platonism, that gross phenomenal regularity signifies particular inner truth or reality. What I do think is that we—many or most of us—start with some inclinations and channels already dug in our minds through which, when law is the object of interest, we can carelessly slip from an approximate empirical Is to a definite ideal Must or Ought to Be, and that statements such as those I have cited from Professor Posner can help to open the sluice gates and grease the skids.

The channels to which I refer are lines of normative political, including jurisprudential, argument, rooted in democratic liberal political thought. Ready in our political and jurisprudential imaginations, I suggest, are attractive lines of thought or argument that can all too easily conduct one from the perception of a pervasive and simplifying regularity in law to a belief that law ought to conform to the perceived regularity. My claim, again, is not that normative belief is logically entailed by descriptive regularity. It is, rather, that persuasive descriptive regularities can serve as premises in political arguments leading to normative conclusions and, further, that such arguments may exert their influence implicitly, catalyzing intuitive and unreflective leaps from descriptive law to legal norm. In the time I have left, my object is to make explicit both the arguments and their defects.

68. R. Posner, supra note 6, at 18.
Consider first the Burkean strain in our political thought, the strain that inclines us to accord legitimacy to time-honored political arrangements and practices, those organically endorsed by the acquiescence of a nonrebellious people. Recall that a complete explanatory theory must aspire to more than just a grossly, but imperfectly, successful descriptive law. It needs also a causal model to impart intelligible significance to the gross empirical regularity. In the most obvious sort of causal model, the sort proposed by Professor Posner, the empirical tendency of legal microdata to regress on pure efficiency is attributed to judicial motivation (albeit hazy, inarticulate, intuitive) to produce efficient law—a motivation Posner thinks may itself be explained by the workings of judicial self-interest under the institutional constraints imposed on adjudication, which supposedly impel judges in common law cases toward the solutions most accommodating to everyone's private desires.\(^69\)

To the corpus of extant, glacially evolving common law apparently belongs the vindication of long-standing popular acceptance; and a normative precept that not only provides a rather successful descriptive rationalization of that popularly accepted law, but also can be seen as having been purposefully used in the shaping of that law by lawmakers sensitive to popular approval, seems bound to attract some of that vindication, some of that legitimacy, to itself. Yet on a closer look there seems to be no firm basis here for finding any historical popular endorsement of the idea that judges ought to do whatever they can to make the law purely efficient. Such a conclusion seems blocked by the very air of revelation that suffuses the literature, whose aim so often seems to be to unveil the inner economic logic of law hidden beneath the moralistic dress in which judges have been prone to disguise it, themselves hardly conscious that all this time they have been speaking economics.\(^70\) The supposed judicial intention to shape the law efficiently has largely remained a hidden one. As Robert Nozick says, such a "hidden hand explanation," the kind that makes what at first looks like an undesigned collection of motley facts come at last to seem like the designed product of a covert intention, can be satisfying as an explanation. But, as Nozick also implies, explanations of that sort are not justifications, have no normative, no legitimating force; the satisfaction they impart is epitomized, for him, by "the popularity of conspiracy theories."\(^71\)

Professor Nozick does, however, believe there can be normative force in an opposite type of explanation he calls an "invisible-hand"
(as opposed to "hidden-hand") explanation—one that "explains what looks to be the product of someone's intentional design, as not being brought about by anyone's intentions." The idea, roughly, is that if an established political order, apparently reflecting a societal norm such as efficiency, can be shown to be one that might have evolved naturally out of countless interactions of rationally self-interested private wills, so that no one would have imposed that norm on anyone else and it just would be there, that would rule out certain kinds of complaints against that order. And there is, indeed, now available a causal model, proposed by Professors George Priest and Paul Rubin, for explaining how law might continuously evolve towards a socially efficient state without any judge or other person having so designed or intended. Their thought is that rationally self-maximizing individual litigants are more likely to incur the costs of relitigating a legal rule if the rule is inefficient. Thus, if judges are assumed to be oblivious to efficiency as an aim or value, and judicial output over any given period is accordingly assumed to be a random, hit-or-miss mixture of relatively efficient and inefficient rules, the parties' self-interested tendency to force the less efficient rules more often through the hit-or-miss judicial gamut will cause the total corpus juris over time to become free of inefficiency.

The Priest-Rubin theory, if true, might justify an efficiency-tending body of law against charges that its efficiency property has been dictatorially imposed on any person, but that will exhaust its normative force. At least one additional moral premise, that all values are arbitrarily private, would be needed to establish that the efficiency property exhibited by an order that freely self-interested actions might have created is to serve as a constraint on choices yet to be made about how we are to live together now and in the future. Its dependency on that moral premise is precisely what keeps efficiency perennially controversial as a moral imperative.

Imagine that a judge consciously holds a theory of what judges are supposed to do that is at odds in some way with the pure efficiency criterion for law. Can we persuade that judge to abandon that theory in favor of pure efficiency by arguing that the law will gradually work itself efficient no matter what the judge does, so she might as well do her part to help things along their inevitable course? Such an argument seems incoherent. To say that law is forever becoming efficient (because parties are forever trying to do what they prefer to do) is not to say that the law ever arrives at efficiency, or ever can.

72. Id.
Arrival at such a final destination would mean that people's motivations and aspirations, their joint assortment of talents and energies, their imaginations and opportunities, had all reached a fixed and final state. But if motivations, aspirations, talents, energies, imaginations, and opportunities are to some extent affected and shaped by the social conditions of people's lives, and if law itself is a significant factor in such conditions, and if the law generated by our judge's noneconomic theory will contribute to a social environment in some ways markedly different from that associated with the law generated by a pure efficiency theory (all of which I must say seems to me very likely to be so), then the judge, by sticking to her theory, will determine a different evolutionary trajectory for law than would judging by the dictates of pure efficiency. In either case the trajectory would always be bending towards an efficient state (if Priest and Rubin are right), but the states will not be the same ones.

But who are judges to choose for us these trajectories and the social states toward which they bend? With that question we enter the realm of normative jurisprudence, a part of our political tradition and ideology that I think contains the steepest and deepest of the intellectual ditches through which legal criticism can slide, carelessly and unreflectively, from Is to Ought.

Judicial accountability continues to be a central problem for normative jurisprudence. The general theory underlying a democratic political order requires the setting of conditions of acceptability for exercises of official power. For judicial power—the rendering of decisions in particular disputes by officers insulated from direct political check—it is widely thought that such a condition is that the judge's decisions be accountable to some set of external and objectively debatable criteria, usually conceived as a collection of rules and perhaps principles, by appeal to which the decisions can be critically tested.7

In order to meet the problem of judicial dictatorship, the body of precepts governing judicial action must apparently compose a complete system able to determine any and all disputes. The collection must be free (in the final analysis) of gaps, equivocations, contradictions, and ambiguities that the dictatorial judge can exploit. Moreover, a body of democratic law must be of nondictatorial authorship, derived by the judge from normative materials not proposed by himself or any other dominant individual, but contributed in some way by numerous participants in a nondominated and representative process.

It seems at one time to have been thought—perhaps there are those who still think—that judges can and should be supplied with

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74. The following discussion adheres closely to the views of Ronald Dworkin, expressed in various essays collected in R. DWORKIN, supra note 42.
an adequate stock of external, determinative rules by the enactments of popular (representative and electorally accountable) legislative bodies. Under this theory of democratic legislative supremacy, it is the task of legislatures to furnish the requisite stock of rules and that of judges to draw upon them (and only them) in deciding cases. It has come to be doubted and denied, however, that a set of rules can be legislatively produced that are impersonal and general enough to command the assent of a truly democratic legislature and, at the same time, complete and determinative for all cases so as to preclude judicial dictatorship. The prevailing belief is that no simple rule can be formulated that is both broad enough to cover every possible case and appealing enough to win legislative acceptance; that no rule complex enough to satisfy both those requirements can be formulated or comprehended by finite human intellects; and that, given the finitude of rules and rule systems that necessarily result, cases must occasionally arise that depend for their ultimate resolution on acts of judicial originality, no matter how dense the collection of finite, legislated rules. And so we have the problem of explaining how it is that the judicial originality that seems an inevitable component of a complete and mature legal system can be admitted while excluding unaccountable judicial discretion.

Many have sought and continue to seek the answer to that problem in a concept of law—especially common law, though the concept has a broader reach—as an organic, a living, corpus, a rich and complex body of more or less concrete formulations that, when properly parsed, can be seen to reflect a structured hierarchy of norms that will always contain, at some level of abstraction, a norm or subset of norms determinative of any case no matter how novel its features. This ever-mysterious and ever-fascinating idea of a multifarious, evolving, and open, yet intelligibly authoritative and determinative, body of law is the one that has Ronald Dworkin for its contemporary champion, and I ought to make no secret of my high regard and sympathy for Professor Dworkin's efforts. As he has, I believe, shown, through an argument I have no time to retrace, this concept of law depends on recognition of norms—"principles," as he calls them—distinguished from rules by their attributes of open-endedness, overlappingness, and relative "weight." Only a norm system with principles for its sinews can avoid the fatal defect of being fixed or complete as of any given moment, of being nothing more than a hugely ossified rule that would sooner or later fail for incompleteness or overbreadth when brought to bear on some novel case. A judge confronting a novel case will always and repeatedly face the task of reviewing, reformulating, and completing the system of legal principles. In order to perform the task democratically and nondictatorially, the judge will have to approach it as though engaged in a mutually respectful dialogue with judicial colleagues of the past and pres-
ent as well as with due regard for the rules and principles enacted by legislators and constitutional framers. Thus the judge will have to construe out of the inherited materials precepts for hierarchical or other relations among rules and principles emanating from various official sources, and all will finally have to be informed and ordered by some underlying normative idea of a democratic polity—the very same idea as that which prompted in the first place the Dworkinian judicial mission, that of construing out of the received materials a single, encompassing, always emergently original, "best theory of law." You can see why Dworkin chose the name "Hercules" for the mythic judge of this ideal theory. Just for a change, I am going to call her Wonder Woman.

The powerful appeal of what we may call a "living law" theory like Dworkin's for reconciling judicial originality with judicial accountabilty sets up, of course, a channel of thought through which guides to future judicial action will seem to emerge from empirical regularities in past judicial behavior. Thus the positive, descriptive economic theory of law may seem to ground a claim that Judge Wonder Woman, in search of organic principles implicit and reflected in the accumulated corpus juris, will or should arrive at the precept that judicial action, in all cases ungoverned by legislation, ought to be governed by the criterion of pure efficiency, by the goal of maximizing private values, minimizing waste, with tastes and distribution held constant. And the next time Dworkin or I tell the living law fable, we can call the fabulous judge by his or her right name: Posner.

But what I want you to see is that that's just a wisecrack, that what Professor Posner has done—for all that it is interesting and illuminating—is not the Herculean judicial task at all. To argue in support of a move from a gross economizing regularity detected in law to endorsement of pure efficiency as the sovereign legal norm would be to misunderstand the task of the judge in the democratic theory of the living law.

Let me ask you to recall at this point a reason I suggested last evening why positive economic theorists of law must use pure efficiency as their hypothetical ordering principle rather than some compound principle that in some way combines efficiency with other, noneconomic concerns. The reason, I suggested, is a strictly pragmatic one—the want of any such compound principle that exists or ever has existed in a form sufficiently articulate and consensual to guide a search for empirical order in law. The best available bet for a positive economic theory of law has been that the data would show a detectable tendency to regress on the line of pure efficiency. The positive economic theory is like a consulting firm retained to develop

a long-term strategy for placing bets on common law outcomes across a broad topical range of disputes, with the client stipulating that the betting strategy must be in harmony with his economic predilections and also that it must be clear and simple enough to be administratively cheap and reasonably foolproof. What emerges in response is the strategy of betting on the purely efficient doctrine and decision. You are not guaranteed a win on every bet. Indeed you are told you will lose some. But you are assured that over the long pull you will have net winnings well in excess of your costs in deciding how to place your bets.

But the judiciary is not a consulting firm for wagerers on legal outcomes. Its task is not to bring about an administratively simplifying purification of law or to reduce all of law to some one factor that currently seems to explain more of it than any other single, comparatively simple factor. There is nothing in normative democratic jurisprudential theory that would make simplicity such an overriding virtue in law. On the other hand, a reductionist interpretation of the judge’s task would be repugnant to the living law theory in several respects, of which I shall mention only two crucial ones.

Reductionism would apparently bring nonlegislated law to a dead end, closing off the leeways for judicial originality in the face of novel or hard cases that the living law theory strains to preserve in a nondictatorial form. Imagine a post-reduction court confronted with a suit on a widower’s contract (made with his deceased wife’s sister, who paid money in exchange for the promise) to leap into his wife’s funeral pyre, or a suit by Shylock for a pound of Antonio. Since the only post-reduction legal principle, that of pure efficiency, apparently calls for a decision in the plaintiff’s favor—at least Posner seems to think so—what is the court to do? If enforcement is granted, we shall have a major and outrageous inconsistency with prior legal principle. If denied, the case will have generated some second legal principle henceforth to share the field with pure efficiency. Reduction will have been either vicious or futile.

Reducing law to one simple principle that seems more prominent in the extant law than any other comparably simple principle entails discarding, as spurious, all the prior law not covered under the favored principle. Such a procedure nullifies all those contributions to the diffuse and representative process of law definition that have proposed or reflected any norm other than the sole surviving one.

76. That normative theory does demand that law be principled and that its principles compose a coherent, consistent, determinate system. But a system of legal norms can be complex without at all compromising its coherence, freedom from contradiction, or the principled quality of the norms.

77. See notes 50-51 supra and accompanying text.
Certain contributions would thus, retroactively, be given infinitely more weight than others, although all presumably reflected a like effort at deciphering the whole corpus of law as it stood at each respective moment of decision. Such preferential weighting would apparently undermine the living law theory's attempt to furnish judge-fashioned law with a democratic base. It would be false to respond that the suppressed contributions are qualitatively inferior ones that, as we can now see with hindsight, failed to grasp the true, emergent spirit of the laws. Because the reductionist judge will not have made the Herculean effort to reconcile all the principles found in extant law (by, for example, delimiting ranges for various principles and reformulating them without violating their consistency with decisions falling within their respective ranges), salvaging as much as possible and discarding the minimum necessary to purge the rest of contradiction, the judge is in no position to conclude that any past invocation of a now discarded principle was inconsistent with the totality of law as it then was.

Let me try to put it a little less abstrusely. There is evidence suggesting that efficiency has been an influential factor in prior law. The same evidence suggests with at least equal force that efficiency has not been the only influential factor. I cannot myself see why the evidence is not quite consistent with a hypothesis that pure efficiency has been a residual factor, a tie breaker lying at the bottom of a hierarchy of norms, a consideration to fall back on when no superior principle of justice; fairness, equality, reciprocity, altruism, whatever, succeeds in ranking the competing claims of the parties. If there were a significant proportion of cases in which the noneconomic principles, though superior in rank, were inapplicable or otherwise indeterminate, the residual pure efficiency principle would shine clearly through the data. Be that as it may, the reductionist approach would be a flight from the task of figuring out the meaning of all the data of the law. The task is Herculean to be sure; but only as it is undertaken can anyone say, for any particular case that may arise, whether it falls within the province of the pure efficiency principle.

The trap to be avoided is the one depicted by Bertrand de Jouvenel, insisting on the radical discontinuity between natural and political science:

We may study the movements of celestial bodies without concerning ourselves with astronomers' concepts which, though they were once believed, do not correspond to the reality; this is so because the movements themselves are unaffected by our beliefs about them. But the position is quite different when it comes to the ideas conceived at different times of Power; for government, being a human, and not a natural, phenomenon, is deeply influenced by the ideas men have of it. And it is true to say that Power expands under cover of the beliefs entertained about it.
It is an agreeable game, imagining how man, if he had the power, would reconstruct the universe—the simple and uniform lines on which he would do it. He has not that power, but he has, or thinks he has, the power of reconstructing the social order. This is a sphere in which he reckons that the laws of nature do not run for him, and there he tries to plant the simplicity which is his ruling passion and which he mistakes for perfection.\footnote{78}