Vol. 10
Iss. 4

Article 9

# Judge Richard Posner's Wealth Maximization Principle: Another Form of Utilitarianism?

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# JUDGE RICHARD POSNER'S WEALTH MAXIMIZATION PRINCIPLE: ANOTHER FORM OF UTILITARIANISM?

Richard Posner, if not the founder of Law-and-Economics, is its popularizer. Since the early 1970s, when he began the development of his legal theory, he has been an important force in breaking down the belief that law can be an autonomous discipline,[1] and has helped to develop a movement that ironically has culminated in Critical Legal Studies,[2] a practice radically opposed to the essentially classical liberal approach of Law-and-Economics with which Posner is associated.

Most of Posner's work in Law-and-Economics has been by way of positive explanation.[3] In particular, he argues that the common law is in fact already efficient.[4] Before 1979, his work was not widely contextualized in an ethical or philosophic tradition. But since 1979, Posner has propelled his analysis a step further by adopting a norma-

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[1] See Posner, The Decline of Law as an Autonomous Discipline: 1962-1987, 100 Harv. L. Rev. 761 (1987). Posner maps "the changes in the legal system and legal thought that began in the early 1960s." Id. at 761. Until the early 1960s, "the autonomy of legal thought was the . . . premise of legal education and scholarship. It is [not any] longer." Id.

> The supports for the faith in law's autonomy as a discipline have been kicked away in the last quarter century. . . .
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> . . . [A] boom in disciplines that are complementary to law, particularly economics and philosophy [has developed]. Economics not only has become more rigorous since the 1950s, but it has branched out from market to nonmarket behavior. . . .
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> Philosophy has also made notable progress in areas related to law. The revival of interest in moral and political philosophy . . . has generated philosophical perspectives on a variety of issues of great importance to law . . . . Developments in Continental philosophy and in literary theory . . . have exposed a deep vein of profound skepticism about the possibility of authoritative interpretation of texts. This skepticism has fueled . . . the contemporary movement in legal scholarship known as "critical legal studies."

Id. at 766-68 (footnotes omitted).

[2] See M. Kelman, A Guide to Critical Legal Studies 114 (1986) (describing Critical Legal Studies as a "negatively charged satellite" of the Law-and-Economics movement).

[3] Positive economic analysis of law states that common law judges have decided cases in a way that reflects the objective of wealth maximization: to maximize social wealth. See Dworkin, Is Wealth a Value?, 9 J. Legal Stud. 191, 191 (1980).

[4] See R. Posner, The Economics of Justice 103-06 (1981); see also Posner, A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law, 9 Hofstra L. Rev. 775, 776 (1981) [hereinafter Posner, A Reply] (dividing law and economics into independent theories, one positive and one normative). Posner defines the positive theory as "an explanation of the rules and possibly the effects of the common law." Id.

tive perspective, based on the premise that wealth maximization provides the soundest ethical basis for guiding a legal system.[5]

Posner began to contextualize his analysis in a coherent normative theory at the turn of the decade,[6] and has consolidated his philosophy in *The Economics of Justice*.[7] Part of his goal is to distinguish wealth maximization theory from utilitarianism, an ethical system with various well-known flaws that Posner seeks to avoid.[8] His purpose is to elucidate wealth maximization's superiority over utilitarianism to clear the way for adopting his economic theory of law.

This Note focuses on Posner's critique of utilitarianism; the purpose is to determine first, whether Posner's wealth maximization is a theory distinguishable from utilitarianism, and second, whether it is a superior ethical guide for a legal system. This Note answers both questions negatively, concluding that wealth maximization is a form of utilitarianism, is subject to its flaws, and thus is not a superior ethical theory to guide a legal system.

The Note is divided into four Parts. Part I describes the contending philosophical systems: utilitarianism and wealth maximization. Part II describes and explains the criticisms Posner inveighs against the utilitarian philosophy. Part III compares wealth maximization to utilitarianism and proves that it is not a distinct philosophy from utilitarianism but rather that it is a form of utilitarianism, and one which is not superior. Part IV does not distinguish wealth maximization from or equate it to utilitarianism; rather, it explores the probable underlying goal Posner seeks to achieve via the adoption of his wealth maximization principle. This Note concludes by observing that wealth maximization succeeds in providing a conservative political program to defeat involuntary wealth redistribution, but does not provide a superior ethical theory to guide a legal system.

## I. Utilitarianism and Wealth Maximization

To determine whether wealth maximization and utilitarianism are distinct ethical theories, a description of the crucial components

5 Normative economic analysis of law argues that cases should be decided with the goal of social wealth maximization in mind. See Posner, A Reply, supra note 4, at 778. There are two branches to the normative side of the efficiency theory. The "strong" version holds that all spheres of public policy should be guided by wealth maximization; the "weak" version holds that it should only guide common-law adjudication. See id.

6 See Posner, The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication, 8 Hofstra L. Rev. 487 (1980); Posner, Utilitarianism, Economics, and Legal Theory, 8 J. Legal Stud. 103 (1979) [hereinafter Posner, Legal Theory].

7 R. Posner, supra note 4.

8 Id. at 48-87.

and objectives of each theory is essential. This section discusses the primary goals of each theory and the premises essential to their operation.

### A. *Utilitarian Philosophy*

Utilitarianism is an ethical system which "holds that the moral worth of an action . . . is to be judged by its effect in promoting happiness—'the surplus of pleasure over pain'—aggregated across all of the inhabitants . . . of society."[9] Therefore, in utilitarianism the ethical quality of human behavior is judged by its consequences.[10]

Initially described in Jeremy Bentham's "hedonistic calculus" and rejuvenated by John Stuart Mill,[11] the word "utilitarianism" now has a far wider use. It is used to refer either to a system of normative ethics—concerning how we "ought" to think about conduct—or to a system of descriptive ethics—an analysis of how we do evaluate behavior.[12] For Posner, utilitarianism contemplates a normative system of ethics.[13]

One of the attractions of utilitarianism is that to a great extent utilitarians do not need a theory of "the good." The only good postulated is the maximization of happiness.[14] Therefore, the utilitarian philosopher/researcher is a neutral policy scientist—unbiased by his own conceptions—who goes out into society and consults sovereign individuals to determine people's preferences.[15]

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9 Id. at 48-49 (quoting H. Sidgwick, The Methods of Ethics 413 (7th ed. 1907)) (footnote omitted).

10 See C. Taylor, Hegel 181 (1975) ("Utilitarianism is an ethic in which acts are judged according to their consequences, that is, their relevance to some . . . end . . . ."); Smart, An Outline of a System of Utilitarian Ethics, in J.J.C. Smart & B. Williams, Utilitarianism 7 (1973).

11 See M. Packe, The Life of John Stuart Mill 53 n.* (1954).

12 Smart, Utilitarianism, in 8 The Encyclopedia of Philosophy 207 (P. Edwards ed. 1967).

13 R. Posner, supra note 4, at 48-51; see also Posner, Legal Theory, supra note 6, at 104 ("Part II, the heart of the paper, examines the differences between utilitarianism and wealth maximization as normative systems.").

14 See J.S. Mill, Utilitarianism, in John Stuart Mill, Utilitarianism, On Liberty, Essay on Bentham 257 (1962):

> The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness . . . . By happiness is intended pleasure, and the absence of pain . . . . To give a clear view of the moral standard set up by the theory, much more requires to be said; in particular, what things it includes in the ideas of pain and pleasure; and to what extent this is left an open question. . . . [T]hese supplementary explanations do not affect the theory of life on which this theory of morality is grounded—namely, that pleasure and freedom from pain are the only things desirable as ends . . . .

15 See id. at 268 ("[T]he happiness which forms the utilitarian standard of what is right in conduct is not the agent's own happiness, but that of all concerned. As between his own

Utilitarianism is not a "coherent" or self-contained theory.[16] One necessary element that it lacks is a method for establishing or dictating a baseline from which to begin the utilitarian analysis.[17] If the utilitarian is to increase overall happiness, he needs to know whose happiness is to be considered, and to know the level of happiness that currently exists in the world to which the happiness in the "new world" can be compared. Consequently, many forms of utilitarianism can in theory exist because the philosophy's characteristics are defined by what baseline is chosen.

Determining whose happiness counts is an entitlement (or "legal") question. For example, one may posit that all human beings are equally entitled to be consulted about their preferences, or that only Americans are so entitled, or that American preferences be weighted over the preferences of aliens, or that people are entitled to happiness in proportion to the wealth they have. None of these baselines is dictated internally by the utilitarian principle itself.

An unstated premise in Posner's critique of utilitarianism is that he is comparing wealth maximization to a single form of utilitarianism, egalitarian utilitarianism, which entitles all people's (or, arguably, all beings') preferences to be counted equally in determining the moral rightness of actions.[18] Since the utilitarian calculus can produce different results depending on the baseline established, to understand Posner, we must realize that by "utilitarianism" he means a particular brand of utilitarianism in which all human beings are equally entitled to happiness.[19]

happiness and that of others, utilitarianism requires him to be as strictly impartial as a disinterested and benevolent spectator.").

16 See Smart, supra note 10, at 16, 24-25.

17 Id. In this Note, baseline refers to the conceptual starting point of utilitarian analysis.

18 See infra text accompanying note 59.

19 Posner never explicitly states that he is evaluating only this one form of utilitarianism; only if this is true, however, does his critique of utilitarianism make logical sense. For example, when Posner discusses utilitarianism's boundary problem, he concludes that sheep must be included in the relevant population of whose happiness is to count. See infra notes 52-62 and accompanying text. He states that "the [utilitarian] theory seems to require including sheep . . . in the population whose happiness is to be maximized." R. Posner, supra note 4, at 53. This conclusion follows only if the type of utilitarianism considered is egalitarian utilitarianism. If the baseline is drawn at a point where things are not necessarily equal (for example, if the baseline is drawn to include only human happiness), then the happiness of sheep does not and would not be included in the population. Moreover, it is commonly assumed that utilitarianism is egalitarian utilitarianism. See, e.g., Rosenfeld, Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory, 70 Iowa L. Rev. 769, 803 (1985).

Posner's attack on utilitarianism is aimed at Jeremy Bentham's version of utilitarianism. R. Posner, supra note 4, at 48, 87. However, this specification of utilitarianism as Benthamism does not alleviate the confusion Posner generates regarding which form of utilitarianism he is criticizing, egalitarian utilitarianism or utilitarianism in general. For example, Posner initially

### B. *Posner's Wealth Maximization Principle*

Posner distinguishes wealth maximization from utilitarianism and asserts that wealth maximization is the superior ethical theory to guide our legal system. In addition, Posner makes a very strong claim that wealth maximization is market based—that is, connected to the concept of exchange of commodities. To evaluate Posner's approach, a clear understanding of wealth maximization is necessary. Accordingly, this section describes its crucial components, wealth and value, and its alleged connection to the market.

#### 1. Wealth and Value

Under Posner's alternative theory (wealth maximization), wealth is the value of everything in society expressed in money or money equivalents.[20] Wealth, however, does not only refer to money: goods have both use and exchange value.[21] Use value is the extent to which a person's subjective assessment of a good, net use value, departs from its exchange value, whether positively or negatively.[22] When exchange value exceeds use value, a consumer would sell the commodity because he would prefer to have the commodity's cash equivalent than to have the commodity itself.[23] Conversely, when use value exceeds exchange value, a consumer would rather retain, not sell, the commodity being valued.[24] This preference will remain true until the commodity's use value falls or its exchange value rises to invert these relationships. A person's wealth is defined as the combined exchange value and net positive use value.[25]

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defines Benthamism's "test of [a] sound social policy [as] whether it promoted the greatest happiness of the greatest number of people." Id. at 33. Subsequently, Posner asserts that Bentham believed that "the greatest happiness principle required that 'the legislator must prohibit all acts which tend to produce a spirit of inhumanity.' . . . [B]ecause animals experience suffering (unhappiness), [Bentham] urged that the law prohibit cruelty to animals." Id. (quoting F. Boutrous, Principles of Legislation from Bentham and Dumont 238 (1842)).

20 See R. Posner, supra note 4, at 60.

21 Id. Though exchange value has a subjective component, throughout this Note, exchange value is used as an objective measurement of value, in the sense that other peoples' preferences establish exchange value, whereas net use value refers to a purely subjective assessment.

22 This proposition may be expressed algebraically:

let $UV$ = use value;
$NUV$ = net use value (subjective assessment);
$XV$ = exchange value.

Therefore, $UV = XV + NUV$.

23 $XV > UV => $ sell.

24 $UV > XV => $ buy/retain.

25 See R. Posner, supra note 4, at 60. Continuing the algebra, let $W$ = wealth. Therefore, $W = XV + NUV$ (positive). In other words, wealth equals use value when use value is greater

In Posner's system, a proposed action or law is good if it maximizes aggregate wealth.[26] Since wealth is the sum of exchange value and net positive use value, the concept of value is fundamental to wealth maximization. According to Posner, "[f]rom the concept of value derives the concept of the wealth of society as the sum of all goods and services in the society [measured] by their values."[27] Thus, Posner defines value as prior to wealth—both value and wealth are products of the human imagination.

Further, Posner's wealth formula suggests that liquidity, not wealth, is the determining factor for wealth maximization. For example, imagine both *A* and *B* want the exclusive right to use land they jointly own. Under wealth maximization, to determine who should be assigned that right, a court must determine who values the right most, that is, who could pay the most for it.[28] Assume *A* owns a piece of land worth $100,000 on the market—$100,000 is its exchange value—but he places a personal use value on the land of an additional $50,000—the land's value to *A* would be $150,000.[29] *B* is a rich man and has $125,000 cash that he is willing to bid for the right. *A*'s resources consist solely of the parcel of land. Based on Posner's definitions of value and wealth, *A*'s wealth is $150,000; it is greater than *B*'s, and therefore *A* should be assigned the right. However, when it comes time to bid for the right at the "auction," *A* cannot bid his

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than exchange value, i.e., $W = XV + NUV$ (positive); but when exchange value is greater than use value, Posner defines wealth as exchange value, i.e., $W = XV$ (and $NUV$ is negative so it is excluded). To illustrate, assume

$$\begin{aligned} XV &= 10; \\ UV &= 5; \\ \text{and } NUV &= -5. \\ \text{Then } W &= 10 + 0 = 10. \\ \text{But if} & \\ XV &= 10; \\ UV &= 15; \\ \text{and } NUV &= 5; \\ \text{then } W &= 10 + 5 = 15. \end{aligned}$$

Only net positive use value is considered when determining wealth because if net use value is negative (requiring that use value is less than exchange value), the commodity will not be traded and its value to its owner can be no greater than its exchange value.

26 See id. at 61.

27 Id. at 60.

28 Id. at 71-72.

29 If $W = XV + NUV$ (positive);

$$\begin{aligned} XV &= \$100{,}000; \\ \text{and } NUV &= \$\ 50{,}000; \\ \text{then } W &= \$100{,}000 + \$50{,}000. \\ W &= \$150{,}000. \end{aligned}$$

*A*'s wealth is thus $150,000.

land. He must sell the land and bid the money he receives from its sale. If *A* sells the land, he will only receive its exchange value—his net personal use value will not be recovered. Therefore, he will have only $100,000 to bid for the right. Since it is the amount of money one has to bid for a right that determines who values it most and would be its highest valuing user, the right would be assigned to *B*. He has $125,000 liquid dollars to bid; *A*, who may have $150,000 in wealth by Posner's definition, has only $100,000 liquid dollars to bid. This compels the curious conclusion that Posner's wealth maximization theory is not, as Posner asserts, primarily concerned with wealth but rather with liquidity.

### 2. Wealth Maximization and Markets

Since value is thought up by human beings, and since people's values differ, net positive value in the world is increased if commodities end up in the hands of those who value them most. Accordingly, placing goods in the hands of their highest valuing user is wealth maximization's goal.[30] This goal, however, contains a curious self-contradiction—what Hegel would have called a "bad infinity."[31] When goods eventually end up in the hands of their highest valuing users, a Pareto optimal condition[32] is reached where no further trades are possible.[33] Ironically, efficient markets, in theory, thus eventually self-destruct.[34]

The only preferences that count in Posner's wealth maximization system are those backed up by money. Such monetarized preferences constitute the means by which the pleasure of one group can be measured against the pain of another. It is said that these competing pleasures and pains are "registered in a market."[35] Posner makes an

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30 Id. at 61.

31 C. Taylor, supra note 10, at 147.

32 See Hausman, Are General Equilibrium Theories Explanatory?, in The Philosophy of Economics 344 (D. Hausman ed. 1984) ("An economic equilibrium is a state of affairs in which there is no excess demand—a state of affairs in which at the going prices nobody wants to go on exchanging.").

33 Pareto optimality is a condition where goods are distributed in such a way that no possible further allocation of resources would improve the well-being of one individual without decreasing that of another. See Economics Dictionary 226 (2d ed. 1983).

34 A market exchange will only occur when an item is not in the hands of its highest-valuing user. Once the Pareto optimum is reached, all goods are in the hands of their highest-valuing users. Pareto optimality can only be achieved in terms of the static, because the minute you include the fact that resources are distributed in terms of the highest-valuing producer and consumer, new items will be produced and a new level of Pareto optimality must be achieved. Therefore, the textual assertion's truth is limited to completely controlled theoretical markets.

35 R. Posner, supra note 4, at 61.

energetic claim that the concept of value is inseparable from the concept of markets.[36]

Posner refers to markets that are either explicit or implicit. He seems to use the term explicit market to refer to actual historical market exchanges where definite monetary values are assigned to goods.[37] Posner's implicit markets include both nonmonetary barter and hypothetical transactions that have not occurred.[38]

Posner's distinction between historical exchanges involving money—explicit exchanges—and exchanges involving barter and imagination—implicit exchanges—is not adequate. For Posner, a nonmonetary executory contract is lumped in with an imaginary hypothetical contract between people who never bargained.[39] Utilitarians claim that (at least where there are no externalities) the fact that an exchange was realized in history proves that there has been a utilitarian or wealth gain, because otherwise the individuals involved in the trade (who are presumed to be wealth maximizers) would not have exchanged values in the first place.[40] This observation is equally as valid for nonmonetary as it is for monetary contracts. Meanwhile, hypothetical trades have a much weaker empirical base, depending on predictions of human will in a subjunctive context. Because a nonmonetary executory contract and other barter exchanges do not suffer from this kind of empirical weakness, such trades should not be placed in the same category as a hypothetical contract between people who never bargained.

It would have been more convenient linguistically if Posner had categorized markets into actual and hypothetical markets. The nonmonetary barter market would fall within the actual market classification. The hypothetical market would refer solely to a system where values are assigned to rights based on what Posner assumes their value would be if they were evaluated in an actual market. To avoid

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[36] The most important thing to bear in mind about the concept of value is that it is based on what people are willing to pay for something . . . . The individual who would like very much to have some good but is unwilling or unable to pay anything for it—perhaps because he is destitute—does not value the good in the sense in which I am using the term "value."

Id. at 60-61.

[37] Id. at 61 ("[t]he wealth of society is the aggregate satisfaction of those preferences . . . that are backed up by money, that is, that are registered in a market").

[38] Id. ("[M]uch of economic life is still organized on barter principles. . . . [S]ervices have value which could be monetized by reference to substitute services sold in explicit markets or in other ways. . . . Another type of nonexplicit market, the hypothetical market, is also important in analyzing the wealth of society.").

[39] See id. at 61-62.

[40] This is the concept behind the use of a voluntary exchange and Pareto superiority as a means of measuring the level of happiness of the parties. Id. at 54-55, 88-89.

the confusion generated by the terms explicit and implicit markets, throughout this Note I will use the actual/hypothetical market distinction.

Understanding the basics of both utilitarianism and wealth maximization enables distinctions and differences between the contending philosophies to be explored analytically. But to determine whether wealth maximization is distinguishable from utilitarianism and whether it is superior, Posner's own critique of utilitarianism's imperfections must be explored. Thereafter, we shall see whether wealth maximization survives these critiques.

## II. POSNER'S CRITIQUE OF UTILITARIAN PHILOSOPHY

Posner's critique of utilitarianism begins with a sound and skillful discussion of three conventional criticisms of that philosophy: its boundary, measurement, and monstrosity problems.[41] Posner contends that since utilitarianism suffers from these ailments, the theory must be rejected.[42] He then submits that his own ethical system of wealth maximization should replace it.[43] Unfortunately, wealth maximization is infected by the very fatal flaws Posner so capably highlights against utilitarianism.[44] Accordingly, Posner proves too much and condemns his own theory as he argues against its would-be predecessor.[45] This part of the Note reviews Posner's critique of utilitarianism, first presenting his methodology for evaluating normative theories, then detailing each of the criticisms of utilitarianism.

### A. *Posner's Method for Evaluating Normative Theories*

In describing criteria for evaluating normative ethical theories,[46] Posner writes that a normative theory

> can be rejected on one of three grounds: first, that the theory fails to meet certain basic formal criteria of adequacy, . . . second, that the theory yields precepts sharply contrary to widely shared ethical intuitions . . . or third, that a society which adopted the theory would not survive in competition with societies following competing theories.[47]

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41 Id. at 51-58.

42 Id. at 60.

43 Id.

44 See infra notes 145-56 and accompanying text.

45 Posner attempts to prove that the criticisms applicable to utilitarianism do not apply to wealth maximization. See R. Posner, supra note 4, at 76-87. However, this attempt fails. See infra notes 145-56 and accompanying text.

46 Posner, Legal Theory, supra note 6, at 110-11.

47 Id. at 110.

Posner deploys the first two criteria to challenge utilitarianism and to announce the triumph of wealth maximization.[48] He claims that utilitarianism "fails to meet certain basic formal criteria of adequacy"[49] (criterion 1) and that it "yields precepts sharply contrary to widely shared ethical intuitions"[50] (criterion 2).[51] Applied to utilitarianism, these criteria produce three conventional criticisms.

### B. *Utilitarianism's Boundary Problem*

The first criticism Posner makes of utilitarianism is its so-called boundary problem—that its domain is uncertain.[52] According to utilitarianism, individuals should strive to create the greatest amount of happiness—the greatest surplus of pleasure over pain. To accomplish this, utilitarians need to determine whose happiness counts. It is often observed that the utilitarian principle cannot itself tell us what happiness is or who is entitled to have it.[53] Utilitarianism presupposes that these facts are known (or can be determined a priori).[54] Therefore, utilitarianism can only exist within a preexisting normative ethical system; it is not a "coherent" theory but only one piece of a mixed ethical theory.

Posner raises this boundary question and poses two criticisms that stem from it.[55] He asserts that utilitarianism violates his evaluative rules either by answering the boundary question with a response that opposes our moral intuitions (criterion 2) or because utilitarianism itself cannot provide an answer (criterion 1).

Posner asserts that criterion 1 is violated because utilitarianism's boundary problem renders it inadequate as an ethical theory: to answer certain questions, such as whose happiness counts, a utilitarian must look beyond the confines of his own theory. For example, Posner asserts that utilitarianism cannot resolve whether foreigners or the

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48 Id. at 111.

49 Id. at 110. Included in Posner's criterion 1—his classification of basic formal criteria of adequacy—are "logical consistency, completeness, definiteness, and the like." Id.

50 An example of a result that would violate Posner's criterion 2 would be a philosophy which holds "that murder is in general a good thing." Id.

51 Posner does not offer an example or any further explanation of his third criterion. Rather, he indicates that "[t]he third is a very controversial criterion, and one that I shall not pursue . . . as it does not afford a basis for drawing sharp distinctions between the economic and the utilitarian approaches." Id. at 110-11.

52 R. Posner, supra note 4, at 52.

53 See id. at 52-54; Clark, Some Difficulties in Utilitarianism, 29 Philosophy 244, 244 (1954) (addressing "some of the difficulties of [utilitarianism], in particular those connected with the meaning of . . . happiness").

54 See Williams, A Critique of Utilitarianism, in J.J.C. Smart & B. Williams, supra note 10, at 110-12.

55 R. Posner, supra note 4, at 52-54.

unborn should be included in the population whose happiness counts.[56] A utilitarian can only begin her work once a decision has been made by resort to an external baseline. Since internal coherence is a "basic formal criteria of adequacy" for Posner, utilitarianism is rendered an inadequate ethical theory.[57]

As another example of the boundary dilemma, Posner muses about whether animals' happiness counts.[58] He asserts that to maximize, as Mill put it, the happiness of sentient beings, animals' happiness would have to count.[59] Posner then posits that when confronted with the choice between killing two sheep or one child, the utilitarian could not condemn as immoral a man who killed the one child and saved the two sheep.[60] Nevertheless, it belies people's basic intuitions to value the life of an animal on the same scale as that of a human being. This offensive result points out the inadequacy of the utilitarian theory. As Posner observes, "there is something amiss in a philosophical system that cannot distinguish between people and sheep."[61] Since utilitarianism violates our basic moral intuitions (criterion 2), Posner concludes that it must be rejected as an ethical theory.[62]

These two boundary-based criticisms expose an inconsistency in Posner's critique. He seems to be saying (a) utilitarianism cannot tell one whether to include foreigners, but (b) utilitarians must consult the preferences of sheep. These claims are contradictory. In (a), he notes that utilitarians must be "arbitrary," from the perspective of their theory, but in (b) he says that utilitarianism requires a certain answer to a boundary issue. The inconsistency results from Posner's failure to specify which form of utilitarianism he is criticizing. Point (a) is true if Posner is criticizing the utilitarian philosophy in general, whereas point (b) is true if he is targeting egalitarian utilitarianism that counts all sentient beings.[63] To avoid this predicament, Posner needs to specify what form of utilitarianism he is addressing.[64]

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[56] Id. at 53.

[57] Posner, Legal Theory, supra note 6, at 110.

[58] R. Posner, supra note 4, at 52-53.

[59] Id. at 53. Mill declared "[t]he general principle to which all rules of practice ought to conform, and the test by which they should be tried, is that of conduciveness to the happiness of mankind, or rather, *all sentient beings*." Gorovitz, *Introduction* to Mill: Utilitarianism xviii (1967) (emphasis added).

[60] R. Posner, supra note 4, at 52-53.

[61] Id. at 53.

[62] See supra note 50 and accompanying text.

[63] See supra text accompanying note 19.

[64] To illustrate, utilitarianism does not provide a boundary line which would mandate including a sheep's happiness in the population of those whose happiness is to be considered. To determine whether the sheep must be included or excluded one must go outside of utilitarian-

### C. *Utilitarianism's Measurement Problem*

Posner's second criticism challenges utilitarianism's "method for calculating the effect of a decision or policy on the total happiness of the relevant population."[65] Posner asserts that there is no reliable technique for measuring a change in the level of satisfaction of others.[66] As Posner concedes, this merely illustrates the general problem of deriving specific policies from ethical premises.[67] He also admits that this difficulty characterizes ethical discussions in general and is not unique to utilitarianism.[68] Nevertheless, Posner correctly observes that these points alone cannot reconcile one to utilitarianism.[69]

### D. *Utilitarianism's Monstrosity Problem*

Posner's third challenge to utilitarianism is that it can lead to monstrous results.[70] He points out that in certain situations pursuing the surplus of pleasure over pain strategy will lead to insane policies that violate our intuition—Posner's criterion 2. This moral monstrousness exists in the utilitarian theory because there is no basis within utilitarianism for distinguishing among types of pleasure, and because an increase in happiness can sometimes be best accomplished by imposing large burdens on some for the sake of others[71]—in Posner's words, to "sacrifice the innocent individual on the altar of social

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ism just as in the unborn situation. Posner assumes a definition that includes the happiness of all beings, and so includes the happiness of sheep. See R. Posner, supra note 4, at 53. Therefore, Posner claims that to maximize "happiness" one must poll the preferences of sheep. But the very action of defining happiness constitutes leaving the domain of utilitarianism and using principles of hermeneutics that are not themselves utilitarian. Posner is incorrect to assume that utilitarianism demands that the happiness of sheep be included. The boundary drawn to include or exclude sheep can only be drawn by reference to a source outside of the utilitarian theory.

65 Id. at 54. See also id. ("the practice of utilitarianism presupposes omniscience") (citing 2 F.A. Hayek, Law, Legislation, and Liberty 17-23 (1976)).

66 Posner rejects the Pareto concept for measuring levels of utility. See id. at 54-55, 88-89.

> As is well known, the Pareto solution is apparent rather than real. Since it is impossible to measure utility directly, normally the only way of demonstrating the Pareto superiority of a change in the allocation of resources is to show that everyone affected by the change consented to it. . . . But because the crucial assumption, . . . the absence of third-party effects, is not satisfied with regard to *classes* of transactions, the Pareto-superiority criterion is inapplicable to most policy questions . . . .

Id. at 88-89 (emphasis in original) (footnote omitted).

67 See id. at 55.

68 Id.

69 Id.

70 Id. at 56-58.

71 Id. at 56-57.

need."[72]

Posner identifies two principal sources of monstrousness.[73] The first, utilitarianism's "refusal" to distinguish between types of pleasure, is illustrated by contrasting the amount of pleasure received from feeding pigeons with the amount of pleasure received from pulling wings off of flies.[74] If a person pulling wings off of flies has a greater capacity for pleasure than a man feeding pigeons, and he receives pleasure from that act, the utilitarian would have to judge him a better man because his actions increase the sum of happiness more than those of the pigeon feeder.[75]

The second source of monstrousness is utilitarianism's requirement that one sacrifice oneself for the sake of others.[76] To illustrate this monster, Posner uses Alan Donagan's example of killing obnoxious grandfathers:

> It might well be the case that more good and less evil would result from your painlessly and undetectedly murdering your malicious, old and unhappy grandfather than from your forbearing to do so: he would be freed from his wretched existence; his children would be rejoiced by their inheritances and would no longer suffer from his mischief . . . .[77]

Posner concludes that in the murdered grandfather hypothetical, the "consistent utilitarian would have to judge the murderer a good man."[78] But to call the murderer in Donagan's example a good man violates Posner's criterion 2.[79]

Posner acknowledges that the utilitarian problem of moral mon-

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[72] Id. at 57.

[73] Id. at 56-57.

[74] Id.

[75] Posner reaches this result by not considering the unhappiness of the flies and the happiness of the pigeons. Id. at 57. A strict utilitarian (i.e., one whose baseline includes pigeons and flies) would never discount these feelings in determining the ethical action. Therefore, Posner's example seems inept (especially in light of his earlier view that utilitarianism "seems to require including [animals] in the population," id. at 53).

> The "strict utilitarian" would surely object to "putting aside the unhappiness of the fly," and would probably (though not necessarily) conclude that *A*'s action was less exemplary than *B*'s, since *A*'s pleasure must be reduced by the flies' pain, while *B*'s pleasure calculus would benefit from the addition of the pleasure experienced by the pigeons that *B* feeds.

Schmalbeck, The Justice of Economics: An Analysis of Wealth Maximization as a Normative Goal (Book Review), 83 Colum. L. Rev. 488, 498 (1983) (reviewing R. Posner, The Economics of Justice (1981)) (citation omitted).

[76] R. Posner, supra note 4, at 57.

[77] Id. (quoting Donagan, Is There a Credible Form of Utilitarianism?, in Contemporary Utilitarianism 187, 188 (M. Bayles ed. 1968)).

[78] Id.

[79] See supra note 50 and accompanying text.

strousness "is a less serious problem . . . at the level of social than of personal choice."[80] This is because a result is less offensive to conventional moral notions if an innocent person is sacrificed as a result of an established institutional structure.[81] For example, if an innocent person is killed as a result of the criminal penal system, although objectionable, it is less reprehensible because it is inevitable that some innocent people will suffer there.[82] But Posner points out that even at the social level utilitarianism can produce moral monsters.[83] For example, when a minority group is "so hated that their extermination would increase the total happiness of the society, the consistent utilitarian would find it hard to denounce their extermination" as morally wrong.[84]

Utilitarianism's instrumental aspect leads to another form of monstrosity.[85] Posner demonstrates the instrumentalism problem by observing that utilitarianism seems to base important rights merely on the intuitive hunch that they promote happiness.[86] Rights in a utilitarian system are strictly instrumental goods because the only final good in the system is the happiness of the group as a whole. Therefore, utilitarianism would only accord rights which promote an increase in total happiness. "If happiness [were] maximized by allowing people to own property, marry as they choose, [and] change jobs [at will,] then the utilitarian [would] grant [these] rights."[87] But if happiness would be increased by denying people these rights, they would be denied. Thus, utilitarianism can produce monstrous policy recommendations because it has no inherent respect for rights.[88]

Posner asserts that utilitarianism must be replaced because it possesses these insurmountable flaws.[89] If so, that which replaces utilitarianism must be either a completely different philosophy that does not suffer from these same shortcomings or a superior version of utilitarianism that avoids them. Part III of this Note compares wealth

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[80] R. Posner, supra note 4, at 57.

[81] Id. at 58.

[82] See Philips, The Inevitability of Punishing the Innocent, 48 Phil. Stud. 389, 391 (1985):

> The point is that to justify having a criminal justice system at all we must maintain either that the rights of innocents are not violated when they are punished or that these rights are violated but that this violation is justified by concerns of social good and the rights of citizens to protection by the state.

[83] R. Posner, supra note 4, at 58.

[84] Id. This would be a possible result even though the anxiety of the people who would fear their own extermination would be considered. Id.

[85] Id. at 56.

[86] Id.

[87] Id.

[88] Id.

[89] Id. at 60; see supra notes 41-45 and accompanying text.

maximization and utilitarianism, and proves that wealth maximization is neither distinct from nor superior to utilitarianism.

## III. POSNER'S ATTEMPT TO ESCAPE UTILITARIANISM

Posner claims that based on his previous works, many scholars have accused him of being a utilitarian.[90] He has denied this charge and has criticized people who equate wealth maximization with utilitarianism, and therefore think they can defeat wealth maximization by defeating utilitarianism.[91] To escape the critique of utilitarianism, Posner expends tremendous energy in *The Economics of Justice* strug-

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[90] Cf. R. Posner, supra note 4, at 73 ("But inequality of results is not what concerns those who argue that the economic theory of law is a theory of rights masquerading as a species of utilitarianism."); id. at 64 (positive economic theory's assumption that people are utility maximizers "is another reason for the frequent confusion of economics and utilitarianism as ethical systems"). In support of the proposition that Posner is a utilitarian, one authority is commonly cited. See Epstein, The Next Generation of Legal Scholarship? (Book Review), 30 Stan. L. Rev. 635, 645 n.35 (1978) (offering Posner's efficiency rationale as an example of the utilitarian's position on compensation in eminent domain cases, implying that the two theories are the same).

Given Posner's efforts to distance himself from utilitarianism, it is ironic that he originally classified himself as a utilitarian. See Baker, Starting Points in *Economic Analysis of Law*, 8 Hofstra L. Rev. 939, 948 (1980) ("In the first edition of *Economic Analysis of Law*, Posner equated economic theory with Bentham's utilitarianism, thereby strongly implying that he basically considered himself a utilitarian." (footnote omitted)). Given Posner's concern about his critics' perceived confusion, it is also ironic that Professors Dworkin and Kronman, two of Posner's primary critics, do not accuse him of being a utilitarian. See Dworkin, supra note 3, at 191 (criticizing wealth maximization but not equating it with utilitarianism); Kronman, Wealth Maximization as a Normative Principle, 9 J. Legal Stud. 227, 227-28 (1980). Kronman recognizes that Posner believes that wealth maximization is often confused with utilitarianism. Id. at 227. However, Kronman does not conclude that wealth maximization is a form of utilitarianism, but instead his criticisms are based on rejecting the notion that "[w]ealth maximization is . . . a happy compromise between utilitarianism and Pareto superiority. . . . If anything [Kronman concludes that] wealth maximization exhibits the vices of both and the virtues of *neither*." Id. at 228 (emphasis added). See also Posner, The Value of Wealth: A Comment on Dworkin and Kronman, 9 J. Legal Stud. 243 (1980) (responding to the criticisms raised by Professors Dworkin and Kronman, but not mentioning wealth maximization being wrongly equated to utilitarianism). This raises a puzzling question: Why is Judge Posner so concerned with being classified as a utilitarian when his critics *do not* seem to be so classifying him?

Judge Posner himself admits that there are no recent critiques of wealth maximization which equate it to utilitarianism, but explains that the comparison has been conventionally made in the past. For example, Posner comments that he has often heard wealth maximization called "utilitarianism warmed over." Interview with Richard A. Posner, Circuit Judge for the Seventh Circuit, at Benjamin N. Cardozo School of Law (Mar. 28, 1988) [hereinafter Posner Interview] (transcript on file at the Cardozo Law Review).

[91] "It is . . . not surprising that among the severest critics of the economic approach to law are those who attack it as a version of utilitarianism. Their procedure is to equate economics with utilitarianism and then attack utilitarianism." R. Posner, supra note 4, at 48 (footnote omitted) (citing Epstein, supra note 90, at 645 n.35; Epstein, Nuisance Law: Corrective Justice and Its Utilitarian Constraints, 8 J. Legal Stud. 49, 74-75 (1979)).

gling to prove that wealth maximization and utilitarianism are different ethical theories.[92] This part of the Note analyzes whether Posner has escaped classification as a utilitarian or whether wealth maximization is merely another form of utilitarianism.

### A. *Is Posner a Utilitarian?*

By drawing the distinction between wealth and utility, Posner attempts to show that wealth maximization's objective—to increase wealth—and utilitarianism's objective—to increase utility—are different.[93] With these distinctions, he concludes that wealth maximization must be a different ethical theory from utilitarianism.[94] He attempts to embellish this proof by showing that wealth is linked to markets whereas utilitarianism is not.[95]

Posner first explains why wealth maximization has been confused with utilitarianism.[96] When an economist speaks normatively (when referring to the good, the right, or the just), he tends to speak of maximizing welfare.[97] According to Posner, welfare maximization is seemingly indistinguishable from the utilitarian's concept of promoting happiness.[98] As a result, a normative economist is often called an applied utilitarian.[99] Nevertheless, Posner rejects the welfare maximization concept and defines the normative economic maxim more narrowly.[100] Instead of the good, the right, or the just, Posner defines welfare "as 'value' in the economic sense of the term, or more [precisely], wealth."[101] Posner asserts that by "economic," he is not referring to the broad normative implication of welfare, but to the more limited concept of enhancing wealth.[102] Posner concludes that his definition of welfare is not utility, but is comparable to economic value, an increase in wealth.[103]

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92 See R. Posner, supra note 4, at 60-65 *passim*.

93 See id. "The most important thing to bear in mind about the concept of value is that it is based on what people are willing to pay for something rather than on the happiness they would derive from having it. . . . [W]hile value necessarily implies utility, utility does not necessarily imply value." Id. at 60-61.

94 Id. at 61.

95 Id.

96 Id. at 48-49.

97 See I.M.D. Little, A Critique of Welfare Economics 6-10 (2d ed. 1957).

98 R. Posner, supra note 4, at 48-49.

99 Id. at 49.

100 Id. at 60.

101 Posner, Legal Theory, supra note 6, at 119.

102 Id.

103 R. Posner, supra note 4, at 60-61.

### 1. The Factory Example: A Posnerian Non Sequitur

Ethical theories can be viewed as different if they produce different results when applied to the same facts.[104] Accordingly, Posner presents hypothetical legal disputes under which different results are reached depending on whether wealth maximization or utilitarianism is employed. One such hypothetical involves a pollution-emitting factory adjacent to a residence.[105] The pollution lowers the residential property value by two million dollars, but would cost the factory three million dollars to prevent the emission.[106] Thus, wealth maximization would require the factory to prevail in the property owners' nuisance action.[107] But if the unhappiness caused by the pollution to the property owner is greater than the present happiness of the factory owners, utilitarianism would mandate the opposite result and the property owner would prevail. Thus, Posner concludes that wealth maximization and utilitarianism are distinct ethical theories.[108]

The different results, however, are attributable only to the different baselines assumed.[109] Wealth maximization implements its theory starting from the point where people have different amounts of wealth; egalitarian utilitarianism is applied at a point where there is complete equality between all parties.[110] If the utilitarian baseline were changed to include only those who could pay for the right, utilitarianism, though still considering happiness, would reach the same result as wealth maximization.[111] Thus, the different results are solely

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104 See D. Lyons, Forms and Limits of Utilitarianism 62 (1965).

105 R. Posner, supra note 4, at 62.

106 Posner says nothing about the ability to pay in his factory example; he indicates only the price each party would have to pay to win the right. By saying that wealth maximization produces different results than utilitarianism, Posner is forced to assume that the parties could pay the amounts specified. See infra note 111 (defining "could" in the Posnerian sense). Posner's inattention to ability/inability to pay may explain why he overlooks the baseline-driven differences of the theories. If the ability to pay were made explicit in his factory example, it would become immediately apparent that the differences between the two theories result from different initial endowments to the parties.

107 The property owners and the factory each have reciprocal rights. The question before a court resolving a dispute between the parties would be whose right takes priority. See generally Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 2 (1960) (establishing the concept of reciprocal harms).

108 R. Posner, supra note 4, at 62.

109 See supra note 17 (defining baseline).

110 See supra note 19 and accompanying text (whether Posner is refuting utilitarianism as a whole or just egalitarian utilitarianism).

111 According to Posner's wealth maximization theory, as long as a person's wealth—exchange value plus net positive use value—is large enough to enable him to afford to pay for a right, he "can" pay for that right. Although Posner asserts that a person's wealth determines where wealth maximization assigns a right, it is liquidity and not wealth with which wealth maximization is concerned. See supra note 20 and accompanying text. Nevertheless, in this discussion, "could" is used in its Posnerian sense—dependent on wealth, not on liquidity.

a function of what is assumed to be the initial endowments of the parties in question—unlimited capacity to register happiness versus limitations on ability to register monetarized preferences in the market. The baseline-driven outcome difference does not indicate two theories but rather two strands of the same system.

Wealth maximization remains a system driven by utilitarian methodology: first, translate all human desire, pleasure, and pain into a common numerical index, and then measure whether the index is increased or decreased by the policy in question.[112] Wealth maximization asks individuals to state preferences in current monetary terms, while utilitarianism asks for preferences to be stated in terms of abstract utility. Yet, like utilitarianism, wealth maximization's ethical prescription results from individuals' preferences. The reason the two systems may prescribe different results is that each system gives the individual different characteristics—depending on where the baseline is drawn—which define the way they must describe their preferences.[113]

By posing the factory example as proof that wealth maximization and utilitarianism are different ethical theories, Posner adopts a non sequitur: from the premise that the use of different baselines and indexes produce different outcomes, Posner leaps to the conclusion that the varying results imply that utilitarianism and wealth maximization must be different ethical theories. Yet the baseline in each system is not itself a choice that is utility maximizing or wealth maximizing. Rather, the baseline is an a priori assertion needed to start both utilitarianism and wealth maximization.

There are many types of utilitarianism, which differ on the question of who is entitled to happiness—itself a question that cannot be

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112 This is the process referred to in this Note as commodification—asking an individual to state his preferences in terms of an index number, whether the index is wealth, utiles, or anything else.

113 When the individuals consulted are given different characteristics, dependent on what baseline is drawn, different ethical outcomes will result. This phenomenon, however, is not limited to utilitarianism versus wealth maximization. For example, if any two forms of utilitarianism were applied, each with a different baseline, the answer to a single question would be different. Consider whether a community should be included as part of an influential and affluent county with a highly valued real estate market. The baseline is drawn to include only people who own their homes. When these people are asked whether their happiness would be increased if their community is included as part of the influential county, since they are all homeowners who would benefit by an increase in their real estate values, the amount of happiness would be great. However, if the baseline is drawn to include tenants, then the amount of happiness would not be as great because the tenants may fear that if they are included, their rents will increase. This group may overall be happier if the community was not included as part of the affluent county. Therefore, whether to become part of the affluent county will differ depending on where the baseline is drawn.

answered by reference to utilitarianism. Under this view, wealth maximization simply becomes a type of utilitarianism. Egalitarians leave the practice of utilitarianism and find equality to be a just baseline; Posner likewise leaves the practice of utilitarianism and finds the existing distribution of wealth to be the proper baseline. But once baselines are found, both egalitarians and Posner return to utilitarian methodology and thereafter engage in identical practices.

2. Different Goals Ergo Different Ethical Theories?

Next Posner attempts to distinguish wealth and utility by asserting that wealth is a single preference whereas utility is the "sum total" of many preferences.[114] According to Posner, wealth is a single dimension of utility which in turn is multifaceted.[115] This claim does not hold up. Wealth and utility are both index numbers through which people state their preferences. In the wealth maximization system, a preference is commodified based on money whereas in the utilitarian system it is commodified based on units of utility.[116] Both are either equally complex or equally simple. For example, if a psychiatrist were asked if the index numbers were complex or simple he would answer that they are both complex because many feelings are considered before one can conclude how much she desires an item—whether the desire is expressed in monetary or utility terms. Conversely, a social scientist would view index numbers as simple because he does not care what internal impulses a sovereign individual must order before a final measure of preference is expressed. He only cares about the end result. Therefore, the distinction Posner seeks between utilitarianism and wealth maximization based on the difference of complexity of their index numbers is illusory. Wealth is in fact constituted by human preference just as utility is. Wealth equals exchange value plus net positive use value, both of which come from subjective

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114 R. Posner, supra note 4, at 64.

115 This may be a response to Dworkin's question of whether wealth is the goal of wealth maximization and therefore is itself a value, or whether wealth is merely a means to other ends which are of value. See Dworkin, supra note 3, at 194-96 & n.4. Posner's answer seems to be that wealth is the end and therefore is itself a value. R. Posner, supra note 4, at 64 ("Wealth is an important element in most people's preferences, and wealth maximization thus resembles utilitarianism in assigning substantial weight to preferences, but it is not the sum total of those preferences."). However, Posner is not clear on whether wealth is a component of happiness or happiness is a component of wealth. There are two possibilities: since wealth is a single preference whereas utility is the sum total of many preferences, wealth is a part of happiness; or, since use value is considered to be a component of wealth, happiness is implicitly considered when policy determinations are based on changes in societal wealth. See Schmalbeck, supra note 75, at 493-94.

116 See supra note 112 and accompanying text (defining commodification).

human assessment.[117]

### 3. Linking Wealth Maximization to Markets

According to Posner, wealth maximization leads to the use of markets whereas utilitarianism does not.[118] For him, this difference is sufficient to prove that wealth maximization is a different ethical theory from utilitarianism. Nonetheless, not only does Posner never prove the alleged connection between wealth maximization and the market, but he obscures the point: wealth maximization does not lead to the use of markets but rather it leads to the use of market rhetoric.

Posner asserts that the wealth of society—the focal point for wealth maximization—is the aggregate satisfaction of preferences that are "registered in a market."[119] When transaction costs are low, actual market transactions should be relied on to maximize wealth.[120] But when transaction costs are high, the hypothetical and not the actual market should be consulted to analyze the wealth of society.[121] By defining markets to include hypothetical markets, Posner embraces a form of straight utilitarianism dressed in market rhetoric.[122]

Since Posner finds markets attractive, utilitarianism provides a dangerous basis for pursuing markets because utilitarianism can destroy them.[123] This occurs whenever the unhappiness of third parties exceeds the gains from the market exchange. For example, laws

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117 See supra text accompanying notes 20-29.

118 R. Posner, supra note 4, at 61.

119 Id.

120 Id. at 62.

121 Id.

122 The hypothetical market is a fictitious market in which judgments are made about how much each party values a right or item, and in whose possession the right would create the most benefit. In applying the hypothetical market, "the court would have to make a judgment as to how much [the right is] worth to you, and how much [the right is] worth to me . . . . I believe that in many cases a court can make a reasonably accurate guess as to the allocation of resources . . . ." Id. at 62. Just as in utilitarianism, hypothetical measures based on "guesswork" are assigned to preferences.

Whenever there is a wealth gain, it is always possible to make up a hypothetical agreement showing that people would agree to it. Consider a rule that says: injured pedestrians get no compensation unless the driver who struck them is negligent. Suppose this creates a wealth gain: the drivers win $100 (the thrill of the free hit) and the pedestrians lose $80 (unreimbursed medical expenses). In a hypothetical contract, the drivers could pay the pedestrians $x$ dollars where $80 > x > 100$, and still have something left over. Since this follows from the fact that there was a wealth gain, it is just as well to leave out the hypothetical contract. It adds nothing. The hypothetical markets are simply truisms about welfare gains. Given *any* wealth gain, one can always imagine a mythical contracting arrangement in a no-transaction cost world in which the winners would compensate the losers and still have a gain.

123 "[F]or the utilitarian, contract is just if it is useful . . . ." Rosenfeld, supra note 19, at 804. The corollary is that utilitarianism destroys contract whenever it is not useful. This evidences the market-destroying potential of utilitarianism. Cf. Unger, The Critical Legal

against drug sales might have a utilitarian basis because the unhappiness of the spectacle of a drug culture outweighs the satisfaction that drug traders attain. For utilitarians, markets only have instrumental value. If we had perfect ability to guess what allocation of resources would maximize wealth, there would be no need for markets, since markets would simply generate unwanted transaction costs.[124] Therefore, markets are not per se good but are only a second-best strategy in light of our cognitive failures.

Classical economic thought relies heavily on actual markets to promote utility, and disfavors resort to hypothetical markets[125] which presuppose that it is possible to index the preferences of one person against another without an actual market exchange.[126] For classical economists, only actual markets, where items have been assigned values, enable the necessary valuation which the utilitarian philosophy requires.[127] But according to Posner, only a "purist would insist that the relevant values are unknowable since they have not been revealed in an actual market transaction, but . . . in many cases a court can make a reasonably accurate guess as to the allocation of resources that would maximize wealth."[128]

Posner attempts to limit use of the hypothetical market to situations where transaction costs are high.[129] When transaction costs are not high, the actual market will control.[130] This transaction cost distinction is not valid, however, if wealth maximization is to have an empirical basis. Before concluding that a market transaction will be efficient and should occur, all persons who will be affected by the transaction must be consulted. Since there is no such thing as a per se

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Studies Movement, 96 Harv. L. Rev. 561, 625 (1983) ("A regime of contract is just another legal name for a market.").

124 Transaction costs are unwanted because "as a general rule wealth is maximized when transaction costs are minimized." Hovenkamp, The Economics of Legal History, 67 Minn. L. Rev. 645, 650-54 (1983). "The most efficient assignment of a legal right is to the person who would end up with it as a result of voluntary market transactions in the absence of transaction costs, for by assigning it to that person initially, the rule eliminates the need for the transactions." Id. at 650-51; cf. Coase, supra note 107. The Coase theorem advises a court to assign the right to the one who would find it most beneficial to purchase the right if the parties were engaged in a voluntary market transaction. This would eliminate unwanted transaction costs that would result if the right was not initially assigned to the one who would pay the most for it; and to acquire the right, he would have to purchase it.

125 See Robbins, The Nature and Significance of Economic Science, in The Philosophy of Economics: An Anthology 113 (D. Hausman ed. 1984); infra notes 150-57 and accompanying text.

126 See R. Posner, supra note 4, at 62.

127 See Robbins, supra note 125.

128 R. Posner, supra note 4, at 62.

129 Id.

130 Id.

contract without externalities,[131] we cannot assume that no one aside from the direct parties to the transaction will be affected by it. We must ask them. Asking whether third parties care about the transaction (even if their answer is that they do not) guarantees that wealth maximization transaction costs are always high. Accordingly, under wealth maximization, hypothetical markets will displace actual markets as the means of assessing the ethical quality of social behavior.[132] Therefore, even a transaction as simple as transferring a pack of gum from one person to another could be accomplished in a hypothetical market because transaction costs (of checking for externalities) will be high.[133]

Hypothetical markets are not markets; on the contrary, they destroy real markets when public opinion is antimarket. Posner tries to save real markets by his high/low transaction cost distinction. But if wealth maximization is to be empirically based, transaction costs are high all the time.[134] Hence, there is no universally true connection between wealth maximization and markets. At best, there is a connection between the current political ideology of the American public and markets.

### B. *Is Posner's Form of Utilitarianism Superior?*

Since wealth maximization is simply another form of utilitarianism, we must consider whether Posner's version of utilitarianism is superior to egalitarian utilitarianism against which Posner compares it. This can be done by addressing two issues: first, whether there is a sound justification for wealth maximization's baseline; and second, whether wealth maximization escapes the fatal criticisms Posner launches at utilitarianism.

#### 1. Posner's Attempt to Justify His Baseline

Posner draws wealth maximization's baseline at a point which freezes current wealth distribution. People do not have an equal right

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131 Posner admits that "the condition that no one else be affected by a 'voluntary' transaction can only rarely be fulfilled." Id. at 55. Cf. Gordon, Unfreezing Legal Reality: Critical Approaches to Law, 15 Fla. St. U.L. Rev. 195, 220 (1987) ("[T]here is no such thing as a free contract.").

132 See Kennedy, Cost-Benefit Analysis of Entitlement Problems: A Critique, 33 Stan. L. Rev. 387, 398-400 (1981) (transaction costs will be high even when those asked if they care about the result say they do not; the process of consulting boosts transaction costs).

133 Another point should be made about the pack of gum sale. If *A* and *B* exchange a dime for gum, then *A* (the buyer) chooses gum over candy. This helps workers at the gum plant and hurts workers at the candy factory. Because *any* exchange changes prices in markets with cross-elasticity, such trades always generate externalities.

134 See supra note 132 and accompanying text.

to happiness, but only to happiness proportional to that which their money can buy.[135] Posner justifies this unequal entitlement to happiness by pointing out that since people work for their wealth, and a "productive individual puts into society more than he takes out of it," their efforts are wealth maximizing and therefore they deserve the resulting wealth.[136]

But, even if wealth maximization is supported by the general assumption that people work for their wealth, in practice, when assessing how much an individual values a right—how much wealth he would expend to acquire that right—wealth maximization does not distinguish between people who worked for their wealth and those who stole or inherited it. Posner is indifferent to how individuals obtained their wealth; he only cares about whether they have it at the time he begins to implement his wealth maximization theory.[137] For example, Posner does not condone the act of theft in general. If he were asked, before the theft occurred, whether *C* should steal to gain wealth he would say no, because theft does not increase societal wealth—it provides no benefit to anyone but the thief.[138] This apathy about the historic source of wealth leads to an internal contradiction in the wealth maximization theory: an unwarranted distinction exists between thefts that are condemned as immoral and thefts that will be permitted. If thefts occurred yesterday, Posner condones and perhaps applauds them, that is, yesterday's thieves are included among those who deserve their wealth. If a theft is planned for tomorrow, however, Posner opposes it. Meanwhile, in twenty-four hours Posner must reassess the theft that yesterday he found abhorrent. Whatever was immoral yesterday becomes moral the minute the deed is history.

Posner demonstrates this point in the following example.[139] A poor man decides to steal a necklace for his wife. The market (exchange) value of the necklace is $10,000, which is also the subjective value to its owner. If the poor man steals the necklace, the wealth of society will not be increased, because the thief's unwillingness to pay for the necklace (due to his inability to pay for it) shows that the necklace is worth less to him than it is to the owner. Therefore, after the theft, the necklace will not be in the hands of its highest-valuing

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135 R. Posner, supra note 4, at 60-61.

136 See id. at 66.

137 See infra text accompanying note 138. Posner cannot be classified as a libertarian who relies on history because libertarians are concerned with the method by which one acquired wealth. See Rosenfeld, supra note 19, at 786-90.

138 R. Posner, supra note 4, at 66-67.

139 Id. at 62-63, 66.

user, and wealth maximization will condemn the theft.[140] If the owner of the necklace—the one from whom the poor man stole it—had initially procured it through theft, that theft would be irrelevant to wealth maximization and would not be condemned.[141]

Posner's indifference to how one acquired wealth means wealth maximization lacks a uniform opinion as to whether theft is moral. Yesterday's theft is moral but today's is not.[142] Whether theft is condemned depends on whether it occurred before or after the wealth maximization analysis has begun.[143] This internal inconsistency ren-

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140 Id.

141 Wealth maximization's inconsistent position on theft is further illustrated by considering the same facts, except that the thief was a rich man and therefore could pay for the necklace. Based on the hypothetical market, he would be the highest valuing user; therefore, wealth maximization would condone the theft because it would increase societal wealth.

Posner, however, would respond that "[h]ypothetical-market analysis is unwarranted because there is no problem of high market transaction costs that would justify allowing the thief to circumvent the market. . . . [Therefore,] the theft [would] not increase the wealth of society, because it is the outcome of neither a voluntary nor a hypothetical-market transaction . . . ." R. Posner, supra note 4, at 63. Since societal wealth is not increased, wealth maximization would not condone this theft.

Accepting the argument that transaction costs are always high and therefore hypothetical market use is always appropriate, Posner's response is inadequate. See supra notes 131-33 and accompanying text. Accordingly, the wealth maximizing result would be to award the necklace to the thief because it is "worth more to him than the owner in a willingness-to-pay sense." See R. Posner, supra note 4, at 63.

142 Wealth maximization's condemnation of some present theft and approval of historic theft must be distinguished from the effect of a statute of limitations that has run. Unlike wealth maximization, statutes of limitations do not determine whether an act was right or wrong. They only specify a time period within which to determine whether an act was legal. When the statutory period has run, the act is not considered legal, but one can no longer be held accountable for his or her act even if it was illegal. See United States v. Kubrick, 444 U.S. 111, 117 (1979) ("Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time . . . . These enactments are statutes of repose . . . ."); Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348 (1944) ("The theory is that . . . the right to be free of stale claims in time comes to prevail over the right to prosecute them.").

143 Posner might respond to this criticism by claiming that wealth maximization would condemn yesterday's theft because permitting theft would advertise that theft was acceptable. Money and effort would then need to be expended both to prepare for future thefts and to prevent them. Instead of increasing societal wealth, these uses of resources would create waste. To prevent this inefficient use of resources, Posner might contend that wealth maximization would condemn yesterday's theft. See Posner Interview, supra note 90. But this response would be insufficient to cure wealth maximization of its inconsistent holding on theft. What if a theft was committed in secret yesterday? Since it is a secret theft it cannot affect society's resource decisions. See supra note 74 and accompanying text; cf. R. Posner, supra note 4, at 57 (Donagan's obnoxious grandfather hypothetical depends on the "stipulat[ion] that the murder will go undetected."). Therefore, the deleterious effects of permitting the theft would not exist and wealth maximization would have to permit it.

Posner's possible reply is similar to the arguments that condemn rent-seeking behavior as inefficient because it wastes social resources. See Posner Interview, supra note 90. The costs of scouting out places to rob, acquiring burglary tools, or installing preventive devices are all ders wealth maximization's baseline inadequate.[144]

### 2. Self-Criticism in Disguise

The flaws Posner depicts as part of his methodical criticism of utilitarianism are equally applicable to wealth maximization because it also suffers from measurement, boundary, and monstrosity problems. First, Posner's system has the same measurement problem as utilitarianism. Posner believes that absent an actual market transaction, one can predict the wealth maximizing result by using the hypothetical market[145] which simply indexes preferences to wealth—the very same procedure that a utilitarian philosopher would conduct when he indexes preferences to utilitarianism, wealth, happiness, or anything else. Posner claims that it is easier to measure wealth than utility, and therefore, it is better to index preferences to money rather than to utiles.[146] Nevertheless, indexing preferences is a detailed procedure.[147] Since commodification is key to both theories, one system cannot be any easier to apply than the other.[148]

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inefficient uses of social resources and therefore wasteful. See Tullock, The Welfare Costs of Tariffs, Monopolies, and Theft, in Toward a Theory of the Rent-Seeking Society 40 (J. Buchanan, R. Tollison & G. Tullock eds. 1980) (discussing theft's inefficient waste of societal resources):

> Theft . . . is a pure transfer and therefore might be assumed to have no welfare effects at all. . . . This would, of course, be incorrect. In spite of the fact that it involves only transfers, the existence of theft has very substantial welfare costs.
>
> . . . Transfers themselves cost society nothing, but for the people engaging in them they are just like any other activity, and this means that large resources may be invested in attempting to make or prevent transfers. These largely offsetting commitments of resources are totally wasted from the standpoint of society as a whole.

Id. at 45, 47.

144 By Posner's own invalidation method, with which he invalidates utilitarianism, wealth maximization would be invalidated because of this inconsistency (criterion 1). See supra notes 47-51 and accompanying text.

145 See supra notes 121-22 and accompanying text (defining hypothetical market). Posner relies on the facts of the classic case, Cotnam v. Wisdom, 83 Ark. 601, 104 S.W. 164 (1907), as proof that wealth maximization does not suffer from a measurement problem. In *Cotnam*, a physician treated an unconscious victim, sued for his regular fee, and the court implied a contract. Posner justifies the result on the ground that if the parties had negotiated, the patient would have agreed to pay for the physician's services. Posner maintains that "[i]t is easier to guess people's market preferences in areas where the market cannot be made to work than to guess what policies will maximize happiness." R. Posner, supra note 4, at 79. However, such an extreme example would be resolved with the same ease by utilitarianism: choosing life over death is the utility maximizing event. Thus, the unconscious patient paradigm does not distinguish wealth maximization from any other kind of utilitarianism.

146 R. Posner, supra note 4, at 60-62.

147 Like utilitarianism, wealth maximization consults the sovereign individual and asks him how much he wants something. Both theories ask the individual to commodify their desires. See supra text accompanying note 112 (discussing commodification).

148 The principal difference between wealth maximization and utilitarianism is not that one

The boundaries that wealth maximization theory commands are considered by Posner to be more intuitively acceptable than those drawn by egalitarian utilitarianism.[149] This is not the case. Wealth maximization's baseline can produce counterintuitive results because it is just as arbitrary as that of utilitarianism's. For example, Posner criticizes utilitarianism for maximizing sheep satisfaction,[150] yet his own system is liable to do so too. Consider a trust established for an animal's benefit. In such a situation, wealth maximization would mandate including these animals (when considering whose preferences count) because they have wealth entitlements.[151] Accordingly, if a man had the choice between killing one child or two sheep, where the sheep were beneficiaries of a large trust and therefore their preferences would count, wealth maximization would be unable to condemn the man as immoral if he chose to kill the child and save the sheep. This result would violate our basic intuitions as it did under the utilitarian system. Therefore, Posner's own invalidation process would call for the invalidation of wealth maximization just as it would of utilitarianism.[152]

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commodifies and one does not—they both commodify. However, wealth maximization commodifies only based on money, whereas utilitarianism commodifies to a less familiar index of utility. Since the index of wealth maximization is confined to money, with which we are all familiar, it appears to be an easier index number to use and to understand. In this sense, Posner may be correct that wealth maximization is superior to utilitarianism as a pure measuring device (putting aside the hidden entitlement position that wealth maximization contains). But even with money as an index number, complexities and ambiguities remain—even though the final index is more familiar, the same considerations must be addressed, and therefore the process is equally complex. See supra notes 116-17 and accompanying text (psychiatrist's perspective).

Posner's claim that it is "easy" to translate preferences into dollars because it is done in the market all the time is incorrect. For example, as Max Weber observed:

> We wish to understand . . . the causes of [events] being historically so and not *otherwise*. Now, as soon as we attempt to reflect about the way in which life confronts us in immediate concrete situations, it presents an infinite multiplicity of successively and coexistently emerging and disappearing events, both "within" and "outside" ourselves. The absolute infinitude of this multiplicity is seen to remain undiminished even when our attention is focused on a single "object," for instance, a concrete act of exchange, as soon as we seriously attempt an exhaustive description of *all* the individual components of this "individual phenomena," to say nothing of explaining it causally. All the analysis of infinite reality which the finite human mind can conduct rests on the tacit assumption that only a finite portion of this reality constitutes the object of scientific investigation . . . .

Weber, Objectivity and Understanding in Economics, in The Philosophy of Economics, supra note 125, at 99, 100.

149 See supra text accompanying note 19 (whether Posner is referring to utilitarianism as a general concept or, more specifically, to egalitarian utilitarianism).

150 R. Posner, supra note 4, at 53; see supra notes 52-62 and accompanying text.

151 See R. Posner, supra note 4, at 76 ("Animals count, but only insofar as they enhance wealth.").

152 It would violate Posner's criterion 2. See supra notes 50-51 and accompanying text.

Posner's final criticism of utilitarianism—its monstrosity problem—is equally applicable to wealth maximization. Consider a rich man who is alone and starving in the woods when he comes across a cabin containing food. According to wealth maximization's hypothetical market (which would be used because transaction costs are high),[153] it would be morally correct for the rich, starving man to steal the food because it would be more valuable to him than to the owner in the willingness and ability-to-pay sense.[154] Next, consider the same factual situation, but the starving man is penniless, not rich. According to the wealth maximization principle, it would be morally incorrect for the poor, starving man to steal the food. The morally correct action would be for the poor man to starve to death because he does not value the food more than its owner in the willingness and ability-to-pay sense.[155] Requiring a poor man to starve to death but allowing a rich man to eat, even though neither pays for the food, is by conventional sensibilities a monstrous result.[156]

## IV. Linking Utilitarianism and Economics

Wealth maximization places Posner at neither of the extremes of utilitarian or classical economics regarding their positions on the use of the actual market. Utilitarians have perfect confidence in their ability to communicate with others. Conversely, classical economists were perfectly antithetical to equating interpersonal utilities absent a market exchange. Posner lies somewhere in between. This part of the

153 See R. Posner, supra note 4, at 63; supra notes 119-21 and accompanying text.

154 The starving rich man would presumably be willing to pay any amount to acquire the food, and since he is wealthy he will be able to do so. Therefore, Posner would conclude that he values the food more than its owner (who would presumably be willing to pay much less). Thus, the starving rich man would be the highest valuing user. R. Posner, supra note 4, at 63.

155 The poor man does not value the food more than the owner, according to wealth maximization, because he is *unable* to pay for it. See id. at 60-61.

156 Posner may not view this result as monstrous but it is difficult to believe that many others could or would consider it morally just. Posner believes that wealth maximization avoids becoming monstrous because for wealth maximization to permit one to act monstrously, the consent of the victim must be purchased. "[You] would have to *buy* [the] victims' consent, and these purchases would soon deplete the wealth of all but the wealthiest sadists. . . . [In] a system of wealth maximization [your] activities are circumscribed by the limitations of [your] wealth." Id. at 82.

Posner's theory does not find any act to be monstrous as long as you purchase the right. Therefore, if you buy the right to kill 10 people and you kill 11, the first 10 would be valid under wealth maximization although the eleventh would not be. Under Posner's theory, the random murdering of the first 10 is not a monstrous result but that of the eleventh is. Posner admits that wealth maximization can lead to moral monsters, including discrimination, segregation, and limiting birth rate. See id. at 85-87. But he asserts that these results "seem[ ] rather farfetched." Id. at 85. But they are farfetched only because no one agrees with Posner's ethical rules; generally, we find such practices inherently wrong.

Note explains a significant ideological side effect of Posner's wealth maximization principle and how his position affects the concept of income redistribution.

Posner's work represents a sharp break from classical market economists, who believed it impossible to measure net use value in the abstract.[157] Classical economists view utilitarians as neutral about what is good but also as able to read the preferences of others. To implement their theory, utilitarians had to be able to communicate with each person whose preferences were to count. To classical economics, this communication was logistically impossible outside of markets.[158] In markets, limited communication becomes possible. Buyers and sellers are presumed to be in the market only because the buyer's use value for the other's commodity exceeded her exchange value for the commodity she possesses, while the seller's exchange value for the commodity held is less than her use value for the other's commodity.[159] Note that a market exchange allows for the existence of a net utility gain, but cannot actually measure the amount of that gain.

The assumed impossibility of making interpersonal comparisons of utility without using actual markets had an important ideological side effect. Egalitarian utilitarians can, by claiming a diminishing marginal utility for commodities, argue for involuntary wealth transfers (wealth redistribution) which is advocated by left-wing political ideology.[160] This radical potential of utilitarianism is disempowered if interpersonal comparisons of utility are forbidden. Lionel Robbins made this ideological consequence explicit:

> It is sometimes thought that certain developments in modern Economic Theory furnish *by themselves* a set of norms capable of providing a basis for political practice. The Law of Diminishing Marginal Utility is held to provide a criterion of all forms of political and social activity affecting distribution.
>
> .... The Law of Diminishing Marginal Utility implies that the more one has of anything the less one values additional units thereof.... Therefore the marginal utility of a rich man's income is less than the marginal utility of a poor man's income. Therefore, if transfers are made, and these transfers do not appreciably affect

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157 See Robbins, supra note 125, at 129; M. Blaug, Economic Theory in Retrospect 157 n.1 (4th ed. 1985) (equating the term classical economics with the followers of Adam Smith, up until and including Mill and Cairnes).

158 Robbins, supra note 125, at 130-31.

159 See supra notes 21-24 and accompanying text.

160 See R. Posner, supra note 4, at 80 ("the economic approach is less hospitable than the utilitarian to redistribution").

production, total utility will be increased. Therefore, such transfers are "economically justified." *Quod erat demonstrandum.*

At first sight the plausibility of the argument is overwhelming. But on closer inspection it is seen to be merely specious. It rests upon an extension of the conception of diminishing marginal utility into a field in which it is entirely illegitimate. The "Law of Diminishing Marginal Utility" here invoked does not follow [because] it makes assumptions which, whether they are true or false, can never be verified by observation or introspection. The proposition we are examining begs the great metaphysical question of the scientific comparability of different individual experiences. . . .

. . . . This is not an assumption which need anywhere be made in modern [i.e., classical, market-based] economic analysis.

. . . . The theory of exchange assumes that *I* can compare the importance *to me* of bread at 6d. per load and 6d. spent on other alternatives presented by the opportunities of the market. . . . It is a comparison which necessarily falls outside the scope of any positive science. To state that A's preference stands above B's in order of importance is entirely different from stating that A prefers *n* to *m* and B prefers *n* and *m* in different order. It involves an element of convention valuation. Hence, it is essentially normative. It has no place in pure science.[161]

Although Posner also disfavors involuntary income redistribution, unlike classical economists, he has no qualms about conducting interpersonal comparisons of preferences. For example, he uses the hypothetical market in his wealth maximization theory, and has routinely made these comparisons, especially in his antitrust work.[162]

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161 Robbins, supra note 125, at 129-31 (emphasis in original).

162 See R. Posner, Economic Analysis of Law 265-96 (3d ed. 1986) (summary of Posner's antitrust analysis); see also R. Posner & F. Easterbrook, Antitrust: Cases, Economic Notes and Other Materials (2d ed. 1981) (compilation of leading antitrust cases).

There are two nonactual market transactions that can be classified as part of the hypothetical market. One is a transaction that would naturally take place in the market but which has not. Hypothetical values are assigned to the commodities to determine what result the market would reach. Using supply and demand curves to describe the outcome of transactions which have not yet taken place in the market is an example. The second type of hypothetical market places a problematic situation which would not naturally be resolved in a market into a market setting. Values are assigned to the possible outcomes of the problem and a solution is reached by guessing the way the market would resolve the issue and allocate the resources. Using the market to determine whether strict liability or negligence should be the standard for determining liability in an automobile accident would illustrate this approach. See R. Posner, supra note 4, at 95-96.

The first type of hypothetical market is commonly used by all economists whenever they discuss theoretical economics. See W. Nordhaus & P. Samuelson, Economics 59-72 (12th ed. 1985). Classical economists would reject the second form of the hypothetical market, see Robbins, supra note 125, but Posner commonly uses it. For example, in antitrust law, only Posner would use the hypothetical market to determine whether monopolies as a rule should be re-

Posner's change of the baseline and index number from the utility index to money accommodates his opposition to involuntary income redistribution, while preserving his right to conduct interpersonal comparisons of utility. Under Posner's system, wealth redistribution is impossible because there can never be different marginal preferences within the index itself. Wealth maximization as applied to wealth redistribution compares wealth to wealth, not wealth to utility. For example, the value of the millionaire's millionth dollar does not decrease solely because of its minimal utility to him. He values his millionth dollar as much as his first. Therefore, wealth maximization would prohibit the transfer of the dollar to a poor man because the rich man is its highest valuing user.[163] Thus, Posner remains secure from the possibility that involuntary income redistribution is ethically required. To summarize, Posner's achievement enables him to branch out past actual markets into hypothetical markets without fear of involuntary income redistribution. This conservative political program seems to be a tacit but overarching goal of his agenda.

## CONCLUSION

Richard Posner has purported to formulate the alternative ethical theory of wealth maximization to guide our legal system. Posner asserts that wealth maximization is different from utilitarianism, and that it is a superior ethical theory. This Note has shown that wealth maximization is merely a form of utilitarianism with a different baseline and index language than that of egalitarian utilitarianism. Further, since Posner's theory of wealth maximization does not avoid any of the major problems confronting other forms of utilitarianism, it

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jected because they decrease social wealth. See R. Posner, supra note 4, at 91-92 & figure 2, at 93 (explaining why monopolies must be rejected from a wealth maximization standpoint).

163 There are two types of income redistribution. For example, anti-price-fixing laws transfer wealth from producers to consumers; Posner favors this. But a rule that the rich should be taxed to finance welfare programs for the poor is an entirely different sort of income redistribution which Posner disfavors. R. Posner, supra note 4, at 80. The difference is between *indirect* and *direct* wealth transfer. To illustrate, in antitrust, wealth comes from the exchange of the product itself for cash. Antitrust laws simply dictate who owns the surplus. As a result of a proconsumer law—and a downward sloping demand curve—production is increased, increasing wealth. Here, the wealth transfers are strictly indirect. But what classical economists such as Robbins fear is straight— direct—transfers of wealth (e.g., thefts and welfare programs). Posner defeats involuntary wealth redistribution from rich to poor, but as Professor Kronman observes, wealth maximization may advocate a redistribution of wealth from poor to rich. See Kronman, supra note 90, at 232 ("[T]he principle of wealth maximization neither requires nor forbids that [the original owner] be compensated for the book he has lost—it only requires that the book be transferred to [its new owner—who values it most].").

cannot, as Posner contends, be viewed as an ethical theory superior to utilitarianism.

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