Wealth Maximization Redux: A Defense of Posner's Economic Approach to Law

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ABSTRACT

This article examines the principle of wealth maximization, as developed by Richard Posner, seeking to dispel misunderstandings, address criticisms, and contextualize its role in legal and political philosophy. The paper first delineates the distinction between the concepts of experienced utility and decision utility, elucidating how the latter is fundamental to the principle of wealth maximization. Next, the authors engage with criticisms of wealth maximization, including issues relating to basic needs, individual rights, and distributive justice. The paper contends that these aspects of 'justice' can be understood as emergent properties of efficiency. The article then presents affirmative arguments for wealth maximization by connecting it to social contract theory and demonstrating its consistency with the tenets of liberal democracy. By analyzing the concept from both Hobbesian and Rawlsian perspectives, the paper illustrates the merits of the wealth maximization principle in relation to social contract theory. In conclusion, the article argues that wealth maximization serves as a robust and justifiable framework for legal and philosophical analysis, ultimately offering a better fit with the principles of liberal democracy than competing normative theories.

Keywords: Wealth maximization, maximand, social welfare functions, intellectual history

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Richard Posner's *Economic Analysis of Law* (1973a) exposits a legal theory grounded in a normative principle known as 'wealth maximization.' Although wealth maximization had been a well-established objective in pure economics,[3] its application to the law was, upon the publication of *Economic Analysis of Law*, still a novelty, and it elicited spirited objections from lawyers, economists, and philosophers.

Yet despite its critics, *Economic Analysis of Law* was nevertheless pivotal in demonstrating the versatility of economic reasoning and catalyzing the nascent 'law and economics' movement.[4] In the decades

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[3] Mas-Colell, Whinston, and Green 1995, 11.

[4] According to Shapiro 2012, Richard Posner is the third most-cited legal scholar of all time. A search of HeinOnline and LexisNexis reveals that *Economic Analysis of Law* has been cited 72 times in U.S. Supreme Court opinions, and 1,707 times in U.S. Circuit Court opinions.

following its publication, the economic perspective which it exemplified has emerged as the leading mode of academic legal analysis.[5] It has moreover exerted substantial influence on judicial decision-making.[6] Yet the principle of wealth maximization—the framework undergirding *Economic Analysis of Law*—remains a topic of contention.[7]

In this Article, we aim to recontextualize the development of the wealth maximization principle, respond to salient criticisms of the theory, and connect it to the broader philosophical tradition of social contract theory.[8] Taxonomically, wealth maximization falls within the class of normative systems labelled 'welfarist.' A welfarist normative system consists of two components: the 'maximand,' which refers to the factor that the system aims to optimize or enhance, and the 'aggregation method,' which denotes the procedure employed to quantify and combine the instances or levels of the maximand across individuals.[9] For wealth maximization, the maximand is economic surplus, measured in terms of an individual's 'willingness to pay' to satisfy their preferences, and the aggregation method is arithmetic summation.

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[5] McCluskey et al. 2016, Medema 2015, Bix 2019.

[6] Easterbrook 1984, 1985, Ash, Chen, and Naidu 2022.

[7] *Economic Analysis of Law* is in some sense an exercise book on the application of wealth maximization to legal problems. However, in the first edition, Posner's explicit treatment of foundational issues occupied little more than one (uncharacteristically apologetic) paragraph:

> When resources are being used where their value is greatest, we may say that they are being employed efficiently. Despite the use of terms like 'value' and 'efficiency,' economics cannot tell us how society should be managed. Efficiency is a technical term: it means exploiting economic resources in such a way that human satisfaction as measured by aggregate consumer willingness to pay for goods and services is maximized. Value too is defined by willingness to pay. Willingness to pay is in turn a function of the existing distribution of income and wealth in society. Were income and wealth distributed in a different pattern, the pattern of demands might also be different, and efficiency would require a different deployment of our economic resources. The economist cannot tell us whether the existing distribution of income and wealth is just, although he may be able to tell us something about the costs of altering it as well as about the distributive consequences of various policies. Nor can he tell us whether, assuming the existing distribution is just, consumer satisfaction should be the dominant value of society. The economist's competence in a discussion of the legal system is limited to predicting the effect of legal rules and arrangements on value and efficiency, in their strict technical senses, and on the existing distribution of income and wealth.

Posner 1973a, 4 (although some aspects of redistribution are also considered in Part V, 212–243). The second edition devotes somewhat greater attention to foundational issues and includes a new section responding to critics. Posner 1977, 10–14, 19–23, 339–385. Subsequent editions further expanded the coverage of fundamental topics, and Posner's treatment of methodological issues grew increasingly sophisticated and forceful in succeeding iterations. However, methodological foundations were never a major focus of the book in any of its editions. Posner 2014, 13–17, 34–35. 633–702. It seems that Posner wanted *Economic Analysis of Law* to be a book about the *application* of wealth maximization rather than a *justification* of wealth maximization. He does defend the methodological virtues and validity of wealth maximization explicitly in Posner 1979, 1981, 1985, 1990 however.

[8] *A disclaimer.* Although the authors of this Article are in general agreement that the merits of wealth maximization tend to be underappreciated, we diverge on the implications and extent of our support for the theory. Parisi holds the more moderate position, favoring a pluralistic approach incorporating the lessons of its critics in certain areas of the law. Pi is more unequivocal in his support, rejecting compromise with competing theories. In the spirit of this special issue on the anniversary of the first edition of *Economic Analysis of Law*, we have elected to err on the side of decisiveness, with the understanding that the more unyielding elements of this Article reflect the views of Pi more than Parisi.

[9] Note that non-welfarist normative systems cannot in general be characterized in this way. See, e.g., Kant 2017 [1797], Nozick 2013 [1974], Taylor 1989.

This Article is organized in three parts. In Section I, we track the historical development of wealth maximization from its origins in eighteenth century utilitarian moral philosophy. In Section II, we summarize and rebut several notable objections to wealth maximization from the prior literature. Finally, in Section III, we recontextualize wealth maximization as an extension of social contract theory. We contend that critics have not fully appreciated the nuanced role that wealth maximization serves in normative legal analysis. We propose that it is not the ersatz utilitarian moral theory that its detractors suppose. Despite superficial appearances, its philosophical foundation is more distant from *Bentham* and closer to *Hobbes* than is customarily assumed.[10]

I. Wealth Maximization Explained

The concept of wealth maximization was developed primarily to circumvent technical problems in utilitarian moral theories and welfare economics. As it was a response to theories which were themselves responses to earlier thought, we begin our inquiry at the inception. The classical utilitarianism of Bentham (2019) [1789] and Mill (2003) [1863] equated *moral good* with the maximization of 'utility.' The classical approach is hedonistic, identifying 'utility' with pleasure, and 'disutility' (or negative utility) with pain. It aggregates utility by simple addition, summing all the pleasure and pain in the world. An act is 'good' if it maximizes pleasure (and minimizes pain) in the world. There is much to admire in the classical approach. It is ostensibly grounded in facts, as it regards pleasure and pain to be observable phenomena. Moreover, it is simple and theoretically tractable.

However, despite its merits, numerous problems were discovered which rendered the philosophy untenable. For example, Moore (1994) [1903] observed that the calculation of consequential effects on global utility will tend to be infeasible in practice. People are not generally capable of anticipating how a given act will affect aggregate utility in the world, projecting forward into the infinite future. Sidgwick (1981) [1874] complained that maximizing total utility in the world would be unachievable for most people in most instances. It is too high a standard to ask people to practice in their daily lives. Edgeworth (1967) [1881] objected to the absence of distributive considerations in the classical model. The simple addition of utilities too easily allows the misery of a few to be offset by the happiness of the many.[11] Finally, Bradley (1877)

[10] Bentham 2019 [1789], Hobbes 1996 [1651].

[11] Nozick 2013 [1974], 42–45 raises a similar concern in an amplified form in his 'utility monster' thought experiment.

observed that the classical approach can often entail absurd results, such as justifying the punishment of an innocent person to satisfy the bloodlust of an angry mob.[12]

Note that historical dissatisfaction with classical utilitarianism implicated both its maximand and aggregation method. Several variations of utilitarianism subsequently arose to address these defects, varying the choice of maximand and aggregation method to avoid or address the problems.[13]

A. The Choice of Maximand

Nineteenth century economists were deeply influenced by the classical utilitarians, adopting much of their theory and terminology. Consequently, the criticisms which discredited the moral philosophy would also prove problematic for the economic theories which incorporated its principles. The identification of utility with pleasure was an obvious source of difficulty in the classical approach. As early as 1881, Edgeworth (1967, 7–8) [1881] lamented the difficulty of «[comparing] the happiness of one person with the happiness of another,» urging that «[s]uch comparison can no longer be shirked, if there is to be any systematic morality at all.»

However, no sensible means of quantification ever developed, and the term 'utility' gradually evolved away from signifying pleasure. Although economists still occasionally intend the term 'utility' to refer to happiness or pleasure, this usage is generally regarded as archaic. Today, in most circumstances 'utility' refers to the relative intensity of a decision-maker's preferences for possible states of the world. The terms 'experienced utility' and 'decision utility' are sometimes used to disambiguate the two meanings. There are several crucial distinctions separating decision utility from experienced utility. First, an individual can prefer one possible state of the world over another, even if the preferred state gives them less pleasure. Second, whereas pleasure is an intrinsic phenomenon, preferences are *relations* between possible states of the world. An experienced utility is simply the intensity of pleasure that an individual feels in a given circumstance. It is not relational. However, decision utility represents the *relationship* between the preference an individual has for one possible state of the world compared to another possible state of the world. Third, experienced utility can only be accessed introspectively, whereas decision utility can be inferred by observing an individual's choices.

The use of decision utility in economics sidesteps many of the problems associated with experienced utility. Unlike pleasure, an individual's choices can be observed and measured by third parties directly. A

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[12] See also Ross 2002 [1930], Rawls 1999 [1971], 19–24, Smart and Williams 1973.
[13] See generally Parisi 2004 and Klick and Parisi 2005.

theory of choice grounded in decision utilities is thus falsifiable. Moreover, the quantifiability of preferences enables economic theorists to construct rigorous models of decision-making. In particular, the 'rational choice model' (which represents behavior as the maximization of the probability-weighted preferences) has proven exceedingly fecund, driving virtually every advancement in theoretical economics. The effectiveness of this approach in positive economics motivated scholars working in welfare economics to repurpose preference satisfaction to normative ends. By inferring cardinal values from preference orderings, an essential part of the classical utilitarian project was resuscitated. The social objective could now be understood as maximizing the satisfaction of preferences rather than maximizing 'pleasure.'

Informed by these developments in economics, a later generation of utilitarian philosophers imported elements of the new economic approach into their moral theories. This species of utilitarianism is known as 'preference utilitarianism.' It identifies the satisfaction of preferences, rather than pleasure, as the basic moral good.[14] Like the modern economists, preference utilitarians understand 'utility' as a relation between *possibilia*. What the preference utilitarian means by 'good' or 'evil' might therefore be more accurately understood as mapping to the lay meanings of 'better' and 'worse.'

While the analytical focus on preference satisfaction in both economics and philosophy resulted in significant improvements over classical utilitarianism and its economic corollaries, it also generated new problems. The principal defect raised by opponents of preference utilitarianism and critics of cardinal utility in economics is the 'incommensurability of preferences.'[15] The problem is that preferences are inextricably bound to the perspective of decision-makers. Possible states of the world are not 'better' or 'worse' *simpliciter*, but rather 'better' or 'worse' according to a given individual. For example, it is sensible to claim that John and Mary each prefer possible states of the world in which they have a steak dinner rather than a lobster dinner. In the economic sense, both attach more 'utility' to steak than lobster. However, it is nonsensical to compare whether the utility John attaches to eating steak is greater than the utility that Mary attaches to eating steak. Indeed, it is indeterminate what it even *means* for John's utility to be 'greater' than Mary's utility. The

[14] Hare 1991 [1952], 1981 and Singer 2011, 11–18.

[15] Arrow 1963, Robbins 1935, Harsanyi 1955, Sen 1970, Raz 1986. Note that the term 'incommensurability of preferences' is also sometimes used to describe the difficulty of comparing preferences *intra*personally. The idea is that an individual's qualitatively distinct preferences cannot be collapsed into the one-dimensional preference ordering assumed in rational choice theory. For example, proponents of intrapersonal incommensurability might contend that an individual's love for their children cannot be meaningfully compared with their love for poetry or their love for mathematics, because these preferences are so radically different in kind. See generally Mason 2018, Hsieh and Andersson 2021. Although Nussbaum 2015 seems to think this poses a problem for wealth maximization. This cannot be right. Since the basis for wealth maximization is decision utility rather than experienced utility, every person's preferences are necessarily collapsed into a value-monistic ordering inasmuch as the person *must* ultimately make choices which imply value comparisons (even if the choice is inaction). Since it is not possible to 'choose' to do two inconsistent acts, value monism is implicit in the very nature of decisions, and therefore it is implicit in decision utility.

interpersonal utility comparison is not merely unknowable; it is *incoherent*. To ask whose preference for steak is greater would be like asking whether the sound of a trumpet is 'brighter' than the color of a tulip. Although it may be sensible to say that the sound of a trumpet is 'brighter' than the sound of a clarinet, and that the color of a tulip is 'brighter' than the color of gravel, it is nonsense to compare the 'brightness' of trumpets and tulips.

The meaning of the term 'brighter' is different when it used to describe sounds than when it is used to describe colors. It is polysemous. The term 'preference' in reference to John or Mary is likewise polysemous. It is an abuse of language to declare that 'steak $\succ$ lobster' is true for both John and Mary. Disambiguating the two meanings of the preference relation '$\succ$,' it is clear that 'steak $\succ_{\text{John}}$ lobster' and 'steak $\succ_{\text{Mary}}$ lobster' express independent propositions. The relations '$\succ_{\text{John}}$' and '$\succ_{\text{Mary}}$' are distinct and unrelated. We can only compare John's preference for eating a steak dinner relative to *his* preferences for other possible states of the world, and we can only compare Mary's preference for eating a steak dinner relative to *her* preferences for other possible states of the world. We cannot relate the magnitude of John's preferences to Mary's preferences, for we have no principled basis for comparing the intensity of preferences *between individuals*. Yet if it is not possible to compare utilities, then it will not be possible to aggregate utilities. This presents a problem for preference utilitarians seeking to define morality in terms of the aggregate social good, and it presents a problem for welfare economists seeking to characterize social welfare in scientifically quantifiable terms.

The incommensurability of utility seems an insurmountable defect both for preference utilitarianism and for welfare economics. Indeed, it is among the principal reasons why utilitarianism generally has declined in popularity since the middle of the twentieth century.[16] It is also one of the principal reasons why orthodox economics generally favors the Pareto (1897) definition of efficiency, which does not require interpersonal utility comparisons.[17] Viewed in the context of this history, wealth maximization can be understood as an effort to circumvent the incommensurability problem. Wealth maximization does not define social welfare as aggregate utility, but rather as aggregate wealth. This further refinement of the maximand retains the desirable characteristics of preference satisfaction, while enabling interpersonal comparisons measured in money terms.

The term 'wealth' denotes the value assigned by an individual to a possible state of the world, as measured by their willingness to pay to actualize it. For example, suppose that John would be willing to pay

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[16] Rawls 1999 [1971], Sen 1979, Chang 1997. See also Bourget and Chalmers 2013.

[17] Mas-Colell, Whinston, and Green 1995, Boadway and Bruce 1984. A state of the world is 'Pareto efficient' if and only if it is impossible to make any individual better off without making at least one individual worse off. This does not require an interpersonal utility comparison, because it relates the private welfare of an individual in one possible world to that same individual's welfare in other possible worlds. Although an analysis of Pareto efficiency requires repeating *intra*personal utility comparisons between possible states of the world for every individual in isolation, it does not require *inter*personal comparisons of utility.

$100 for a steak dinner and $85 for a lobster dinner, and Mary would be willing to pay $125 for a steak dinner and $115 for a lobster dinner. Suppose the price of a steak dinner is $75, and the price of a lobster dinner is $70. John's wealth would therefore increase $25 if he bought a steak and $15 if he bought a lobster,[18] whereas Mary's wealth would increase $50 if she bought a steak and $45 if she bought a lobster.

Note that wealth maximization preserves the *intra*personal ordering of preferences, assuming individuals are willing to pay more to realize possible states of the world for which they have a stronger preference. Yet unlike preference utilitarianism, it also allows for *inter*personal utility comparisons, providing an objective metric, external to the decision-makers' minds, with which to measure the intensity of their preferences.

Wealth maximization thus furnishes a tractable theoretical framework for analyzing social interactions. For example, suppose that John and Mary go to the grocery and discover that there is only one steak remaining. Due to the incommensurability problem, preference utilitarianism cannot provide any principled basis for allocating the steak to one customer rather than another. Neither can Pareto efficiency, for the possible world in which John is allocated the steak and the possible world in which Mary is allocated the steak are *both* Pareto efficient. However, if we analyze the problem in terms of each customer's willingness to pay, we observe that Mary values the steak more than John, because her wealth would increase $50 if she were allocated the steak, whereas John's wealth would only increase $25 if he were allocated the steak.

Note however that this does not necessarily imply that the steak ought to be sold to Mary. Observe that Mary's opportunity cost (the lobster) is greater than John's opportunity cost. If John gets the steak and Mary gets the lobster, then the total wealth of society increases by $70 (i.e., John's surplus of $25 plus Mary's surplus of $45). Whereas if John gets the lobster and Mary gets the steak, then the total wealth of society increases by only $65 (i.e., John's surplus of $15 plus Mary's surplus of $50). Since $70 > 65$, the aggregate wealth of society is maximized when John gets the steak and Mary gets the lobster.

The use of 'willingness to pay' to measure wealth thus preserves the aspects of preference utilitarianism which made it appealing, while sidestepping the incommensurability problem which undermined its use in normative policy analysis.[19] It is an elegant solution. Inasmuch as the incommensurability problem is fundamentally a problem of pricing, the wealth maximization 'solution' is

[18] John's surplus from purchasing steak would be $25 because he values the meal at $100, but he must give up $75 to have it, and $100 - 75 = 25$.

[19] Hausman and McPherson 1986, Adler and Posner, 1999, Varian 2014, Mitchell and Carson 1989.

simply to allow each person to price their own utility. Every individual determines for themselves how their preferences ought to be measured in relation to the preferences of others.

B. The Choice of Aggregation Method

The difficulties associated with interpersonal utility comparisons also affect the choice of aggregation method. The classical utilitarians considered pleasure a real and measurable phenomenon. It follows that their definition of social welfare would simply be the total quantity of pleasure that exists in the world. It made sense therefore that the aggregation method for the classical utilitarians was simple addition. For example, in a society consisting of two individuals, Smith and Jones, suppose Smith experiences 5 utils of pleasure and Jones experiences 7 utils of pleasure. The classical utilitarian would compute social welfare in that circumstance as the sum $5 + 7 = 12$ utils.

However, for preference utilitarians and modern economists, utility is not 'real' in an ontological sense. There are no such things as 'utils.' This makes addition infeasible. Whereas pleasure and pain were thought to be natural kinds, preference satisfaction is a subjective state interposed upon facts which does not map onto an objective division in the world. It would therefore be nonsensical to define social welfare as the 'addition' of preference satisfactions.

The Pareto (1897) definition of efficiency avoids this problem. The Pareto criterion asks not whether some value has been maximized, but rather whether a reallocation of resources would render at least one person better off without making anyone worse off. If no such reallocation were possible, then the *status quo* would be 'Pareto efficient.' The Pareto criterion has several advantages. First, it avoids the incommensurability problem because it does not require interpersonal utility comparisons. Second, because the Pareto criterion cannot make any individual worse off, no one would object to a Pareto improvement, and at least one person will complain if a Pareto efficient state of affairs were disturbed. This means that every member of society figuratively has the right to 'veto' any change in the state of the world. It is thus an eminently democratic normative criterion.

However, Pareto efficiency may be criticized for being *too* democratic. By affording each individual a metaphorical 'veto,' it defines efficiency so strictly that many common sense improvements to the *status quo* violate the Pareto criterion. For example, it would violate the Pareto criterion to inconvenience one individual, however slightly, in order to save a hundred lives. Relatedly, Pareto efficiency may be criticized for being overly broad. A circumstance can only be Pareto *inefficient* if no individuals would veto a change. Therefore, infinitely many possible arrangements would satisfy the requirements of Pareto efficiency, and the

Pareto criterion is incapable of distinguishing between them. For these reasons, Pareto efficiency is a theoretically unsatisfying definition of social welfare. Yet it is plausibly the best definition possible which does not require interpersonal value comparisons.

When interpersonal comparisons are feasible however, the additive method is clearly preferable. In welfare economics, additive aggregation is known as the 'Kaldor-Hicks criterion.'[20] To understand its motivation, consider two possible states of the world A and B. Suppose we are faced with a decision which would transform the *status quo* A into B. The core idea of the Kaldor-Hicks approach is that state B is superior to A if and only if those who benefit from the change profit enough to compensate those who lose. At the extremum, a state of the world is 'Kaldor-Hicks efficient' when there exist no further reallocations which would be Kaldor-Hicks improving.

For example, imagine a tract of land is discovered to contain valuable minerals. Suppose a mining company wishes to extract those minerals, but that its operations would result in environmental destruction, negatively impacting the health of nearby residents. Allowing the mining company to conduct its operations would certainly violate the Pareto criterion because the residents would be left worse off than if the extraction had not happened. However, under the Kaldor-Hicks approach, if the mining company could extract the minerals, compensate the residents leaving them no worse off, and still have some profit for themselves, then that arrangement would represent an improvement in social welfare. For this reason, the Kaldor-Hicks criterion is sometimes referred to as the 'Kaldor-Hicks test of potential compensation' or 'quasi-Pareto improvement.' Note that the Kaldor-Hicks criterion is a test of *potential* compensation because it only requires a comparison of gains and losses. It is not equivalent to the Pareto criterion, because the losers need not be compensated in actuality for the Kaldor-Hicks criterion to be satisfied.[21]

C. Wealth Maximization in the Context of Law

Kaldor (1939), Hicks (1939), and Scitovsky (1941) implicitly assumed that the maximand of additive aggregation would be wealth. The principle of wealth maximization thus predated its use in legal analysis by more than thirty years. Isolated applications of wealth maximization to the law were present in the works of

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[20] Formulation of the criterion has been attributed to three economists working independently: Kaldor 1939, Hicks 1939 and Scitovsky 1941.

[21] Mathematically, aggregation using the Kaldor-Hicks criterion is the sum of wealth in a society and therefore represents a return to the aggregation method of the classical utilitarians—except with a wealth maximand instead of pleasure.

Coase (1960), Calabresi (1961), and Becker (1968). However, it was Posner (1973a) which demonstrated the full extent of its explanatory potential.[22]

The application of wealth maximization to law required several adaptations. First, the law does not typically effect states of the world directly. Instead, it manipulates incentives using general rules which induce rational citizens to alter their behavior. When that modified behavior increases the total economic surplus, then it is a 'Kaldor-Hicks improvement.' When that improvement is maximal, then it is 'Kaldor-Hicks efficient.' The efficiency of legal rules is thus derivative. A legal rule is efficient in virtue of its effects on behavior, and behavior is efficient in virtue of its effect on total economic surplus. When applied to law, the normative objective is therefore twice removed from the policy instrument. Consequently, the pure economist and the lawyer mean subtly different things by 'efficiency,' even when both are operating in a Kaldor-Hicks framework. The pure economist uses the term 'efficient' to describe a state of the world, whereas the lawyer uses the term 'efficient' to describe the effects of legal rules. Since rules of general applicability inevitably involve tradeoffs, the 'efficient rule' will rarely induce a truly efficient state of affairs. What is sought instead is to get as proximate to efficiency as practicable without resort to *ad hoc* interventions.

Wealth maximization has proven to be a remarkably effective instrument for the analysis of law. It has been applied to every conceivable circumstance involving legal rules, requiring only minimal adjustments and generating accurate predictions and often profound insights. In the great majority of situations, it explains why the rules are what they are. Since legal rules often gravitate toward efficiency through a process of natural selection,[23] proving that a prevailing rule is efficient explains why it is the law. In instances where the prevailing rule is not efficient, the wealth maximization approach furnishes a justification for reform. It is thus a *complete* theory of the law.

II. Wealth Maximization Criticized

Both the wealth maximand and the Kaldor-Hicks criterion have been criticized from a variety of scholarly perspectives. In this Section, we examine several historically significant objections and offer some fresh rebuttals in defense of the theory.

[22] Other comprehensive treatments include Shavell 2004, Polinsky 1989, Cooter and Ulen 2020, and Miceli 2017. However, Posner 1973a remains the most widely cited work attempting the 'treatise' approach, and many legal scholars—especially those working outside law and economics—take it to be the quintessential representation of the economic perspective.

[23] Posner 1973b, Priest 1977, Rubin 1977, Priest and Klein 1984, Parisi 2002.

A. The Choice of Maximand

Many critics implicitly hold the belief, even if they do not consciously recognize their commitment to the premise, that experienced utilities are real and comparable. They object to the use of wealth as a maximand, not because of any inherent defect in the theory, but rather because they consider wealth to be a poor proxy for experienced utility.

One common complaint of this type is that the wealth maximand is indifferent to qualitative differences in the use of money. Under wealth maximization, 'a dollar is a dollar,' regardless whether it is used to buy life-saving medicine or a new set of golf clubs. The critic contends that this is a problem because the utility that a dollar buys differs according to its use. Intuitively, a dollar spent in the pursuit of health is 'worth more' than a dollar spent in the pursuit of leisure. However, the wealth maximand does not imply that the subjective value of money is fixed. An individual's risk preferences, taste for fairness, and all the other factors affecting their well-being are not obscured but rather credibly revealed by their willingness to pay. When subject to a budget constraint, ordinary individuals will sooner spend their money on health than on leisure. What the wealth maximand does *not* capture is the difference in the effect of money on utility *between* different individuals. However, this is not an inadequacy of the wealth maximand. The utility that one individual attaches to medicine cannot be compared to the utility that *another* individual attaches to golf clubs. The incommensurability of interpersonal preferences means that the comparison is not only infeasible but that it is meaningless. It is a *virtue* of the wealth maximand that it does not pretend to simulate such a comparison. The relative value of medicine for one person versus golf clubs for another person can only be compared using the money that each is willing to pay. This is not an artifact of using wealth as the maximand. It simply reflects the fact that utilities cannot be compared directly.

Another objection of this type relates to a phenomenon which economists call the 'affluence effect.' Let S denotes the set of all possible states of the world; let $u: S \rightarrow [0,1]$ denote a person's utility function; and let e denote the person's 'endowment.' An endowment is the initial allocation of resources that a person possesses, including goods, assets, and capital. It follows that the money price an individual attaches to a state of the world $s \in S$ (i.e., their 'willingness to pay' for s) will simply be $u(s) \times e$.[24] In other words, in a wealth maximizing society, the preferences of affluent people will tend to matter more than the preferences of poor people because wealth is measured by an individual's willingness to pay, and affluent people can leverage a greater e value. If one believes that experienced utilities are real and measurable, then this can result in social

[24] Jaffe, et al. 2019, 24. We concede this may be somewhat simplistic. For example, illiquidity could reduce the willingness to pay for individuals who possess large endowments. However, the general principle will nevertheless be true.

policies which misallocate resources to affluent individuals who 'value them less' (in experienced utility terms).

To illustrate, suppose John D. Rockefeller ambles through an art gallery and spots a painting which he finds interesting. Suppose a poor railroad worker also notices that same painting, but it sends him into a state of profound euphoria. Imagine that the railroad worker, who earns $500 per year, would be willing to pay $250 to purchase the painting, and Rockefeller, who is worth billions, would be willing to pay $300. From the perspective of wealth maximization, social welfare is greater when Rockefeller possesses the painting than when the railroad worker does, despite the railroad worker being willing to sacrifice half his annual salary to have it. However, common intuition suggests that the railroad worker has a 'stronger' preference, despite his lower willingness to pay.

Critics who consider the affluence effect a problem are implicitly asserting that there exists some 'true' comparison of experienced utilities. Since they believe that wealth is meant to be a proxy for experienced utility, and a greater endowment does not entail greater happiness or pleasure, they conclude that the affluence effect represents a fundamental problem with the use of wealth as the maximand. Notice that this criticism relies upon the premise that interpersonal utility comparisons are possible in principle. Although these critics may accept that such comparisons are *inaccessible*, they still believe there is a truth to the matter. They believe that there is a true answer to the question whether Rockefeller or the railroad worker derives 'more utility' from the painting. However, incommensurability is not merely an epistemic problem; it is an ontological problem. For the reasons we discussed in Section I (A), experienced utility is not susceptible to interpersonal comparisons. It is not merely that we cannot *know* whether Rockefeller or the railroad worker experience 'more utility' from the painting. The point is that there is no true answer because the question is nonsense. The words 'more utility' and 'less utility' have no meaning when comparing experienced utilities between persons.

To better appreciate this point, suppose we choose to identify experienced utility with some aggregate measure of dopamine, serotonin, oxytocin, or endorphin levels, assuming these hormones and neurotransmitters are the fundamental causes of pleasure or happiness at a neurological level. These are at least measurable in principle. The critical problem with this approach is that it equates pleasure with neurological properties in a one-to-one relation. It is conceivable that the effect of an equal quantity of dopamine may manifest differently for different individuals. Exposed to the same level of dopamine, an individual with a high sensitivity could experience a state of ecstasy while an individual with a low sensitivity might experience merely a dull state of contentment. There is simply no principled way of equating mental

phenomena with neurological properties. Note that this does not presuppose anything philosophically controversial about the relationship between minds and brains. Even if the mind is nothing more than processes in the brain, we cannot infer that a greater intensity in brain processes correlates to a greater intensity of mental phenomena. More to the point, we would still lack a criterion for comparing the neurochemical properties of one brain to those of another. We might determine neurochemically that Rockefeller derives more pleasure from collecting beetles than paintings. This requires only a comparison of like kinds: i.e., Rockefeller-dopamine to Rockefeller-dopamine. Yet we would still be left with the problem of comparing Rockefeller's neurochemicals to the railroad worker's neurochemicals. Clearly, this approach offers no escape from positing arbitrary relations.

The experienced utility approach also implies the absurd conclusion that all the resources of a society ought to be devoted to the production of psychoactive drugs, for that seems to be the most efficacious way of maximizing experienced utility. Such an arrangement may not be *preference* maximizing, but if experienced utility is the maximand, then decision utility would be irrelevant. A society maximizing experienced utility should simply apprehend any dissenters, immobilize them, and inject them with pleasure-inducing drugs. We expect most people would find such a state unacceptable. The maximization of experienced utility would therefore seem to be a bad objective even if incommensurability were not a problem.

Not all criticisms of the wealth maximand are so crude. For example, Sen (1999a [1985], 1992, 1999b) and Nussbaum (2000, 2011) have offered an alternative basis for interpersonal comparisons, which is not premised upon the commensurability of experienced utilities. According to Sen, social institutions should aim not to maximize wealth or experienced utility, but rather to maximize the capabilities of individuals. Nussbaum (2000) offers a concrete list of proposed 'central human capabilities,'[25] which she contends are fundamental to well-being.[26] Note that the 'capabilities approach' avoids the incommensurability problem. Unlike utility, capabilities can be observed and compared. For example, if one individual has access to medicine, and another individual does not, then it an entirely sensible claim that the first individual possesses a capability which the other lacks. It is a tractable, quantitative interpersonal comparison.

However, although it can be a useful tool for social criticism, the affirmative agenda of the capabilities approach is in many respects indeterminate. Once the basic capabilities of individuals are met, the capabilities

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[25] Nussbaum's list includes life, bodily health, bodily integrity, senses, imagination, thought, emotions, practical reason, affiliation, harmony with the natural world, play, and control over one's environment. She maintains that the capabilities in her list are crucial to well-being for the great majority of human persons. She does not however consider the list exclusive and accepts that there may be other capabilities which could be essential to the human experience.

[26] Some other 'objective list' approaches, which seek to enumerate specific concrete moral goods or essential values necessary for human well-being—though often quite different from the capabilities approach in other respects—include Finnis 1980 and Parfit 1984.

approach does not prescribe how residual resources ought to be allocated.[27] Moreover, the capabilities approach does not offer any method for comparing the relative values of capabilities. Sen and Nussbaum acknowledge that the capabilities approach is not a complete theory of justice. Indeed, they regard this incompleteness to be a feature of the capabilities approach, for it enables their analysis to work in conjunction with other normative theories.

In conjunction with wealth maximization however, the capabilities approach will rarely make any difference, for the prescriptions will tend to be coextensive as between the two theories. Assuming that Nussbaum's central human capabilities are of utmost value to most individuals, this should be reflected in a greater willingness to pay for them. Consequently, a society that maximizes wealth will also tend to maximize capabilities. In some circumstances, it may arise that the affluence effect results in an allocation of resources which appears to reduce the aggregate capabilities in a society. For example, resources may be efficiently allocated to Rockefeller's new golf clubs while Tom Joad struggles to feed his family. However, the capabilities approach would not necessarily prescribe a reallocation of resources in this circumstance either.

In the absence of market failures, Rockefeller's endowment is simply a fraction of the surplus value he provided to society. Although redistribution might feed Tom Joad's family in the short term, such a redistribution would distort productivity incentives and result in an even greater reduction in capabilities for a greater number of people in the long term. If Rockefeller's transactions with others do not improve his private welfare—measured in terms of his preferences—then he will forgo those productive interactions, and the net effect will be a reduction in social welfare—measured in terms of *capabilities*.

In the presence of market failures, the capabilities approach would prescribe a redistribution of resources to benefit those whose basic capabilities were unrealized. However, if there were market failures present, then the allocation of resources would not be efficient, and redistribution would *also* be justified under wealth maximization. Despite the mischaracterization of some critics, wealth maximization is not reducible to a minimal libertarian state in which the free-market reigns unchecked. A regulation is justified under wealth maximization when the inefficiency due to a market failure exceeds the inefficiency caused by that market regulation. Consequently, the prescriptions of the capabilities approach will tend to be coextensive with those of wealth maximization even in the presence of market failures.

[27] This aspect of the capabilities approach is sometimes called 'sufficientarianism.' Other versions of sufficientarianism include Frankfurt 1987, Crisp 2003, Shields 2016, and Shields and Crisp 2016, which prioritizes 'having enough' over other normative goals—specifically, equality or efficiency.

Another critical perspective on wealth maximization is that it lacks moral content. Dworkin (1980, 1985) argued that wealth maximization problematically disregards individual rights.[28] Dworkin (1978, 1988) believed that the law fundamentally ought to be understood as a process of constructive interpretation, in which judges attempt to balance the moral principles and values of a community. Those principles and values, he believed, are expressed in individual rights. According to Dworkin, any subversion or compromise of individual rights would therefore contradict the very *raison d'être* of the institution of law. Dworkin apparently believed that wealth maximization could result in circumstances where rights might be compromised in the service of efficiency. He therefore considered wealth maximization to be an inappropriate normative criterion.

We contemplate two counterarguments against Dworkin's criticism. First, he assumes that efficiency is determined on an *ad hoc* basis. Dworkin imagines, for example, that if the expression of speech were inefficient in some instance, then the wealth maximization approach would prescribe suppression of that speech. In such a circumstance, a judge would, according to Dworkin, be forced to decide between efficiency and speech rights. However, this is a straw man. The application of wealth maximization in legal scholarship is not *ad hoc*. As we explained in Section I (C), when wealth maximization is applied to the law, the units of analysis are universal rules rather than particular decisions or circumstances. The law does not determine the allocation of goods or privileges on a case-by-case basis. It prescribes general rules, which may result in isolated inefficiencies, but which incentivize efficient behavior when applied consistently over many cases.

To the extent that rights are rules, therefore, the wealth maximization approach could be entirely coextensive with the tapestry of rights Dworkin regarded as essential to the law.[29] Indeed, a colorable argument could be made that the core rights frequently mentioned by Dworkin—e.g., equality, freedom of expression, the right to political participation—are necessarily efficient entitlements from the wealth maximization perspective.

Dworkin might still object that *even if* the decisions of a wealth maximizing judge and a 'law as integrity' judge were perfectly coextensive, it matters that their *deliberative processes* fundamentally differ. According to Dworkin, legal decision-making is necessarily moral reasoning, which he considers methodologically incompatible with economic reasoning. This brings us to our second counterargument.

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[28] Dworkin 1980, 1985 also criticizes wealth maximization as disregarding distributive justice. We discuss this element of Dworkin's critique in Section II (B), *infra.*

[29] Note that Dworkin would not have agreed that 'rights' are a species of 'rules.' However, he defines the term 'rule' more narrowly than we intend here. In our present usage, we use the term 'rule' merely to distinguish between *ad hoc* decision-making and patterned decision-making. The distinction would thus be merely semantic. Dworkin would likely agree that rights are 'rules' in the broader sense we intend.

Dworkin believed that moral principles could not be reduced to nonmoral kinds or empirical facts. However, there is a growing body of research suggesting that moral intuitions—including the very principles Dworkin considers atomic—have causal origins in evolutionary biology.[30] For example, the intuition that killing is morally wrong could plausibly have developed through a process of natural selection because paleolithic tribes consisting of individuals who felt no compunction about killing tended to annihilate themselves. Consequently, the only remaining humans were those who possessed a genetic predisposition against killing, which manifests today as the moral intuition that killing is 'wrong.'[31] Evolutionary processes may also operate at a cultural level. A substantial body of economic theory contends that communities tend to adopt efficient norms, which manifest as traditions and shared values.[32] Thus, for the same reasons that biological evolution tends to select for efficient moral intuitions, so too would cultural evolution select for efficient moral traditions.

Both the biological and cultural analyses of morality are consistent with the wealth maximization framework. At the level of genes and at the level of social conventions, it is the maximization of total economic surplus which motivates the development of moral principles. Viewed from this perspective, wealth maximization is not antithetical to Dworkin's 'law as integrity' approach, but rather a more fundamental expression of it.

B. The Choice of Aggregation Method

One immediate criticism of the Kaldor-Hicks criterion is that unlike a Pareto improvement, a Kaldor-Hicks improvement can leave some individuals worse off. Recall that the Kaldor-Hicks criterion is a test of *potential* compensation, and it does not require compensation to occur in actuality. The objection is that a normative theory which permits such uncompensated harms is somehow 'unjust.' We presume that critics who raise this concern would not object to *all* violations of the Pareto criterion. For example, if a portion of Rockefeller's wealth were transferred, without compensation, directly to low-wage workers, then this would also violate the Pareto criterion. However, we suspect only a handful of dogmatic libertarians would complain that this too would be unjust.[33] Therefore, the issue is not that Kaldor-Hicks allows *any* individuals to be harmed without compensation, but rather that it could allow certain subsets of the population to be harmed without

[30] Wilson 2000 [1975], 1998, Haidt 2001, de Waal 2006, Hauser 2006, Joyce 2006.
[31] Boehm 2012.
[32] Bowles and Gintis 2011, Henrich 2016, Boyd and Richerson 2005, North 1990.
[33] See Nozick 2013 [1974] for an example of such an argument. Nozick was an exceedingly careful philosopher however, and we do not suggest that he was a libertarian of the 'dogmatic' variety.

compensation. Specifically, the concern is that Kaldor-Hicks efficiency could disadvantage individuals with relatively lower endowments.[34]

Several alternative aggregation methods have been proposed to address this distributional concern. For example, the Nash (1950) criterion uses multiplicative aggregation, defining social welfare as the result of multiplying the private welfare of individuals in a society.[35] The intuition motivating the Nash approach is that society should be understood as a *network* of interpersonal relations.[36] Proponents of the Nash approach argue that multiplication captures this crucial aspect of social organization. This definition of social welfare attaches greater weight to the well-being of its poorest members because marginal increases in the lowest multiplier have a greater effect on the product.[37] Consider for example a society consisting of two individuals, Smith and Jones. Suppose Smith's wealth is $5 and Jones's wealth is $7. Using the Nash criterion, a marginal increase in Smith's wealth improves social welfare more than a marginal increase in Jones's wealth, because $(5+1) \times 7 = 42 > 40 = 5 \times (7+1)$. However, the associativity of addition implies that the Kaldor-Hicks criterion is indifferent to the allocation of a unit change $(5+1) + 7 = 13 = 5 + (7+1)$. The Nash criterion will therefore tend to favor more egalitarian distributions than the Kaldor-Hicks criterion.

Rawls (1999) [1971] adopts a more direct approach, identifying the welfare of society with the welfare of its least advantaged members exclusively. According to the 'difference principle' or 'maximin principle,' a just arrangement of major institutions ensures the best worst-case outcome in a society. The

[34] A related concern is that the Kaldor-Hicks criterion fails to account for the diminishing marginal utility of wealth. Although summing implicitly accords equal weight to each member of society, this formal equality overlooks the fact that 'a dollar is *not* a dollar' when evaluating its impact on different segments of society. A thousand dollars in Rockefeller's pocket has the same purchasing power as a thousand dollars in a railroad worker's pocket, but due to the diminishing marginal utility of money, it is likely to have a very different impact on his well-being. It is true that the Kaldor-Hicks criterion does not incorporate the effect of diminishing marginal utility, however this is not a problem for wealth maximization because the effect *is* captured by the wealth maximand. Adopting an aggregation method which incorporates the diminishing marginal utility of money would therefore be double counting.

[35] This criterion of welfare builds on Nash's axiomatic bargaining solution, where parties arrive at the set of alternatives that maximizes the product of their utility gains. Based on this result, Sen 1970 and Mueller 2003 have formulated a Nash social welfare function, in which the welfare of the society is maximized following hypothetical bargaining between its members. Kaneko and Nakamura argue that the Nash criterion would be the aggregation method which individuals would agree upon if bargaining over the content of the social contract. I.e., the hypothetical Nash bargaining solution is what members of society would have chosen «…as a unique possible social welfare function [according to the prevailing] social choice theory…» Kaneko and Nakamura 1979, 423. Note however that political philosophers do not conceive the social contract as the product of bargaining.

[36] This motivation bears some resemblance to the ideas which animated communitarianism in the 1980s and 1990s. See, e.g., Etzioni 1993, Sandel 1982, 1996, Taylor 1989, 1991, MacIntyre 1981, 1988, and Walzer 1983, 1994. However, scholars in this tradition have typically adopted a more qualitative methodology, and the Nash criterion is not commonly associated with their philosophy. However, the connection seems potentially fruitful and worth exploring.

[37] For both methodological and practical reasons, these models of social welfare are not widely used in the economic analysis of law. See generally de Geest 2015. From a methodological point of view, the prevailing wisdom in law and economics is that distributional concerns should be kept separate from the pursuit of efficiency. See Kaplow and Shavell 1994. From a practical point of view, the adoption of the Nash criterion would run into the well-known difficulties of normalization of the benchmark starting point of wealth (or utility) across individuals to estimate the optimal scope of distribution through law.

welfare of any segment of the population other than the least advantaged is irrelevant for the purposes of the difference principle. Note that the difference principle will not ordinarily result in complete wealth equality. Rawls believed that perfect equality would tend to dilute productivity incentives to the extent that the least advantaged people would be made worse off. The difference principle tolerates inequality, but only to the extent that the consequential improvements in productivity also benefit the least advantaged class.

At the extremum position are certain socialist theories,[38] which seek to maximize equality irrespective of any consequential effects that such a redistribution may have. For example, Cohen (2000, 2008, 2009) argued that *any* inequalities in the distribution of resources ought to be eliminated. He rejected the proposition that this would lead to a reduction in productivity because he believed that people ought to be motivated by an interest in improving social welfare for its own sake rather than private gain.

These alternative aggregation methods incorporate distributive concerns explicitly in their definitions of social welfare. However, justifications for redistribution need not be explicit. The Kaldor-Hicks criterion can also justify a reallocation of resources to poorer or less productive segments of the population indirectly. It is well established in the experimental and empirical literature that people universally share a preference for the well-being of others.[39] These 'other-regarding preferences' have been measured in terms of people's willingness to pay in a variety of economic settings.[40] Insofar as it is human nature to value the well-being of others, that value will be reflected—no less than any other value—in the wealth maximization approach.

Some critics may find this justification for redistribution too feeble because it is contingent upon the preferences of a population. If the prevailing sentiment in a community happened to be callous and radically individualistic, then extreme inequalities could be Kaldor-Hicks efficient. Since any normative theory which could in principle tolerate such disparities would be unacceptable, the critic contends, Kaldor-Hicks efficiency cannot be an acceptable political objective, even if it would *usually* result in fair distributions. However, this objection is not really about distributive justice; but rather about the role of political theory more generally. We will return to this metatheoretical question (i.e., whether distributive objectives ought to be baked into a theory's definition of social welfare) in Section III (B).

Let us presently assume *arguendo* that some alternative aggregation method is preferable to the Kaldor-Hicks criterion. Assuming some level of redistribution would be desirable, we must next determine

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[38] The term 'socialist' is somewhat fraught. Note that there are normative theories which may fall under that classification broadly, which do not adopt the extremum position.

[39] Fehr and Schmidt 1999, Charness and Rabin 2002, Engelmann and Strobel 2004, Engel 2011. However, there is little evidence that human nature is capable of extreme altruism that Cohen expects for a successful socialist state.

[40] E.g., the dictator game, ultimatum game, public goods games. See generally Camerer 2003.

the most effective instruments for facilitating the desired redistribution. We shall be especially interested in two candidates: progressive taxation and progressive legal rules. A progressive tax policy achieves redistribution by taking a higher percentage of income from more affluent individuals, whereas a progressive legal rule accomplishes redistribution by imposing greater legal liability on more affluent individuals.

Shavell (1981) and Kaplow and Shavell (1994, 2000, 2002) contend that redistribution is always «accomplished more efficiently through the income tax system than through the use of legal rules.»[41] Because uncompensated transfers of wealth deplete the surplus that individuals gain from their productive activities, any redistribution will necessarily distort productivity incentives. In public economics terms, this distortion is simply the cost that society must bear to achieve its redistributive goals. However, when redistribution is incorporated into the content of legal rules, the misalignment of behavioral incentives generates a second distortion. If more affluent tortfeasors cannot avoid paying greater damages, then they will either overinvest in precautionary care or reduce their activity levels excessively. This distortion is additional to the effect on productivity incentives.

Given that society is willing to accept some incentive distortion to accomplish redistribution, Kaplow and Shavell argue, it would surely be better to suffer one distortion rather than two. Therefore, any redistribution should be implemented through the tax system exclusively, avoiding any needless distortion of behavioral incentives.[42] Kaplow and Shavell envision a 'two-step optimization,' where legal rules maximize wealth, and the tax system corrects any inequities that may result. Since the result of their two-step optimization can achieve the same proportional distribution as a system using *both* legal rules and the tax system, they claim that the two-step optimization is Pareto superior. By separating the function of law and the tax system, we ensure that there is as much wealth as possible available for redistribution.

If Kaplow and Shavell are correct, then wealth maximization ought to be the objective of the legal system, even if it is not the ultimate political goal. However, Sanchirico (2000) argues that the double-distortion argument may not be valid in all circumstances. He contends that under certain conditions, the law may yet be the better instrument for redistributing wealth. For example, in situations where a class of litigants

[41] Kaplow and Shavell 1994, 677.
[42] Although we focus on the double-distortion argument in this Article, Kaplow and Shavell 2002 offer a variety of other reasons why the tax system is the better instrument for redistribution. For example, legal rules which do not maximize productivity will result in a reduction in economic surplus, which will reduce the surplus available for redistribution. Additionally, they contend that redistribution using legal rules is inequitable because it would only affect litigants, whereas redistribution through the tax system would apply to all citizens. Next, they point out that the marginal cost of increasing the tax rate will tend to be far less than the cost of litigation. Finally, they point out that the tax system generates revenue which can be used not only for redistribution, but also to fund the apparatus of the tax system.

possesses characteristics relevant to society's redistributive aims, legal rules could offer a more targeted approach than the tax system, which only differentiates income levels. Moreover, if the marginal rate of distortions is increasing, then separating redistribution into two channels—legal rules and the tax system—could minimize the total cost of distortions.

However, Sanchirico's argument fails to anticipate that affluent individuals and businesses can simply price-in the cost of legal liability when *ex ante* price mechanisms exist. Consequently, any attempt to effectuate a transfer of wealth using the legal system would be frustrated by price adjustments in equilibrium. For example, if contract damages were made a function of wealth, such that wealthier breachers were forced to pay greater damages, then affluent promisors would either contract around the default through liquidated damages or increase their price to reflect the augmented cost of liability. In either case, the desired redistribution will be undermined.

Of course, there are situations where *ex ante* price mechanisms are generally unavailable. For example, in the tort context, prospective injurers cannot bargain with their victims because it is indeterminate who (if anyone) will be a victim. Therefore, balancing the marginal cost of distortions would appear to be a viable strategy in the tort context at least. However, Sanchirico's approach now fails for a different reason. Affluent individuals and businesses will typically buy insurance to limit their exposure to risk. Since progressive legal rules impose greater liability on wealthier injurers, their greater exposure will be reflected in higher premiums. This has two effects. First, insurance coverage insulates affluent tortfeasors from the incentive effects of increased legal liability—mitigating the distortion in behavioral incentives. Second, increased insurance premiums operate like a tax—exacerbating the distortion in productivity incentives. In other words, insurance converts behavioral distortions into productivity distortions. This dissipates the advantages Sanchirico claims a hybrid approach would offer. The only remaining difference between redistribution using legal rules and redistribution using the tax system would be the higher transaction costs associated with litigation. Kaplow and Shavell's thesis would thus appear to remain intact after Sanchirico's critique.[43]

[43] Most law and economics scholars have embraced Kaplow and Shavell's 'two-step optimization' approach. See Fennell and McAdams 2015, reviewing various 'income-tax only' arguments in the law and economics literature. See also Posner and Parisi 1998 for an earlier assessment of several nuanced positions advanced by scholars in the field. See also Weisbach's 2023 interesting reappraisal of the proper role of law in pursuing distributive justice objectives.

C. Generalization of Critical Themes

The three leitmotifs to which critics of wealth maximization have repeatedly returned have been: (i) the disregard for people's basic needs, (ii) the disregard for individual rights, and (iii) the disregard for distributive justice. As we have seen, these themes have arisen both in criticisms of the wealth maximand and the Kaldor-Hicks criterion.

We have attempted to identify and address the most forceful and historically significant arguments advancing these objections. Our general strategy has been to explain how basic needs, individual rights, and distributive justice are emergent properties of wealth maximization.[44] We have sought to describe how these factors of 'justice' will tend to arise organically when aggregate wealth is maximized. This inversion of logical priority explains why our commonly shared intuitions about justice are what they are. A society is not 'just' because it meets basic needs, protects individual rights, or ensures a fair distribution of resources. Rather, people tend to believe a 'just' society should meet basic needs, protect individual rights, and ensure a fair distribution of resources because these functions tend to be wealth maximizing.[45]

III. Wealth Maximization Reconsidered

In the previous Section, we considered and rejected several arguments opposing wealth maximization. In this Section, we offer some affirmative arguments in support of wealth maximization. Specifically, we will argue that wealth maximization is more consistent with the basic tenets of liberal democracy than competing normative theories.

The social contract is the foundation of liberal political philosophy. The 'contract' is a figurative exchange between individuals and the state. In the absence of the state, individuals would be vulnerable to the aggression of strangers and the perils of nature. Thus, in exchange for refuge and the prosperity which attends cooperative enterprise, the individual surrenders a portion of his freedom and consents to be governed. The rational individual assents to the social contract if and only if he is better off submitting to the authority of the state than he would have been in the 'state of nature.' If he is not, then the individual would be justified in seeking to escape its reach, resist, or to rebel against it.

There are two distinct perspectives political philosophers have adopted when reasoning about the social contract. First, they can adopt the perspective of particular individuals, considering whatever

[44] O'Connor and Wong 2020.

[45] See *supra* footnotes 30, 31, and 32.

characteristics or idiosyncrasies they may possess (including ourselves), and inquire whether that individual would willingly enter into a social contract to avoid the state of nature.[46] Let us call this the 'Hobbesian' approach. Alternatively, they could adopt an abstract perspective, divorced from any characteristics peculiar to particular persons, and inquire about universal principles of justice which might justify a hypothetical arrangement of social institutions.[47] Let us call this the 'Rawlsian' approach. We investigate the desirability of a wealth maximizing society from both perspectives.

A. The Choice of Maximand

Let us first consider the suitability of the wealth maximand from the Hobbesian perspective. Recall the distinction between 'experienced utility' and 'decision utility.' When we inquire whether an individual would be better off in the state of nature or under the authority of a government, we are asking what that individual would *choose*. We are not asking what the individual would find more 'pleasurable.' The relevant inquiry therefore concerns decision utility and not experienced utility.

Since wealth is measured in terms of an individual's willingness to pay, which is the product of their decision utility and their endowment, wealth maximization seeks to maximize the very factor that determines the individual's choice whether to consent to being governed. In other words, by maximizing wealth, a society maximizes an individual's incentive to enter the social contract. This does not guarantee that an individual would be better off under the state's authority than the state of nature. As we have seen, wealth maximizing institutions can disadvantage individuals with limited endowments, potentially to the point that they would be better off in the state of nature. However, for the reasons we discussed in Section I (A), in order to make interpersonal preference comparisons it will be necessary to price decision utilities. It is nonsensical to compare decision utilities between individuals directly. In order to relate decision utilities, we will need to multiply individuals' utility functions by *some* scalar term.

The scalar term which is best advances the objectives of the social contract is the individual's endowment. In a society that maximizes wealth, an individual's endowment is directly related to their productivity. As no one would assent to an exchange which leaves them worse off, an individual's endowment accumulates from the surplus wealth they generate through their interactions with others. Their endowment thus represents their relative value to society as determined by the individuals with whom they

[46] Hobbes 1996 [1651], Locke 1988 [1689], and Rousseau 2019 [1762].

[47] Kant 2017 [1797] and Rawls 1999 [1971] have approached the social contract in this way.

transact. In other words, the process that determines each individual's endowment is the same process which maximizes the value of the social contract for *other* members of society.

This point is critical, and it is worth restating. The controversial element of the wealth maximand is the endowment factor. If we eliminate the endowment factor, then some other variable would have to replace it if we wanted to make interpersonal comparisons. However, the magnitude of an individual's endowment fulfills this function better than any substitute. It is better justified than other possible scalar terms because it reflects an individual's contribution to the fulfillment of the social contract for other members of society. The endowment thus captures the reciprocal nature of the social contract.

Next, from the Rawlsian perspective, let us consider what arrangement of institutions an abstract individual would choose in order to maximize his expected utility. In Rawls' (1999) [1971] formulation, the abstract individual does not know any specific information about themselves when they decide upon the optimal arrangement of major institutions. Rawls posited that the abstract individual would be rationally self-interested and maximally risk-averse. He referred to this condition as the 'original position.' Since the abstract individual, lacking any information about themselves, does not know what arrangement will maximize their utility, their choice is essentially a wager. And since the abstract individual is maximally risk-averse, they will opt for whatever arrangement ensures the most favorable worst-case outcome. In other words, according to Rawls, they will hedge against the possibility that they are in the least advantaged class.[48]

However, the assumption of maximal risk-aversion is difficult to justify. The abstract individual's risk-aversion is a preference which contradicts the premise that the abstract person is devoid of specific characteristics. The assumption of risk-neutrality would be a better default because, *ceteris paribus*, risk-neutrality tends to maximize the expected payoff. If we assume that the abstract individual is risk-neutral, then they will choose whatever arrangement maximizes the total economic surplus of society. That condition is equivalent to maximizing wealth.[49]

B. The Choice of Aggregation Method

From the Hobbesian perspective, the Kaldor-Hicks criterion will tend to maximize the proportion of citizens for whom consent to the authority of the state is preferable to the state of nature. This may initially seem to be

[48] An often overlooked feature of Rawls' thought experiment is how it avoids the incommensurability problem. By eliminating the abstract individual's access to any specific information about themselves, interpersonal utility comparisons are in effect converted into intrapersonal comparisons. This is ironically rather similar to Epstein's 1985 'single owner test.'
[49] Harsanyi 1955 observed that a risk-neutral individual in the original position would choose to maximize the 'average expected utility' of society. This is consistent with our claim. Maximizing 'average expected utility' is equivalent to wealth maximization when wealth is measured by willingness to pay.

a counterintuitive claim, for the Kaldor-Hicks criterion does not have any redistributive component built into its definition.

However, we are not claiming that the Kaldor-Hicks criterion will maximize the value of the social contract for every person. Any choice of social objective will inevitably result in 'winners' and 'losers' relative to other possible normative systems. Our claim is that aggregation using the Kaldor-Hicks criterion will tend to minimize the proportion of individuals who would prefer living in the state of nature. In such a circumstance, the state will have metaphorically 'breached' the social contract, and the disaffected individual would be justified in seeking to undermine that society. The disaffected individual may not seek outright rebellion, for the cost of failure may be great. However, they would nevertheless be justified in exploiting public goods, adverse selection and moral hazard scenarios, and opportunities to free-ride. They would moreover be less responsive to legal incentives, committing a higher rate of criminal offenses and exercising suboptimal precautionary care when undertaking risky activities.

The considerable social cost generated by disaffected citizens could be mitigated by providing them with a situation only marginally better than the state of nature. Therefore, it would almost certainly be wealth maximizing to redistribute resources to the extent that no person would be better off in the state of nature. This would represent an absolute floor, beyond which an individual's welfare could not be further reduced. To extend the metaphor, the wealth maximization principle justifies paying 'damages' for 'breach' of the social contract, ensuring that no person is left worse off than had the contract been 'performed.'[50]

Critics who regard redistribution as an essential function of the state may find this minimal safeguard unsatisfying. However, it is likely a better outcome than many other arrangements can achieve, including those with explicitly redistributive objectives such as communist states. Since a wealth maximizing system seeks to maximize total economic surplus, it will have greater flexibility and resources to ensure an acceptable minimum standard of living to all its citizens. In the present context 'acceptable' means any standard superior to what one would experience in the state of nature.

Proponents of alternative aggregation methods may yet object that the minimal requirement of the social contract is not an 'acceptable' level of redistribution in some grander moral sense. However, this begs the question *how much* redistribution would be 'acceptable' in a grander moral sense. It would be circular to answer that the acceptable level is that which an alternative aggregation method determines to be acceptable.

[50] This argument would probably justify more than the bare minimum required to avoid 'breach' of the social contract. Even in the absence of other-regarding preferences, redistribution will be efficient up to the point that the marginal reduction in productivity is equal to the marginal reduction in the cost of disaffection. It is ultimately an empirical question, however it seems plausible that a substantial reallocation of resources would be justified.

The question is whether a given theory's threshold of acceptability is itself acceptable in a metatheoretical sense. If the minimum 'acceptable' level of redistribution is matter of consensus, then as we discussed in Section II (B), this should be reflected in people's willingness to pay for a more egalitarian distribution, and the wealth maximizing society would perforce engage in an 'morally acceptable' distribution of resources.

Delegating the issue to the contingent preferences of the population, rather than deciding it on first principles, is not a flaw but a feature of the wealth maximization approach. It follows directly from the principles of consent, mutuality, and popular sovereignty essential to the contractarian framework. The alternative is to impose, at the level of theory, a conception of distributive justice which could conflict with the ever-evolving preferences of a community, potentially undermining public support for the system. Perhaps this is the purpose motivating some political philosophies—i.e., to devise a test to judge which societies are 'just' and which are 'unjust' according to some *a priori* criterion. However, these are not social contractarian theories. The social contract justifies government from the perspective of the governed.

Next, from the Rawlsian perspective, recall that the abstract individual in the original position is essentially gambling. They are arranging social institutions behind a veil of ignorance, seeking to maximize their expected payoff. In the absence of specific knowledge about themselves, the abstract individual will simply seek to maximize the average expected wealth of society. The 'average' being the total sum of wealth in a society divided by size of its population, it follows trivially that maximizing the total sum of wealth maximizes average expected wealth. Therefore, the abstract individual will aggregate using addition.

C. Conclusion

In this Article, we have sought to recontextualize the evolution of wealth maximization, framing it not as a continuation of, but rather a response to defects in utilitarian moral philosophy. Special attention was given to the incommensurability problem, which played a significant role in the shift away from classical utilitarianism. We have responded to the most salient criticisms of the theory, dispelling some common misunderstandings, and contributing to the resolution of ongoing controversies. Our counterarguments have emphasized how the values commonly associated with 'justice' emerge organically when wealth is maximized. In a hypothetical bargaining situation over the choice of legal rules, rational parties will pursue their private objectives and bargain to maximize their subjective well-being. As a result, the parties' risk propensities, notions of justice, and all the other factors that affect their well-being would be captured and truthfully revealed by their willingness to pay. These considerations will hopefully help to address some of the methodological and ideological objections to wealth maximization in legal policymaking. Finally, we

have sought to connect wealth maximization to the broader philosophical tradition of social contract theory, arguing that wealth maximization is, *pace* Dworkin, a better 'fit' with the principles of liberal democracy than competing normative theories.

References

- Adler, M.D. and Posner, E.A. 1999, «Rethinking Cost-Benefit Analysis», *Yale Law Journal* 109, 2, 165–247.
- Arrow, K.J. 1963, *Social Choice and Individual Values*, 2nd ed., New Haven, Yale University Press.
- Ash, E., Chen, D.L., and Naidu, S. 2022, «Ideas Have Consequences: The Impact of Law and Economics on American Justice», *NBER Working Paper Series* 29788, Cambridge, MA, National Bureau of Economic Research.
- Becker, G.S. 1968, «Crime and Punishment: An Economic Approach», *Journal of Political Economy*, 76, 2, 169–217.
- Bentham, J. 2019 [1789], *An Introduction to the Principles of Morals and Legislation*, Oxford, Oxford University Press.
- Bix, B.H. 2019, *Jurisprudence: Theory and Context*, 8th ed., Durham, Carolina Academic Press.
- Boadway, R. and Bruce, N. 1984, *Welfare Economics*, Oxford, Basil Blackwell.
- Boehm, C. 2012, *Moral Origins: The Evolution of Virtue, Altruism, and Shame*, New York, Basic Books.
- Bourget, D. and Chalmers, D.J. 2014, «What Do Philosophers Believe?», *Philosophical Studies*, 170, 3, 465–500.
- Bowles S. and Gintis, H. 2011, *A Cooperative Species: Human Reciprocity and its Evolution*, Princeton, Princeton University Press.
- Boyd, R. and Richerson, P.J. 2005, *The Secret of Our Success: How Culture is Driving Human Evolution, Domesticating Our Species, and Making Us Smarter*, Princeton, Princeton University Press.
- Bradley, F.H. 1877, «Mr Sidgwick's Hedonism» in 1970 [1935], *Collected Essays*, Oxford, Oxford University Press.
- Calabresi, G. 1961, «Some Thoughts on Risk Distribution and the Law of Torts», *Yale Law Journal*, 70, 4, 499–553.
- Camerer, C.F. 2003, *Behavioral Game Theory: Experiments in Strategic Interaction*, Princeton, Princeton University Press.
- Chang, R. 1997, *Incommensurability, Incomparability, and Practical Reason*, Cambridge, MA, Harvard University Press.
- Charness, G. and Rabin, M. 2002, «Understanding Social Preferences with Simple Tests», *The Quarterly Journal of Economics*, 117, 3, 817–869.
- Coase, R.H. 1960, «The Problem of Social Cost», *Journal of Law and Economics*, 3, 1–44.
- Cohen, G.A. 2000, «If You're an Egalitarian, How Come You're So Rich?» *The Journal of Ethics*, 4, 1, 1–26.
- Cohen, G.A. 2008, *Rescuing Justice and Equality*, Cambridge, MA, Harvard University Press.

- Cohen, G.A. 2009, «Where the Action Is: On the Site of Distributive Justice», *Philosophy and Public Affairs* 26, 1, 3–30.
- Cooter, R. and Ulen, T. 2011, *Law and Economics*, 7th ed., London, Pearson.
- Crisp, R. 2003, «Equality, Priority, and Compassion», *Ethics*, 113, 4, 745–763.
- Edgeworth, F.Y. 1967 [1881], *Mathematical Psychics: An Essay on the Application of Mathematics to the Moral Sciences*, New York, Kelley.
- Dworkin, R. 1978, *Taking Rights Seriously*, Cambridge, MA, Harvard University Press.
- Dworkin, R. 1980, «Is Wealth a Value?» *The Journal of Legal Studies*, 9, 2, 191–226.
- Dworkin, R. 1985, *A Matter of Principle*, Cambridge, MA, Harvard University Press.
- Dworkin, R. 1988, *Law's Empire*, Cambridge, MA, Harvard University Press.
- Easterbrook, F. 1984, «The Supreme Court, 1983 Term—Foreword: The Court and the Economic System», *Harvard Law Review*, 98, 1, 4–60.
- Easterbrook, F. 1985, «Method, Result, and Authority: A Reply», *Harvard Law Review*, 98, 3, 622–629.
- Engel, C. 2011, «Dictator Games: A Meta-Study» *Experimental Economics*, 14, 4, 583–610.
- Engelmann, D. and Strobel, M. 2004, «Inequality Aversion, Efficiency, and Maximin Preferences in Simple Distribution Experiments», *American Economic Review*, 94, 4, 857–869.
- Epstein, R.A. 1985, *Takings: Private Property and the Power of Eminent Domain*, Cambridge, MA, Harvard University Press.
- Etzioni, A. 1993, *The Spirit of Community: Rights, Responsibilities, and the Communitarian Agenda*, New York, Crown Publishers.
- Fehr, E. and Schmidt, K.M. 1999, «A Theory of Fairness, Competition and Cooperation», *The Quarterly Journal of Economics*, 114, 3, 817–868.
- Fennell, L.A. and McAdams, R.A. 2016, «The Distributive Deficit in Law and Economics», *Minnesota Law Review*, 100, 3, 1051–1129 (2015).
- Finnis, J. 1980, *Natural Law and Natural Rights*, Oxford, Oxford University Press.
- Frankfurt, H.G. 1987, «Equality as the Moral Ideal», *Ethics*, 98, 1, 21–43.
- de Geest, G. 2015, «Any Normative Policy Analysis Not Based on Kaldor-Hicks Efficiency Violates Scholarly Transparency Norms», in Hatzis, A.N. and Mercuro, N. (eds) 2015, *Law and Economics: Philosophical Issues and Fundamental Questions*, New York, Routledge.
- Haidt, J. 2001, «The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment» *Psychological Review*, 108, 4, 814–834.
- Hare, R.M. 1991 [1952], *The Language of Morals*, Oxford, Oxford University Press.
- Hare, R.M. 1981, *Moral Thinking: Its Levels, Method, and Point*, Oxford, Oxford University Press.
- Harsanyi, J.D. 1955, «Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility», *Journal of Political Economy*, 63, 4, 309–321.
- Hauser, M.D. 2006, *Moral Minds: How Nature Designed Our Universal Sense of Right and Wrong*, New York, HarperCollins Publishers.
- Hausman, D.M. and McPherson, M.S. 1986, «Preference Satisfaction and Welfare Economics», *Economics and Philosophy*, 2, 1, 131–145.
- Henrich, J. 2016, *The Secret of Our Success: How Culture is Driving Human Evolution, Domesticating Our Species, and Making Us Smarter*, Princeton, Princeton University Press.
- Hicks, J. 1939, «The Foundation of Welfare Economics», *The Economic Journal*, 49, 196, 696–712.
- Hobbes, T. 1996 [1651], *Leviathan*, Cambridge, Cambridge University Press.

- Hsieh, N. and Andersson, H. 2021, «Incommensurable Values», in Zalta, E.N. (ed) 2021, *Stanford Encyclopedia of Philosophy*, Stanford, Metaphysics Research Lab.
- Jaffe, S., Minton, R., Mulligan, C.B., and Murphy, K.M. 2019, *Chicago Price Theory*, Princeton, Princeton University Press.
- Joyce, R. 2006, *The Evolution of Morality*, Cambridge, MA, MIT Press.
- Kant, I. 2017 [1797], *The Metaphysics of Morals*, Cambridge, Cambridge University Press.
- Kaldor, N. 1939, «Welfare Propositions in Economics and Interpersonal Comparisons of Utility», *The Economic Journal*, 49, 195, 549–552.
- Kaneko, M. and Nakamura, K. 1979, «The Nash Social Welfare Function», *Econometrica*, 47, 2, 423–35.
- Kaplow, L. and Shavell, S. 1994, «Why the Legal System is Less Efficient than the Income Tax in Redistributing Income», *Journal of Legal Studies*, 23, 2, 667–681.
- Kaplow, L. and Shavell, S. 2000, «Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income», *Journal of Legal Studies*, 29, 2, 821, 835.
- Kaplow, L. and Shavell, S. 2002, *Fairness versus Welfare*, Cambridge, MA, Harvard University Press.
- Klick, J. and Parisi, F. 2005, «Wealth, Utility and the Human Dimension», *NYU Journal of Law and Liberty,* 1, 1, 590–608.
- Locke, J. 1988 [1689], *Two Treatises of Government*, Cambridge, Cambridge University Press.
- MacIntyre, A. 1981, *After Virtue: A Study in Moral Theory*, Notre Dame, IN, University of Notre Dame Press.
- MacIntyre, A. 1988, *Whose Justice? Which Rationality?* Notre Dame, IN, University of Notre Dame Press.
- Mas-Colell, A., Whinston, M.D., and Green, J.R. 1995, *Microeconomic Theory*, Oxford, Oxford University Press.
- Mason, E. 2018, «Value Pluralism», in Zalta, E.N. (ed) 2018, *Stanford Encyclopedia of Philosophy*, Stanford, Metaphysics Research Lab.
- McCluskey, M.T., Pasquale, F., and Taub, J. 2016, «Law and Economics: Contemporary Approaches», *Yale Law & Policy Review*, 35, 1, 297–308.
- Medema, S.G. 2015, «From Dismal to Dominance? Law and Economics and the Values of Imperial Science, Historically Contemplated», in Hatzis, A.N. and Mercuro, N. (eds) 2015, *Law and Economics: Philosophical Issues and Fundamental Questions*, New York, Routledge.
- Miceli, T.J. 2017, *The Economic Approach to Law*, 3rd ed., Palo Alto, Stanford University Press.
- Mill, J.S. 2003 [1863], *Utilitarianism*, Oxford, Oxford University Press.
- Mitchell, R.C. and Carson, R.T. 1989, *Using Surveys to Value Public Goods: The Contingent Valuation Method*, Washington, D.C., Resources for the Future.
- Moore, G.E. 1994 [1903], *Principia Ethica*, Cambridge, Cambridge University Press.
- Mueller, D.C. 2003, *Public Choice III*, Cambridge, Cambridge University Press.
- O'Connor, T. and Wong, H.Y. 2020, «Emergent Properties», in Zalta, E.N. (ed) 2020, *Stanford Encyclopedia of Philosophy*, Stanford, Metaphysics Research Lab.
- Nash, J.F. 1950, «Equilibrium Points in N-Person Games», *Proceedings of the National Academy of Sciences*, 36, 1, 48–9.
- North, D.C. 1990, *Institutions, Institutional Change and Economic Performance*, Cambridge, Cambridge University Press.

- Nozick, R. 2013 [1974], *Anarchy, State, and Utopia*, New York, Basic Books.
- Nussbaum, M.C. 2000, *Women and Human Development: The Capabilities Approach*, Cambridge, Cambridge University Press.
- Nussbaum, M.C. 2011, *Creating Capabilities: The Human Development Approach*, Cambridge, MA, Belknap Press.
- Nussbaum, M.C. 2015, «Flawed Foundations: The Philosophical Critique of (A Particular Type of) Economics»», in Hatzis, A.N. and Mercuro, N. (eds) 2015, *Law and Economics: Philosophical Issues and Fundamental Questions*, New York, Routledge.
- Pareto, V. 1897, «The New Theories of Economics», *Journal of Political Economy*, 5, 4, 488–502.
- Parfit, D. 1984, *Reasons and Persons*, Oxford, Oxford University Press.
- Parisi, F. 2002, «The Efficiency of the Common Law Hypothesis: A Comparative Institutional Analysis», *Public Choice*, 112, 1-2, 7–22.
- Parisi, F. 2004, «Positive, Normative and Functional Schools in Law and Economics», *European Journal of Law and Economics*, 18, 3, 259-272.
- Polinsky, A.M. 1989, *An Introduction to Law and Economics*, Boston, Aspen Publishing.
- Posner, R.A. 1973a, *Economic Analysis of Law*, Boston, Little Brown.
- Posner, R.A. 1973b, «An Economic Approach to Legal Procedure and Judicial Administration», *Journal of Legal Studies*, 2, 2, 399–458.
- Posner, R.A. 1977, *Economic Analysis of Law*, 2nd ed., Boston, Little Brown.
- Posner, R.A. 1979, «Utilitarianism, Economics, and Legal Theory», *Journal of Legal Studies* 8, 1, 103–140.
- Posner, R.A. 1981, *The Economics of Justice*, Cambridge, MA, Harvard University Press.
- Posner, R.A. 1985, «Wealth Maximization Revisited», *Notre Dame Journal of Law, Ethics and Public Policy*, 2, 1, 85.
- Posner, R.A. 1990, *The Problems of Jurisprudence*, Cambridge, MA, Harvard University Press.
- Posner, R.A. 2014, *Economic Analysis of Law*, 9th ed., Philadelphia, Wolters Kluwer.
- Posner, R.A. and Parisi, F. 1998, «Scuole e Tendenze nella Analisi Economica del Diritto», *Biblioteca della Libertá*, 33, 3–19.
- Priest, G.L. 1977, «The Common Law Process and the Selection of Efficient Rules», *Journal of Legal Studies*, 6, 1, 65–82.
- Priest, G.L. and Klein, B. 1984, «The Selection of Disputes for Litigation», *Journal of Legal Studies*, 13, 1, 1–55.
- Rawls, J. 1999 [1971], *A Theory of Justice*, Cambridge, MA, Harvard University Press.
- Raz, J. 1986, *The Morality of Freedom*, Oxford, Clarendon Press.
- Rousseau, J. 2019 [1762], *On the Social Contract*, Indianapolis, Hackett Publishing Company.
- Robbins, L. 1935, *An Essay on the Nature and Significance of Economic Science*, 2nd ed., London, Macmillan.
- Ross, W.D. 2002 [1930], *The Right and the Good*, Oxford, Oxford University Press.
- Rubin, P.H. 1977, «Why is the Common Law Efficient?», *Journal of Legal Studies*, 6, 1, 51–63.
- Sanchirico, C.W. 2000, «Taxes Versus Legal Rules as Instruments for Equity: A More Equitable Approach» *Journal of Legal Studies*, 29, 2, 797–820.
- Sanchirico, C.W. 2001, «Deconstructing the New Efficiency Rationale», *Cornell Law Review*, 86, 5, 1003–1089.
- Sandel, M.J. 1982, *Liberalism and the Limits of Justice*, Cambridge, Cambridge University Press.

- Sandel, M.J. 1996, *Democracy's Discontent: America in Search of a Public Philosophy*, Cambridge, MA, Belknap Press.
- Scitvosky, T. 1941, «A Note on Welfare Propositions in Economics», *Review of Economic Studies*, 9, 1, 77–88.
- Sen, A. 1970, «Interpersonal Aggregation and Partial Comparability», *Econometrica*, 38, 3, 393–409.
- Sen, A. 1979, «Utilitarianism and Welfarism», *Journal of Philosophy*, 76, 9, 463–489.
- Sen, A. 1992, *Inequality Reexamined*, Cambridge, MA, Harvard University Press.
- Sen, A. 1999a [1985], *Commodities and Capabilities*, Oxford, Oxford University Press.
- Sen, A. 1999b, *Development as Freedom*, New York, Alfred A. Knopf.
- Shapiro, F. 2012, «The Most-Cited Legal Scholars», *Michigan Law Review*, 110, 8, 1483–1537.
- Shavell, S. 1981, «A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?», *American Economic Review,* 71, 2 414–418 (1981).
- Shavell, S. 2004, *Foundations of Economic Analysis of Law*, Cambridge, MA, Harvard University Press.
- Shields, L. 2016, *Just Enough: Sufficiency as a Demand of Justice*, Edinburgh, Edinburgh University Press.
- Shields, L. and Crisp, R. 2016, «Sufficientarianism», in Fletcher, G. (ed) 2016, *The Routledge Handbook of the Philosophy of the Philosophy of Well-Being*, New York, Routledge.
- Singer, P. 2011, *Practical Ethics*, 3rd ed., Cambridge, Cambridge University Press.
- Smart, J.J.C. and Williams, B. (eds) 1973, *Utilitarianism: For and Against*, Cambridge, Cambridge University Press
- Sidgwick, H. 1981 [1874], *The Methods of Ethics*, Indianapolis, Hackett Publishing Company.
- Taylor, C. 1989, *Sources of the Self: The Making of the Modern Identity*, Cambridge, MA, Harvard University Press.
- Taylor, C. 1991, *The Ethics of Authenticity*, Cambridge, MA, Harvard University Press.
- Varian, H.R. 2014, *Intermediate Microeconomics: A Modern Approach*, 9th ed., New York, W.W. Norton & Company.
- de Waal, F.B.M. 2006, *Primates and Philosophers: How Morality Evolved*, Princeton, Princeton University Press.
- Walzer, M. 1983, *Spheres of Justice: A Defense of Pluralism and Equality*, New York, Basic Books.
- Walzer, M. 1994, *Thick and Thin: Moral Argument at Home and Abroad*, Notre Dame, IN, University of Notre Dame Press.
- Weisbach, D.A. 2023, «Constrained Income Redistribution and Inequality: Legal Rules Compared to Taxes and Transfers», *Chicago Unbound: Coase-Sander Working Papers in Law and Economics* #23-01.
- Wilson, E.O. 1998, *Consilience: The Unity of Knowledge*, New York, Penguin Random House.
- Wilson, E.O. 2000 [1975], *Sociobiology: The New Synthesis*, Cambridge, MA, Harvard University Press.