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# VALUING VIRTUE: MORALITY AND PRODUCTIVITY IN POSNER'S THEORY OF WEALTH MAXIMIZATION

ANNALISE E. ACORN\*

## I. INTRODUCTION

The law and economics movement has been very influential in the legal academy and legal practice in the last twenty years.<sup>1</sup> This has been the case notwithstanding the existence of much strong and persuasive criticism of the ethical foundations of the movement. Ronald Dworkin<sup>2</sup> and Mark Kelman,<sup>3</sup> among others,<sup>4</sup> have leveled devastating criticisms against attempts to construct the notion of efficiency within the theory of law and economics as an ethical

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1. The extent and nature of the influence of the law and economics movement is difficult to measure. For discussions of the influence of the law and economics movement in judicial reasoning, see Izhak England, *Law and Economics in American Tort Cases: A Critical Assessment of the Theory's Impact on Courts*, 41 U. TORONTO L.J. 359 (1991); Warren J. Samuels & Nicholas Mercurio, *Posnerian Law and Economics on the Bench*, 4 INT. REV. OF LAW & ECON. 107 (1984). For further bibliography on Richard Posner's influence on the bench since his appointment to the United States Court of Appeals for the Seventh Circuit, see England, *supra*, at 361 n.4.

2. RONALD DWORKIN, *Is Wealth a Value? & Why Efficiency?*, in A MATTER OF PRINCIPLE 237, 267 (1986). The ultimate import of the stories of Amartya and Derek at 242; the doctor and the candy maker at 239, 252; and Agatha and Sir George at 254, is that wealth maximization favors the advantaged for no justifiable reason.

3. MARK KELMAN, *Legal Economists and Normative Social Theory and Legal Economists and Conservative Preferences*, in A GUIDE TO CRITICAL LEGAL STUDIES 114, 151 (1987). As with Dworkin's examples, Kelman's example of the position of Native Americans in relation to land claims illustrates primarily that the notion of valuation favors the advantaged. *Id.* at 143. Once it is decided that Native Americans do not own the land, it is impossible for them to value it more highly than do the European settlers. Thus, their use of it is deemed inefficient. *Id.*

4. For a bibliographical note on other C.L.S. (Critical Legal Studies) critics of law and economics' normative branch, see KELMAN, *supra* note 3, at 114 nn.1-2; see also Arthur A. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980); Morton J. Horowitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980); Lawrence G. Sager, *Pareto Superiority, Consent, and Justice*, 8 HOFSTRA L. REV. 913 (1980); Lewis A. Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591 (1980); John M. Finnis, *Allocating Risks and Suffering: Some Hidden Traps*, 38 CLEV. ST. L. REV. 193 (1990).

norm. These thinkers have shown that a constitutive and foundational element of the theory is that it favors the advantaged over the disadvantaged.<sup>5</sup> Law and economics has, however, had an enduring and substantial effect even after these criticisms have exposed its deep rejection of a principle of equality of individuals.

The continued significance of law and economics in the face of these criticisms can be explained by the fact that at its ethical foundation the movement does, indeed, embrace the idea that the advantaged deserve to come out ahead in the allocation of entitlements. Richard Posner, as the most daring and explicit proponent of efficiency as an ethical norm, justified the favoring of the advantaged by arguing that the advantaged are also productive and that productive individuals are more deserving than unproductive individuals.<sup>6</sup> In his early work, Posner argued that wealth maximization, as a system of allocating entitlements, was morally defensible because it both rewarded and provided an incentive toward the moral virtue of productivity.<sup>7</sup> It gave due recognition to the moral distinction between production and consumption. The substance of this moral distinction then purportedly justified the instances in which wealth maximization favors those who are most able to value entitlements in either the real or hypothetical market.<sup>8</sup>

There is a sense in which the egalitarian critics of law and economics, such as Dworkin and Kelman, in criticizing Posner's work on wealth maximization, took him too seriously as a moral and legal philosopher and not seriously enough as a lawyerly rhetorician of the political right.<sup>9</sup> However, we cannot now consider the debate to be one of the past. The morality of efficiency has recently been making gains on a number of fronts. The metaphor of the big pie and the notion of efficiency as an ethical norm have been revitalized by the perceived significance of the overthrow of the Communist regimes in Eastern

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5. I am borrowing this definition of the right inferentially from Philippe Van Parijs, *Basic Income Capitalism*, 102 ETHICS 465, 469 (1992), who suggests a definition of the left/right axis as the degree to which a position caters for the interests of the least advantaged.

6. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 66 (1981) [hereinafter POSNER, *ECONOMICS OF JUSTICE*].

7. *Id.* at 66-69. Posner reiterates this view, while backing off of some of his other claims about the viability of wealth maximization as an ethical norm in *Wealth Maximization Revisited*, 2 NOTRE DAME J.L., ETHICS & PUB. POL'Y 85, 97-99 (1985) [hereinafter Posner, *Wealth Maximization Revisited*].

8. For a discussion of the ways in which wealth maximization theoretically justifies the coercion and even the slaughter of the unproductive, see Kornhauser, *supra* note 4, at 602.

9. Kelman argues that the normative theory behind law and economics goes beyond simply being the narration of the political right in the legal sphere, and is also an attempt to resolve the ongoing difficulty of the relationship between law and politics. Law and economics theory views law as the apolitical efficient allocation of entitlements, and thereby separates law from politics, which is concerned with distributional goals. KELMAN, *supra* note 3, at 125.

Europe.<sup>10</sup> Exposure of the anti-egalitarian strands of efficiency as a moral norm has not ousted efficiency from the realm of moral discourse.<sup>11</sup> Thus, both the questions about the moral significance of efficiency and material productivity, and the relative desserts of productive and unproductive individuals require re-examination.

It is not, however, the question of whether efficiency as a norm favors the advantaged that I want to discuss here. Rather, what I want to do is to re-examine Posner's defense of wealth maximization as an ethical principle and to ask how Posner and other followers of the school of law and economics defend the view that it is morally desirable to favor the advantaged. In this, I, too, may be accused of taking Posner too seriously as a moral philosopher instead of simply dismissing him as an apologist in the legal arena for right wing orthodoxy. However, I propose to analyze his defense of the political right at the point where I think it is most in need of analysis, that is, in his argument that the advantaged are more deserving and that a system of legal decision-making that favors the advantaged is morally attractive. Therefore, I shall attempt to take the assertion that there is an important relationship between morality and productivity at its strongest. I shall try to determine whether there are any convincing arguments to be made about the moral significance of productivity, and further, whether such arguments could be inserted into the ethical foundations of law and economics to give it fuller normative appeal.

I shall first examine the argument that productivity is morally significant because it is through productive activity that one contributes to the lives of others. On this view, productive individuals may be viewed as morally superior to unproductive individuals because, through the creation of goods or services to be enjoyed by others, they give to society rather than merely taking from it through consumption. This view is engaged by Posner's discussion of the moral significance of the creation of a consumer surplus.

Secondly, because Posner invokes Calvinism in his normative defense of wealth maximization, I shall examine the Calvinist emphasis on productivity as it was fleshed out in the idea of work in a calling. The Calvinist ethic of productivity is deeply self-negating and is centered around the idea that by imposing order on the external world through productive activity, the individual

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10. John E. Roemer, *The Morality and Efficiency of Market Socialism*, 102 ETHICS 448, 451 (1992). See generally *Symposium on Markets and Equality Under Capitalism and Socialism*, 102 ETHICS 447 (1992).

11. Even the Democratic party's 1992 platform engaged the notion of the moral significance of productivity, speaking in terms of honoring business as a noble endeavor. THE REPORT OF THE PLATFORM COMMITTEE TO THE DEMOCRATIC NATIONAL CONVENTION 1992, at 3 (Ronald H. Brown chairman, 1992).

engages in the submission of his<sup>12</sup> will to that of God. Productivity is seen as providing a means of religious redemption for the individual. I shall ask about whether it is possible to factor out the religious aspect of the notion of the calling to discover any ethically convincing argument about the significance of productivity within it.

The third argument I shall address concerning the ethical significance of material productivity is that of Karl Marx. It is, of course, unlikely that Marxist theory on the relationship of productivity to personal fulfillment would be compatible with Posnerian ethical theory. Nevertheless, I think that it is instructive to examine the ways in which both thinkers posit productivity as, in some sense, central to good human life. I shall, therefore, discuss Marx's view of productivity as self-realization. I shall discuss some of the strengths and limitations of Marx's theory in this regard, and I shall explore some of the reasons why Marx's ideas about the significance of creativity cannot be harnessed by Posner to support his conclusion that productive individuals are morally more deserving.

In discussing these various arguments for the significance of productivity, I shall also ask whether Posner's use of the notion of productivity is consistent with any of these rationales for treating efficiency as morally significant. Additionally, I will question whether Posner's favoring of the advantaged at the theoretical level can be justified by reference to the moral distinction he draws between production and consumption. I shall argue that even though there are defensible reasons for positing productivity as morally significant, these reasons are not available to Posner, given the substance of the rest of his theory. Thus, I hope to add further support to the view that the theory of wealth maximization does not provide an acceptable moral justification for its conclusions about the allocation of legal entitlements.

Before proceeding, however, I shall explain both the continuing significance of Posner's early normative theory as well as the role that the morality of productivity plays in it.

## II. THE CONTINUING SIGNIFICANCE OF POSNER'S EARLY NORMATIVE THEORY

I propose now to turn to Posner's exposition of wealth maximization as a moral theory primarily as it appears in the first section of Posner's book, *The*

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12. I will use a masculine pronoun where the text I am dealing with assumes a male subject. For a discussion of the distortion inherent in assuming that masculine texts can be rehabilitated by inserting the feminine pronoun, see SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 11 (1989).

*Economics of Justice*.<sup>13</sup> It may be objected that this text, now more than ten years old, was eccentric when it was first published and, in any event, no longer enjoys a reputation of being the foundation of the theory. It is, indeed, the case that Posner has backed off from his espousal of wealth maximization as an ethical norm and has repudiated many of the claims he made in his earlier work defending the normative branch of his theory.<sup>14</sup> However, the text remains of importance because it is here that Posner squarely addressed the question of how it can be ethically permissible for law and economics to reject a principle of equality.

The necessity of looking to Posner's earlier work can be shown through an examination of his more recent and more measured defense of the moral justification of law and economics. In a debate with Robin Paul Malloy entitled *Is Law and Economics Moral?*, Posner argues that wealth maximization, rather than being a moral theory as such, abandons the sinking ship of moral discourse and replaces it with a pragmatic means of producing fair resolutions of difficult social and legal problems.<sup>15</sup> This defense of wealth maximization is, in its structure, much like arguments put forward to defend procedural liberalism.<sup>16</sup> This defense is advanced as follows: Decisions about who is entitled to what are very controversial in our society. Pluralistic societies are, by definition, lacking in consensus on matters of morality. Therefore, in making decisions about social policy and law, it is a good thing (in such a society) to have a system that will yield answers not contingent upon the adoption of any particular moral philosophy or world view. Such a system will defuse these issues of their controversial nature to some extent and will provide policies with which everyone can be reasonably satisfied. Thus, Posner argues that with respect to a controversial issue like surrogate motherhood, one can determine policies on such an issue without engaging in a lot of very messy and indeterminate talk of the commodification of children, exploitation of women, rights of the genetic father, and the like, simply by asking what policies will be wealth maximizing.<sup>17</sup>

Of course, flipping a coin is another means of decision-making which "abstracts from controversial issues."<sup>18</sup> It is not, on that basis, an attractive method for creating social policy, deciding upon the structure of institutions, or

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13. See POSNER, *ECONOMICS OF JUSTICE*, *supra* note 6.

14. See, e.g., Richard A. Posner, *Law and Economics Is Moral*, 24 VAL. U. L. REV. 163 (1990) [hereinafter Posner, *Law & Economics*]. Other revisions of his defense of wealth maximization are found in Posner, *Wealth Maximization Revisited*, *supra* note 7, and POSNER, *THE PROBLEMS OF JURISPRUDENCE* 374-87 (1990) [hereinafter POSNER, *PROBLEMS OF JURISPRUDENCE*].

15. Posner, *Law & Economics*, *supra* note 14, at 163.

16. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1972).

17. Posner, *Law & Economics*, *supra* note 14, at 169.

18. *Id.*

allocating legal entitlements. The reason why this sort of procedural argument is compelling, in the context of a theory advanced by a liberal like Rawls, is not simply that it provides a means for resolving issues without appeal to controversial conceptions of the good. Rawls does, indeed, identify or construct a necessity to pull out of discussion matters on which people would necessarily disagree, and his argument for the justness of the theory is, in some measure, based on his conviction that the recognition and accommodation of that perceived necessity is extremely important. However, he does not claim that the recognition of this need, on its own, could sustain the persuasiveness of his theory. Rather, the theory's legitimacy on its own terms rests upon the truth of its claim that in devising procedures for the creation of social order, it treats individuals equally and evenhandedly respects their various claims to live according to their own conceptions of the good.<sup>19</sup>

Posner's theory of wealth maximization does not claim any such ambition. In creating a procedure for the resolution of questions it does not even ostensibly seek to treat individuals equally. It does, however, seek to treat dollars equally. Posner argues that the merit of this position is that once one becomes concerned with questions of how much a dollar means to each individual, one is once again mired in controversial distributive concerns, and the cleanliness of the economic approach is lost.<sup>20</sup> It seems relatively obvious, however, that in treating each dollar equally rather than each individual equally, wealth maximization again favors those with more dollars.

Thus, we can see that in attempting to rehabilitate his ethical defense of wealth maximization and to provide it with a somewhat more sophisticated ethical foundation by borrowing from the logic of procedural liberalism, Posner has not deflected the concern that wealth maximization is immoral because it favors the advantaged. It is for this reason that I would argue that we must return to the points at which Posner has openly embraced the conclusion that his theory is not egalitarian and that it does and should favor the advantaged. We can see in his earlier work that Posner accepts the conclusion that wealth maximization openly rejects the egalitarianism of Rawls' theory. In comparing wealth maximization to Rawls' principles of justice, Posner says:

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19. RAWLS, *supra* note 16, at 19. "It seems reasonable to suppose that the parties in the original position are equal. That is, all have the same rights in the procedure for choosing principles; each can make proposals, submit reasons for their acceptance and so on. Obviously the purpose of these conditions is to represent equality between human beings as moral persons, as creatures having a conception of their good and capable of a sense of justice." *Id.*

20. See Posner, *Law & Economics*, *supra* note 14, at 167, where he writes: "I will give you an example of how a distributive consideration—the attempt to weigh dollars according to who holds them—complicates public policy analysis, and how wealth maximization provides a cleaner approach."

[A]ny theory of consent that is based on choice in the original position is unsatisfactory . . . because the original-position approach opens the door to the claims of the nonproductive. In the original position, no one knows whether he has productive capabilities, so choices made in that position will presumably reflect some probability that the individual making the choice will turn out to be an unproductive member of society—perhaps one of Nozick's "utility monsters." The original position approach thus obscures the important moral distinction between capacity to enjoy and capacity to produce for others.<sup>21</sup>

In Posner's later writings he abandons his initial claim to the comprehensiveness of wealth maximization as a norm.<sup>22</sup> However, it is instructive to examine the theory in its earlier and stronger formulation since it is here that we see most clearly the nature of the claim that efficiency makes to moral authority. Once Posner is put on his guard, we get less of an insight into the underlying assumptions of the law and economics movement. If we assume, as I think we must, that law and economics requires some ethical justification as a theory about how entitlements should be allocated, then it is necessary to return to these initial discussions, since it is there that the concern of egalitarianism is addressed, and it is there that we find answers to questions about why the law and economics movement has been so seductive to this generation of lawyers.

### III. THE ROLE OF PRODUCTIVITY IN POSNER'S NORMATIVE THEORY

In *The Economics of Justice*, Posner argued that it is morally good to place goods, broadly defined, in the hands of those who value them most. The infinitive "to value" is very narrowly defined and refers to capability and willingness to pay money for goods.<sup>23</sup> Legal rules that place goods in the

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21. POSNER, *ECONOMICS OF JUSTICE*, *supra* note 6, at 100. It is interesting to note that this chapter, which is a reprint of Posner's original article, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 *HOFSTRA L. REV.* 487, 498-99 (1980), contains some changes. The earlier version contained the words "not to be endowed with any such capabilities" in place of "to be an unproductive member of society—perhaps one of Nozick's 'utility monsters.'" A further sentence which reads, "In effect, the choices of the unproductive are weighed equally with those of the productive," is omitted. It would seem then that in the later version Posner is more blatant in his attempt to link non-productivity to moral turpitude, by suggesting that the unproductive individual might be a torturer of others while at the same time he deletes the express recognition that wealth maximization does not treat individuals equally. For Mark Kelman's discussion of this passage, see *KELMAN*, *supra* note 3, at 144. Kelman uses the term "anti-egalitarian" to describe the theory.

22. Posner, *Law & Economics*, *supra* note 14.

23. POSNER, *ECONOMICS OF JUSTICE*, *supra* note 6, at 60-61.



hands of those who value them most are wealth maximizing. Although utility and wealth are presented as quite different concepts,<sup>24</sup> the principle of wealth maximization operates, broadly speaking, in the same manner as the principle of utility in classical utilitarianism. Like the principle of utility, the principle of wealth maximization purports to transcend the dichotomy between the right and the good, defining both justice and goodness in terms of the maximization of wealth.

Posner begins his defense of wealth maximization by arguing that its normative appeal is revealed in its application to practical situations. It is here that wealth maximization purports to have incorporated the virtues of both utilitarianism and Kantian morality and the flaws of neither.<sup>25</sup> Essentially, the claim is that the utilitarian difficulty with sacrificing the individual on the altar of public expediency is eliminated by the requirement of consent. Unless transaction costs are prohibitively high, an individual cannot be deprived of an entitlement unless he or she consents to a transfer of that entitlement in the actual market.<sup>26</sup> Free operation of the market determines most accurately who values what most.<sup>27</sup> If, for example, black people are not willing to sell the right to live in a particular neighborhood at the price that whites are willing to pay to have them excluded, then allowing them to remain in the neighborhood is wealth maximizing because the black people value the entitlement more than the whites.<sup>28</sup> Thus, it is argued that wealth maximization improves upon utilitarianism because neither the white neighbors' happiness at excluding blacks, nor the black neighbors' unhappiness at being excluded figure in the moral assessment of the situation.

Posner further argues that wealth maximization is purged of the moral fanaticism of Kantian theory. Kantian moral squeamishness and inability ever to recognize the correctness of sometimes balancing individual interests against the collective welfare is eliminated by wealth maximization since the existence of prohibitive transaction costs will allow for a non-consensual transfer of entitlements where express consent is too costly to obtain.<sup>29</sup>

One of the ways in which Posner's critics have exposed wealth maximization as giving even greater advantages to the already privileged is by discussing the difficulties that arise in relation to the initial setting of

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24. POSNER, *ECONOMICS OF JUSTICE*, *supra* note 6, at 60.

25. *Id.* at 66.

26. *Id.* at 70.

27. *Id.* at 79.

28. *Id.* at 85.

29. *Id.* at 62.

entitlements.<sup>30</sup> The more one has in the first place, the less likely one is to find oneself in a position unable either to obtain or retain, for example, the right not to being excluded from a neighborhood or the right not to be tortured. Similarly, the more one has to start off with, the more one is able "to value" and, thereby, to accumulate further entitlements. Consent is a function of power in the market, and power in the market is determined by actual holdings. Thus, Posner's appeal to the cleansing properties of consent does not provide wealth maximization with an answer to the persistent objection that it systematically favors those with more material wealth.

Again, it is at this point that we begin to see Posner embracing and defending wealth maximization's rejection of egalitarianism on the basis of the moral quality of productivity. Posner explicates the moral significance of one's ability "to value" through the use of examples. He asks us to compare our moral evaluation of a man who steals a diamond necklace with a man who pays \$10,000 for a necklace.<sup>31</sup> Two facts are relevant to our moral assessment of the buyer. First, that he engaged in a consensual transaction with the seller, and second, that he had \$10,000 to spend on a necklace. The first is morally relevant because the seller's consent to the transaction proves that it was of benefit to him. Thus, the buyer is said to have conferred a benefit upon the seller and has made the seller's situation better. Presumably, this benefit is the difference between the \$10,000 and what the seller would have taken for the necklace. If the seller would have sold the necklace for \$9000, then the buyer has conferred an additional benefit of \$1000 on the seller. If, however, the seller would not have sold the necklace for a penny less than \$10,000, then presumably there is at least still some quantifiable benefit to the seller in liquidating the asset. Thus, in Posner's view, simply to engage in consensual transactions is morally good because although one acts in one's own self-interest, one improves the lot of those with whom one transacts.

Secondly, the fact that the purchaser has \$10,000 to spend on a necklace is morally relevant because it is evidence of productivity. Posner argues that the fact that a person has a lot of money usually reflects that person's production of many benefits for others. One makes money by producing things that others value. Through this productive activity one creates a consumer surplus, which

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30. The original idea that, in a world of no transaction costs, all entitlements would end up in the hands of the person who values them most, no matter where they are originally located, comes from R.H. Coase's seminal article, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). For a discussion of the difficulties arising out of the issue of initial entitlements, see DWORKIN, *supra* note 2, at 238, 254; KELMAN, *supra* note 3, at 142. Posner's responses to these criticisms can be found in Posner, *Wealth Maximization Revisited*, *supra* note 7, at 90-95, and POSNER, PROBLEMS OF JURISPRUDENCE, *supra* note 14, at 375-77.

31. POSNER, ECONOMICS OF JUSTICE, *supra* note 6, at 65.

is the amount that the purchaser would have paid over and above what he did pay for a good or service produced. Posner says:

Moreover, the buyer's \$10,000 was in all likelihood accumulated through productive activity—that is, activity beneficial to other people besides himself, whether to his employer, customers, or his father's customers.<sup>32</sup> If we assume that a person's income is less than the total value of his production, it follows that the productive individual puts into society more than he takes out of it. Hence, not only does the buyer in our example confer a net benefit on the owner of the necklace (who would not accept \$10,000 otherwise), but at every stage in the accumulation of that money through productive activity, net benefits were conferred on other people besides the producer. The thief in contrast provides no benefit to the owner of the necklace or to anyone else.<sup>33</sup>

In explaining the affront to our moral sensibilities posed by the unproductive, Posner says:

Lawfully obtained wealth is created by doing things for other people—offering them advantageous trades. The individual may be completely selfish but he cannot, in a well-regulated market economy, promote his self-interest without benefiting others as well as himself. This may be why laziness is a disfavored trait in our society. The lazy person substitutes leisure—which does not produce any consumer surplus for the rest of society to enjoy—for work which does.<sup>34</sup>

Posner does parenthetically recognize the contentious nature of the claim that people who succeed in the free market may be presumed to be morally superior to those who do not. In a footnote to his initial discussion of the moral superiority of the productive, he quotes Ruskin as saying that:

In a community regulated only by the laws of supply and demand, but

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32. It is interesting that Posner invokes the image of the family business here in painting the picture of the diligent upper middle class male entrepreneur.

33. POSNER, *ECONOMICS OF JUSTICE*, *supra* note 6, at 66.

34. *Id.* at 83. See also *id.* at 83 n.62, where Posner, in distinguishing wealth maximization from utility, goes on to say: "It may not be completely coincidental that nineteenth-century English thought which in its philosophical aspect was dominated by utilitarianism, in its literary aspect celebrated idleness—escaping from trade to the genteel pottering of the country squire's life. These seemingly opposed tendencies are united by a preoccupation with the pursuit of happiness, in which productive activity need not figure. The man who leads a contemplative, withdrawn rural life may be happier than the captain of industry, but he will also produce a smaller surplus for the rest of society to enjoy."

protected from open violence, the persons who become rich are, generally speaking, industrious, resolute, proud, covetous, prompt, methodical, sensible, unimaginative, insensitive, and ignorant. The persons who remain poor are the entirely foolish, the entirely wise, the idle, the reckless, the humble, the thoughtful, the dull, the imaginative, the sensitive, the well informed, the improvident, the irregularly and impulsively wicked, the clumsy knave, the open thief, and the entirely merciful, just, and godly person.<sup>35</sup>

Posner counters with the point that imagination, sensitivity, knowledge within a narrow sphere, and wisdom are all advantages in the market place. Interestingly, he says nothing about covetousness or pride. However, he goes on to argue that there is no reason to believe that an entirely merciful, just, and godly person would be at a disadvantage in the market unless such a person were, because of these characteristics, disinclined to production. He singles out godliness as a quality that might commonly be thought to be concurrent with a disinclination to produce. However, he argues that there is no sound basis to assume that such a correlation exists.<sup>36</sup>

In formulating productivity as a moral virtue, Posner conjoins the notion of productivity with that of altruism and attributes moral significance to productivity, because through production the individual confers benefits on others.<sup>37</sup> Thus, it is the bestowing of something of value on others that often seems to underwrite Posner's conception of the moral significance of production.

In further defending wealth maximization as an ethical norm, Posner ultimately falls back on quasi-religious rhetoric surrounding the notion of productivity. He praises wealth maximization for the senses in which it promotes Calvinist and Protestant virtues.<sup>38</sup> He argues that inasmuch as wealth maximization encourages Calvinist virtues, it is morally superior to utilitarianism, which is infirm in its accommodation of hedonistic and epicurean indulgence.

#### IV. PRODUCTION AND CONTRIBUTION TO THE COMMON GOOD

Two fundamental tensions emerge in relation to the argument that material productivity has intrinsic moral significance. The first is the tension between the idea that moral virtue requires contribution to and participation in a community and the idea that moral virtue requires the inward individual

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35. *Id.* at 68, n.44.

36. *Id.*

37. *Id.* at 67-68.

38. *Id.* at 68.

development of intangible moral wisdom. The second tension, which flows from a concession to the view that some contribution to the lives of others is essential to the morally good life, arises out of the question of whether and under what circumstances compensated contribution of a material nature can be seen as virtuous and as morally significant.

One way of quickly rejecting Posner's theory that the materially productive are morally superior is to take the view that materiality and morality are utterly unrelated, and that material productivity is always irrelevant to a defensible moral assessment of an individual. However, such an argument is both too hasty and wrong. Indeed, it even lets Posner off the hook too easily, because he can successfully counter the argument merely by pointing to any sense in which material contribution can be seen to benefit others in need. A complete dismissal of the relationship between productivity and moral virtue, in fact, plays into the hands of Posner's rhetorical appeal because it necessarily leads one to an untenable elitism wherein the virtuous are exempted from concern with the sustenance of the community. Therefore, I would like to explore in more detail the question of the conditions under which material productivity ought to be seen as a morally significant contribution to the community. I think that doing so puts Posner to the most difficult test of bearing out the claim that the moral appeal of his theory rests on the beneficial effects of production and market exchange.

In discussing the question of the moral place of productivity as a contribution to the community, I would like to begin with an examination of some classical and medieval thinkers. It is in these early philosophies that we can see most clearly an ambivalence about the moral meaning of material productivity. On the one hand, material productivity is seen as vulgar and avaricious, and on the other, it is seen as a morally significant aspect of social participation. Much of classical and medieval philosophy embraces the view that virtue requires detachment from material reality. This, of course, leaves us with the question of who is to engage in material activity to provide the sustaining commodities of life for the continued existence of the community.

The first hurdle to overcome in positing productivity as morally significant is the question of whether moral virtue exists in social relations or in the intrinsic quality of the self. It is interesting to note here that Posner is particularly disapproving of "hedonistic and epicurean values." Posner seems to be using the term "epicurean" in a colloquial sense, but we might consider at this point why it is true that philosophers concerned with productivity as a

virtue would be particularly hostile to Epicurus's ideas.<sup>39</sup>

Rather than believing in excessive indulgence in sensual pleasure, Epicurus believed in moderation and in shielding one's self from the pain of desire and misfortune by cultivating a capacity for abstinence.<sup>40</sup> What is significant about Epicurus is that he did not think that the virtuous person need be concerned at all with contribution to a community. He advocated celibacy,<sup>41</sup> and he advised against all participation in public life.<sup>42</sup> He had a conception of the virtuous person that was directed completely toward individual experience and not at all toward contribution to the common good through production or even interaction with others.<sup>43</sup> He saw avoidance of all social participation as a necessary condition for the tranquility that he viewed as the ultimate value.<sup>44</sup> Thus, Epicurus poses a direct affront to the idea that in order to be virtuous, one must contribute to society by engaging with others in ways that are beneficial to them. In this we can see how he earned his status as a villain of western moral philosophy and, to a lesser degree, his inaccurate caricature as a proponent of extravagance and excess. Indeed, if Posner was truly concerned with creating a theory that encourages altruistic participation in and contribution to society, it is right that he should have identified Epicurus' philosophy as antithetical to his purpose.

If then, along with Posner, we are prepared to reject the view that human virtue is divorced from social participation and contribution, we must go on to consider the question of whether, and under what circumstances, participation in production and material contribution can count as virtuous. The idea that materiality and morality are completely separate and incompatible realms is prevalent in early western moral philosophy.

Aristotle, for example, saw material well-being as a necessary background

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39. NORMAN W. DEWITT, *EPICURUS AND HIS PHILOSOPHY* 3 (1954). "[N]o man was more ceaselessly reviled . . . His character and his doctrines became the special target of abuse for each successive school and sect, first for Platonists, next for Stoics, and finally for Christians." *Id.*

40. Prudence being the first of Epicurus' virtues, the prudent man is said:

[To] so deport himself, as that cutting off all vain Cupidities, he contracts his desires to only Necessaries; which are indeed, so few and small, as scarce any unkindness of Fortune can rob him of them: so that since very little of Fortune can intervene to a wise man; he may well say to her, "I have prevented thee, O Fortune, and so barrocadoed all thy ways of access, as that thou canst not approach me."

*EPICURUS, MORALS* 31 (Walter Charleton trans., Edinburgh University Press 1926).

41. *Id.* at 35.

42. *Id.* at 39.

43. HANNAH ARENDT, *THE HUMAN CONDITION* 112-13 (1958).

44. *Id.* at 113. Arendt describes this sort of hedonism as "the most radical form of a non-political, totally private way of life, the true fulfillment of Epicurus". . . . 'Live in hiding and do not care about the world.'"

condition for the development of virtue.<sup>45</sup> However, the production of this material well-being was to be left to a class of those unable and unfit to cultivate the higher capacities. So, although material productivity is seen as necessary, it is seen as work befitting a class of a lower quality than those capable of realizing the virtues of the good citizen.<sup>46</sup> So in Aristotle's thinking, advantage was both a background condition for, and an indication of, a capacity for virtue. The virtuous were to concern themselves with higher tasks, such as participation in the political process. It was to those who were incapable of virtue that the concern of material productivity fell.

This tendency to shun material reality as a base and inappropriate concern for a higher, more virtuous person extends into medieval thinking, although here virtue and indigence, rather than virtue and material advantage, become conjoined. Francis of Assisi advocated the life of absolute poverty devoted to the veneration and contemplation of God.<sup>47</sup> He argued that the best life was one in which one lived off of the charity of others, that such charity should only be accepted in the form of food and clothing, and that it was wrong even to take alms in the form of money.<sup>48</sup> He notes that Christ lived on alms and that it was, therefore, not a life to be ashamed of.<sup>49</sup>

Thomas Aquinas also thought that the most virtuous life was one of voluntary poverty devoted to the spiritual pursuits of acquiring wisdom and an understanding of God.<sup>50</sup> He was of the view that it was wrong to require labor as a necessary part of a virtuous life, because to do so would put at a disadvantage those who, either because of physical disability or because of a

45. ARISTOTLE, *Politics* 1253b25, in *THE BASIC WORKS OF ARISTOTLE* 1127 (Richard McKeon ed., Random House 1941).

46. ARENDT, *supra* note 43, at 83-84. See also *id.* at 83 n.9, where it is pointed out that Aristotle classed peasants along with slaves because they were both completely subject to necessity. Arendt argues that Aristotle was of the view that it was not that the slave was incapable of human virtue, but that because of the condition of being constantly subject to necessity, the slave was unable to cultivate virtue. However, the interpretation would seem to be too kind to Aristotle. *Id.* at 84. In the *Politics*, Aristotle says: "Where then there is such a difference as that between soul and body, or between men and animals (as in the case of those whose business is to use their body, and who can do nothing better), the lower sort are by nature slaves, and it is better for them as for all inferiors that they should be under the rule of a master." ARISTOTLE, *supra* note 45, at 1254b15.

47. FRANCIS AND CLARE: *THE COMPLETE WORKS* 103 (Regis J. Armstrong & Ignatius C. Brandy trans., Paulist Press 1982) [hereinafter FRANCIS & CLARE]. The injunction to poverty is found in *Matthew* 19:21: "If you would be perfect, go, sell what you possess and give to the poor, and you will have treasure in heaven and come, follow Me." Also, "it is easier for a camel to go through the eye of a needle than for a rich man to enter the kingdom of God." *Matthew* 19:24.

48. FRANCIS & CLARE, *supra* note 47, at 116.

49. *Id.* at 117.

50. 4 THOMAS AQUINAS, *SUMMA CONTRA GENTILES* 132 (English Dominican Fathers trans., Burns Oates & Washbourne Ltd. 1924).

privileged upbringing, were not able to master the skills necessary to perform manual labor.<sup>51</sup> Aquinas was not convinced by the argument that work devoted to material production was morally good insofar as it guarded against idleness. Rather, he thought that idleness was better avoided by the pursuit of wisdom.<sup>52</sup>

However, Aquinas also thought that it was wrong for the virtuous to beg, partly because to do so would be to diminish the store of alms available to other needy people, but also because begging implies the desire to receive something for nothing that can be associated with an appetite for gain.<sup>53</sup> Thus, he argued that the virtuous person could receive material sustenance in return for the giving of doctrine or instruction in spiritual matters.<sup>54</sup>

It is clear, of course, that the medieval and the Aristotelian conceptions of virtue are deeply elitist in that the notion of virtue is constructed on the assumption of the existence of some *other* group of people who do not follow the path of perfection of virtue, but who will be responsible for the continued material needs of the society. If Posner's point were simply that this kind of elitism is ethically unattractive, then it would be uncontroversial.

Indeed, even these thinkers seem to have had some sense that they were on shaky ground here. If we examine these texts more closely, we see within them the emergence of an ambivalence about the relationship between virtue and material productivity. While Aristotle thought that a class of base slaves was needed to take care of material needs, he also argued in the *Rhetoric* that in choosing those with whom we would like to be friends, we should prefer those who are materially self-sufficient. He used the example of the farmer as one who provides for himself by working with his hands and who can, therefore, be

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51. *Id.* at 136. Like Saint Francis, Saint Thomas was of high birth. His father was the head of a very wealthy family in southern Italy and his mother was a countess. See 1 THOMAS AQUINAS, *SUMMA THEOLOGICA* v (English Dominican Fathers trans., William Benton 1955). It is interesting to note on this point that Posner fails to consider the ramifications of his theory of the moral significance of productivity in the assessment of damages for personal injury. Presumably, if moral virtue is determined by contribution to others in productive activity and market exchange, then personal injury that deprives one of the physical capacity to make such a contribution also deprives one of the capacity for moral virtue. This is a loss that presumably, if the Learned Hand formula is to set an efficient level of accident prevention, must be calculated into the cost of the accident. See Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 46-48 (1972).

52. 4 AQUINAS, *SUMMA CONTRA GENTILES*, *supra* note 50, at 136.

53. *Id.* at 137.

54. Of course, this would not be contrary to the Posnerian view since the production of a service of "ministering," if valued by others, would be production that counted in terms of an increase of wealth. See also ETIENNE GILSON, *THE CHRISTIAN PHILOSOPHY OF SAINT THOMAS AQUINAS* 4-5 (1956).



a good friend, not needing to live off of others.<sup>55</sup> Material self-sufficiency frees one from the temptation to use others as instruments to material well-being.

Assisi also recognized that his admonition to perfection in a life of poverty and contemplation of God, if universally followed, would lead to serious economic difficulty. In what appears to be an attempt to resolve this difficulty, and to deflect the inference that the virtuous are irresponsible in that they leave the difficulty of providing for the material welfare to others, Assisi argued that it was best to render service in return for alms.<sup>56</sup> He saw idleness as evil, and therefore, he was of the view that one must always either be at prayer or at work.<sup>57</sup>

In *Summa Theologica*, Aquinas argued that engaging in secular business was not wrong so long as its purpose was charitable rather than avaricious.<sup>58</sup> The pursuit of riches could be instrumental to some other worthy end, and, therefore, was not seen by Aquinas to be unlawful for the religious to engage in.<sup>59</sup> In relation to manual labor, he allowed that insofar as such work was necessary for the provision of food, and insofar as it may provide the wherewithal to give charity, it was required of the virtuous person.<sup>60</sup> However, Aquinas argued that it was crucial that one should never hold ownership against the needy.<sup>61</sup> Private property, although it was not forbidden in Aquinas's thinking, was always tempered by the idea of commonality of property and the necessity of always yielding to the claims of those in need. To have wealth for its own sake was seen by Aquinas to be a vice, but to have

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55. ARISTOTLE, *Rhetoric II*, at 1381a22, in THE BASIC WORKS OF ARISTOTLE, *supra* note 45, at 1325. Of course, we ought not to be too comfortable with this aspect of Aristotle's thinking since within his framework one could be materially self-sufficient by virtue of one's ownership of many slaves which would provide the necessary material background conditions for friendship.

56. FRANCIS & CLARE, *supra* note 47, at 115.

57. Here the scriptural reference is to Paul's second letter to the *Thessalonians* 3:7-11, "we were not idle when we were with you, we did not eat any one's bread without paying, but with toil and labor we worked night and day, that we might not burden any of you . . . If anyone will not work, let him not eat. For we hear that some of you are living in idleness, mere busybodies not doing any work." See also 1 *Corinthians* 7:24, which introduces the notion of the virtue of working. See also J. VINER, RELIGIOUS THOUGHT AND ECONOMIC SOCIETY 31-32 (Jacques Melitz & Donald Winch eds., 1978). "When the Fathers Praised Labor, they no doubt were aware of its contribution to economic productivity. But what they emphasized was its value in promoting moral discipline, its merit in agreeing with the express command of the Scriptures, and its importance as a protection against the moral hazards of idleness." *Id.*

58. THOMAS AQUINAS, *SUMMA THEOLOGICA* (Fathers of the English Dominican Province trans., Benziger Brothers, Inc. 1947) at II-II, 187, 2.

59. *Id.*

60. *Id.* at II-II, 187, 3.

61. *Id.* at II-II, 66, 2.

wealth at the disposal of the community and for the sake of the common good was not.<sup>62</sup>

Thus, Aquinas thought that work or materially productive labor was not virtuous in and of itself, but could be virtuous inasmuch as it provided for material subsistence and could be a source for giving charity. However, it is important to note that underlying his cautious concessions to the potentially morally significant attributes of material productivity, was a firm disdain for, and condemnation of, avarice or material acquisitiveness beyond one's needs. Aquinas saw it as wrong to seek to raise one's standard of living or even the standard of living of the poor.<sup>63</sup>

The moral emphasis on the creation of something to contribute to the satisfaction of material need is also seen in religious prohibitions on certain kinds of economic activity. Usury in particular was prohibited because it was exploitative and non-productive.<sup>64</sup> The practice of taking interest on a loan exploited need and did not create anything of value to assuage need. In receiving money for the loan of money, the lender was seen to be selling nothing. The rules relating to usury were developed with the paradigm of a poor person needing to borrow for the purpose of consumption.<sup>65</sup> Although the discussion of the reasons behind the prohibition of usury is at times very technical,<sup>66</sup> the basic moral thrust of the doctrine seems to be that the usurer is able to gain without having added anything to the use value of any commodity, and that the usurer is able to unfairly benefit from the needy situation of others.<sup>67</sup>

Similarly, Aquinas' concept of "just price" was based on the idea that it is wrong to sell for a greater price than one bought for without having improved the value of the good.<sup>68</sup> He argued that profit should only be allowed in return for some kind of contribution to use-value that can go toward fulfilling the needs

62. GILSON, *supra* note 54, at 308-09, 314. Note that Aquinas did not include taking of necessity in his understanding of theft. AQUINAS, *SUMMA THEOLOGICA*, *supra* note 58, at II-II, 66, 7.

63. VINER, *supra* note 57, at 25.

64. *Id.* at 86. The scriptural reference is to *Luke* 6:35: "But love your enemies, and do good, and lend, expecting nothing in return and your reward will be great . . . ." See also R.H. TAWNEY, *RELIGION AND THE RISE OF CAPITALISM* 43 (1926).

65. VINER, *supra* note 57, at 87; TAWNEY, *supra* note 64, at 44.

66. VINER, *supra* note 57, at 87.

67. *Id.* at 92. This argument seems also to have its roots in Aristotle. Viner writes, "In Aristotle's treatment of usury the implication is that there is an exclusive association of 'productivity' with fertility, biologically conceived, in a sense which makes it morally or economically meritorious." *Id.*

68. GILSON, *supra* note 54, at 322; VINER, *supra* note 57, at 81; and TAWNEY, *supra* note 64, at 48.

of others. In an inferential way, we can see how these ideas about what sort of conduct is acceptable in economic dealings have at their root the idea that productivity is morally significant, at least insofar as it is seen as necessary to establish an entitlement to profit.<sup>69</sup>

Thus, particularly in Aquinas' thinking, we see the development of a tentative embrace of the idea that productivity can have moral significance. Yet, this idea is accompanied by the view that its significance is always derivative from its capacity to alleviate need. Profit is only allowable insofar as it is commensurate with the contribution that an individual has made to a particular good. Property is only allowable insofar as it is always tempered by the preemptive claims of those in need.

Thomas More<sup>70</sup> went further than either Assisi or Aquinas in endowing productivity with a moral quality. In *Utopia*,<sup>71</sup> which advocates the abolition of private property, More fully articulates a view, in some senses much like Posner's, that the productive are more virtuous than the unproductive and are more deserving of advantage in the allocation of entitlements in the society. He writes:

However abundant goods may be, when every man tries to get as much as he can for his own exclusive use, a handful of men end up sharing the whole thing, and the rest are left in poverty. The result generally is two sorts of people whose fortunes ought to be interchanged: the rich are rapacious, wicked, and useless, while the poor are unassuming, modest men who work hard, more for the benefit of the public than of themselves.<sup>72</sup>

More later writes:

What kind of justice is it when a nobleman or a goldsmith or a money lender, or someone else who makes his living by doing either nothing at all or something completely useless to the public, gets to live a life of luxury and grandeur? In the meantime, a laborer, a carter, a carpenter, or a farmer works so hard and so constantly that even a

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69. Another economic prohibition that stems from the idea that it is wrong to gain in the absence of actual increase in the value of things is that one should not make money from trade in currency. See VINER, *supra* note 57, at 100.

70. More, who lived from 1478 to 1535, is really a transitional thinker and does not properly belong to a discussion of medieval moral thought. However, I include a discussion of his ideas here because he is so strong in his characterization of productivity as morally important.

71. THOMAS MORE, *UTOPIA* (Robert M. Adams trans., W.W. Norton & Company 1975) (1516).

72. *Id.* at 31.

beast of burden would perish under the load; and this work of theirs is so necessary that no commonwealth could survive a year without it. Yet they earn so meagre a living and lead such miserable lives that a beast of burden would really be better off.<sup>73</sup>

More's analysis is similar to Posner's in the strength of its materialism. Like Posner, he seems to attribute moral significance directly to productivity as a contribution to the well-being of others. Productive activity, without more, is seen as endowing the productive individual with virtue. The usefulness to others of one's material contribution to the society is seen as a basis of the moral assessment of the individual.

## V. THE COMMON GOOD AND CONSUMER SURPLUS

Material production may be seen to be morally good because it is necessary to sustain life and promote the physical well-being of individuals. Satisfaction of physical need allows individuals to develop and experience higher human capacities. Absence of physical need allows people to view their fellow human beings as ends in themselves rather than as means to the end of satisfaction of that need. Because absence of material need is a background condition for the development of other human capacities, it is naive and impractical to argue that morality is a concept completely independent of material reality and that productivity has no place in a complete conception of virtue.

Allowing that these conclusions are reasonable, we must now ask whether this conception of the moral significance of productivity can be imported into Posner's theory to support the foundational role that the morality of productivity plays. Here we must look at Posner's statements that it is in the creation of a consumer surplus "for the rest of us to enjoy" that the productive individual makes an altruistic contribution to the common good.<sup>74</sup>

The first thing to note about a consumer surplus as Posner defines it is that it can be created in relation to anything that anybody is willing to pay for. A consumer surplus is created in any situation in which there is an exchange at a price less than the highest price that the buyer would have paid.<sup>75</sup> Posner's idea of the consumer surplus captures the difference between the price paid in the market and the highest price that the purchaser would have been willing and able to pay. Willingness and ability to pay are relative to both desire and means. Once we recognize that Posner's conception of consumer surplus is tied

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73. *Id.* at 89.

74. POSNER, *ECONOMICS OF JUSTICE*, *supra* note 6, at 82. See also Posner, *Wealth Maximization Revisited*, *supra* note 7, at 88-89 (discussing consumer surplus).

75. *Id.* at 78.

directly to ability and willingness to pay, it is clear that arguments about the morality of productivity and the alleviation of need or suffering become problematic.<sup>76</sup> No necessary correlation exists between the creation of a consumer surplus and the satisfaction of need. If a poor person cannot pay any more than she does pay in the market to keep from starving, there is no consumer surplus with respect to her purchase of food. It does seem clear, however, that in producing necessities of life one is likely also to produce a large consumer surplus. People would, if they had both the need and the means, pay more for commodities like food and shelter than they do. Whereas people would generally not pay much more than they do for items such as diamond necklaces. In the case of necessities, people will always value them with whatever they have, if they are forced. So it is true that those who produce goods that satisfy basic physical needs do also generally create the greatest consumer surplus.

Here we can see the similarities between the reasoning of Posner and More. More presents the farmer or the carpenter as the most virtuous because what they produce is of the greatest use and represents the greatest contribution to the commonwealth. More points out however, as Posner does not, that it is generally the case that the goods that are indispensable to the society's continued existence are not valued at a high price, and thus, they do not yield a large income to those who produce them. The farmer does create a large consumer surplus, much larger than the goldsmith, for example. Because the farmer does not receive a return proportionate to the use-value that he or she contributes, the consumer surplus is created. More's discussion suggests that the virtue of the person who contributes the necessities of life lies in this lack of reciprocity between what he or she contributes and what he or she receives in return. The status as a victim of this injustice or imbalance seems to endow the worker with an additional measure of moral superiority. This notion of lack of reciprocity between contribution and return can be directly transposed into the language of consumer surplus. Again, in Posner's discussion of the moral significance of the creation of consumer surplus, productive individuals put more into the society than they take out, and their moral superiority stems from that imbalance.<sup>77</sup> The difficulty for Posner is that he assumes that those who create the greatest consumer surplus will also be the most wealthy in the society.<sup>78</sup> It is difficult, however, to see why this should be the case.

To test this assumption, let us consider a story of two people: June and John. June and John both own pieces of land of equal size. June's piece of

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76. For a discussion of the way in which wealth maximization is always dependent upon price and is therefore antagonistic to the elimination of scarcity, see Coleman, *supra* note 4, at 523-24.

77. POSNER, *ECONOMICS OF JUSTICE*, *supra* note 6, at 77.

78. *Id.* at 66.

land is good fertile soil suitable for farming. John's piece of land is not fertile but contains rich deposits of diamonds. June develops skills as a farmer and produces potatoes. John develops the skills of mining and cutting diamonds. When June goes to the market to sell her potatoes, there are many people who are willing to buy; but because there are many other potato growers at the market, June is not able to ask a very high price for her potatoes. However, were there not so many potato growers and so many other means of obtaining food, many would spend all that they had on potatoes. John, on the other hand, has very few customers. He is the only one at the market selling diamonds. Because the diamonds are scarce and are viewed as a luxury and a symbol of success, a few wealthy people are willing to spend a significant amount to purchase a diamond. John sells his diamonds at a very high price. He tries to price his diamonds so that he receives the greatest amount that the rich purchasers of diamonds will pay. Because of the scarcity of his commodity, John is able to set his price just under the point at which the buyer would no longer be willing to enter into the exchange. He is able to price his goods at exactly the price that his consumers value them. Thus, John creates little or no consumer surplus. John, however, makes significantly more money than June does.

Both John and June work very hard. Both are diligent and self-denying, and both try to produce products of the finest quality. June, however, creates a large consumer surplus by cheaply producing a good that is necessary to sustain the lives of those in her community. John, on the other hand, creates little or no consumer surplus because his goods would not be purchased at a higher price than what he sells them for. June puts more into the society than she takes out. By contrast, John is not the subject of any such lack of reciprocity. By eliminating the consumer surplus and appropriating it to himself, John becomes rich. If we consider the creation of consumer surplus to be the morally significant factor, then June is more virtuous than John. Posner and More seem to be in agreement on this point.

If June were in a position to eliminate the consumer surplus, she would no longer be contributing more to society than she receives back from it. The only situation in which she could reduce the consumer surplus is one in which she was in a position to exploit need and extract from the potato purchaser the full amount of purchase price that could be obtained for a potato. If June were in a position to exploit need, and thereby to shrink the consumer surplus, June would presumably get rich.

The difficulty with Posner's position becomes apparent here. He assumes that those who create a consumer surplus will be rich, and therefore, that it is defensible to favor the rich at the theoretical level. Why Posner would believe that this would likely be the case is unclear, because the very idea of creation

of consumer surplus implies an imbalance between contribution and return. To favor the wealthy is not the same as favoring those who create a large consumer surplus.

Furthermore, from the point of view of wealth maximization, both John and June behave correctly in eliminating consumer surplus whenever they can.<sup>79</sup> By keeping his prices as high as possible, John increases the chances that the diamonds will end up in the hands of the person who values them most. In doing so, he also evens out the measure of his contribution to the society and the measure of what he receives in return. Like the thief and the idle heir, he does not create a consumer surplus for the rest of us to enjoy. However, from a wealth maximization point of view, his actions bring about a situation in which the goods he produces are most likely to be placed in the hands of those who value them most. Those who are able to price their products at a level that shrinks the consumer surplus eliminate the imbalance in what they put into the society and what they get back from it. In so doing they maximize the overall wealth of the society.

There is clearly a parallel between the idea of the moral significance of a contribution to the common good through productive activity and Posner's idea of the moral significance of the creation of a consumer surplus. However, once we examine the theory of wealth maximization in further detail, we can see first, that though there can be a correlation, the concept of a consumer surplus has no necessary relationship to the satisfaction of human need, and second, that wealth maximization does not in fact encourage the creation of consumer surplus. If a person were to produce commodities that were necessary for the satisfaction of human need and were to sell those goods at a price that made them available to all those in need, that person would indeed be creating a large consumer surplus under Posner's theory. However, it is unlikely that such a person, if she resisted exploiting need or were not in a position to exploit need, would get rich by so doing, nor would that person necessarily be maximizing wealth. So, even if it were morally plausible to favor the productive at the theoretical level, it is not the case that Posner's theory, in favoring the advantaged, favors the productive.

In this discussion, the metaphor of the big pie becomes ambiguous. There is, indeed, moral significance to the creation of the sustaining commodities of the community, and if this is what we mean by the creation of a big pie, we can

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79. Dworkin makes this point in *Is Wealth a Value?*, *supra* note 2, at 256, where he says: "The better someone is at personal wealth maximization—the more he displays the skills and talents to be rewarded in the system—the less his acts will benefit others, because the more of the surplus will he be able to retain from each transaction or enterprise."

understand its moral appeal.<sup>80</sup> However, as More points out, the rich are not necessarily those who have produced those commodities or contributed to their production in the most significant sense. Thus, the view that a society encourages the creation of the biggest pie by allocating entitlements on the basis of ability to value them in a free market is misguided.<sup>81</sup> The absence of any relationship between success in the market, creation of consumer surplus, and the creation of commodities that satisfy need shows the difficulty with identifying wealth as evidence of a contribution to the pie—defined as the store of commodities necessary to sustain the community.<sup>82</sup> The ambiguity of the metaphor is, however, useful if one is seeking to endow commercial activity that does not satisfy need with moral significance. The moral significance of all productive activity valued in the market is assumed. But this assumption contains a sleight of hand in which the moral significance of productive activity that alleviates need is extended to all productive activity. Thus, the perceived moral significance of all productive activity is drawn from the moral significance of a subset of productive activity.<sup>83</sup>

## VI. CALVINISM AND PRODUCTIVITY AS REDEMPTION

In defending wealth maximization as a moral theory, Posner expressly allies himself with Calvin and the goal of fostering protestant virtues. He says:

[T]he wealth-maximization principle encourages and rewards the traditional "Calvinist" or "Protestant" virtues and capacities associated with economic progress. It may be doubted whether the happiness principle also implies the same constellation of virtues and capacities, especially given the degree of self-denial implicit in adherence to them. Utilitarians would have to give capacity for enjoyment, self-indulgence, and other hedonistic and epicurean values at least equal emphasis with diligence and honesty, which the utilitarian values only because they tend to increase wealth and hence *might* increase happiness.<sup>84</sup>

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80. The question of how to recognize the usefulness of markets in the creation of sufficient material wealth to sustain communities while respecting a principle of equality of individuals is addressed at length in *Symposium on Markets and Equality under Capitalism and Socialism*, *supra* note 10.

81. Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980).

82. See Coleman, *supra* note 4, at 523-24, on wealth maximization, scarcity, and price.

83. This point calls for a more detailed explanation of the notion of need. Although such a discussion is beyond the scope of this paper, it is undeniable that there is a distinction between production which satisfies human need and that which does not.

84. POSNER, *ECONOMICS OF JUSTICE*, *supra* note 6, at 68-69 (emphasis in original).



Here Posner seems to be arguing that wealth maximization gains its moral credibility from its instrumental value to the development of a cluster of virtues that are each of intrinsic worth. Rather than focusing directly on productivity here, Posner focuses on what he sees as virtues that accompany productivity. The emphasis on materiality is shifted and the idea of personal qualities takes primary significance. Posner criticizes utilitarianism for viewing diligence, self-denial, and honesty as significant only insofar as they may bring about happiness.<sup>85</sup> He claims superiority for his ethical theory on the basis that it gives these virtues ultimate significance even though they are pursued indirectly through wealth maximization. Positing wealth maximization as the controlling principle simply is the best way to value and encourage the most desirable human virtues. Again, the argument is mounted in justification of the theoretical favoring of the wealthy. The reason that it is permissible to favor the rich is that they are the virtuous, the diligent, the self-denying, and the honest.

Having rejected the utilitarian view that diligence, self-denial, and honesty must be judged as virtues according to whether they bring about happiness, the question then arises as to why Posner views these qualities as good, independent of their relation to happiness. Posner does not offer any explanation or elaboration on the intrinsic value of the virtues he names. He does, however, invoke the Calvinist justification for their significance. Therefore, it will be instructive to look at what Calvin theorized to see whether there is any morally convincing argument to be made to support the significance of these virtues.

In invoking Calvinism, Posner correctly avoids direct reference to the moral significance of the material aspect of production. The Calvinist view of work, labor, and production differs from the classical and medieval discussions of productivity, because rather than separating the spiritual and the material, and endowing a subordinate instrumental moral significance to material activity, the Calvinist view fuses the two and endows work, including material production, with its own spiritual significance.<sup>86</sup> Thus, material production is not morally justified by its capacity to alleviate need and sustain human life. Rather, the activity of work becomes significant because of the possibility that it has an intrinsic spiritual quality.<sup>87</sup> The moral significance of work does not derive from its capacity to help others. Rather, it is significant because, done in the

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85. *Id.* Of course, there is no reason to think that the utilitarian would be concerned with the intermediary step of producing wealth. Even a purely experiential utilitarian could be of the view that the pleasure derived from practising the virtues of diligence and honesty and even self-denial could be more intense, of greater duration, certainty, propinquity, fecundity, purity and extent than pleasure derived from eating and drinking. See JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 29-30 (Prometheus Books 1988) (1871).

86. LUCIEN J. RICHARD, *THE SPIRITUALITY OF JOHN CALVIN* 178 (1974).

87. 1 CALVIN: *INSTITUTES OF THE CHRISTIAN RELIGION* 725 (John T. McNeill ed., Ford L. Battles Westminster Press 1961) (1559) (Book 3, chap. x, § 6) [hereinafter CALVIN].

proper spirit, it can be a means of worshipping God.<sup>88</sup> Its significance is deeply religious. Work, including material productivity, can epitomize the subordination of one's self to the will of God.<sup>89</sup>

In discussing the protestant narration of these virtues, we should deal with diligence and self-denial separately from honesty. Calvin does not discuss honesty as a virtue at length, and it would seem that it is subsumed under the discussion of love of one's neighbor, which is an instantiation of the love of God.<sup>90</sup> In other words, the morality of one's relationship to one's fellow human beings is subordinate to the concern for one's relationship with God. Diligence and self-denial, by contrast, seem to pertain directly to the relationship with God. I shall consider them first in trying to discover the reasoning behind their moral significance.

Diligence and submission to a precisely defined work are capable of profound religious significance in Calvin's theology. However, it must be remembered that the tenor of Calvin's writings is even more vehemently condemnatory of avarice than the classical or medieval thinkers.<sup>91</sup> The act of working in a calling has moral significance for Calvin because it is seen to be a part of living according to the will of God. In humbling one's self to a task, one humbles one's self to God, and thereby worships God. If we search Calvin's work, we do find a number of strands of thinking that, to some extent, explain why God would will that each person work in a specified calling.

First, it would seem that the centrality of the notions of diligence and self-denial in the calling relate to the importance of order. In Calvin's view, man was ordained by God to shape the world according to God's will.<sup>92</sup> The ideas of the correctness of division of labor and a single function for each individual are stressed in Calvin's discussion of the calling.<sup>93</sup> A person should perform the function ordained for him by God and should not perform any other function. When following a calling, one does one's part in bringing the world into conformity with God's plan. Some of the imagery used to develop this idea is geometric. The notion of compartmentalized, defined, rigid classifications is

88. Calvin saw doing evil and doing good with improper motives to be exactly the same in God's eyes. See SUZANNE SELINGER, *CALVIN AGAINST HIMSELF: AN INQUIRY IN INTELLECTUAL HISTORY* 34 (1984).

89. CALVIN, *supra* note 87, at 724 (Book III, chap. x, § 6).

90. *Id.* at 411, 415 (Book II, chap. viii, §§ 47, 51); RICHARD, *supra* note 86, at 120.

91. See, e.g., CALVIN, *supra* note 87, at 698, 840 (Book III, chap. vii, § 8; Book III, chap. xix, § 9). For a more detailed look at Calvin's disdain for acquisitiveness, see ROBERT M. MITCHELL, *CALVIN'S AND THE PURITAN'S VIEW OF THE PROTESTANT ETHIC* 30-31 (1979).

92. GIANFRANCO POGGI, *CALVINISM AND THE CAPITALIST SPIRIT: WEBER'S PROTESTANT ETHIC* 72 (1983); RICHARD, *supra* note 86, at 111.

93. CALVIN, *supra* note 87, at 724 (Book III, chap. x, § 6).

invoked in explaining the nature of the calling.<sup>94</sup> One imagines God as a draughtsman expressing his will in an architectural plan in which there is a space for each individual to fit and, thereby, to reflect God's design to him, to worship and to please him. Organic imagery is also used to explain the notion of the calling. Different roles in the society are conceptualized as the different parts of Christ's body. When each individual is working diligently in his calling, the body of Christ is healthy and pleasing to God.<sup>95</sup>

The moral superiority of humility over self-assurance and self-assertion is stressed in the notion of the calling. Here, one sees the sense in which Calvinism is deeply self-denying.<sup>96</sup> Work in the calling, undertaken in the proper spirit, is submission to God, and therefore, it is good.<sup>97</sup> However, it must be remembered that within Calvin's theology the individual is completely unable to do anything to gain the grace of God. The individual is powerless in relation to God, and therefore, it is sinful conceit to believe that through work of any kind one could attain the grace of God.<sup>98</sup> To think that one has control over whether or not one receives the grace of God is to place one's self in a position of power over God, and therefore, is the utmost of evil-doing. One can never presume to be able to act in a way that affects God.<sup>99</sup> Thus, the Calvinist conception of the moral significance of work is deeply self-negating and self-denying.<sup>100</sup> Exercising the capacity to work diligently, assiduously, and relentlessly proves the absence of arrogance, self-assertion, self-aggrandizement, and the effrontery to God that is inherent in the exercise of one's own will in defiance of the will of God. The self-denial inherent in work in a calling is a recognition of the superiority and power of God.<sup>101</sup> To presume, however, that the exercise of the capacity for diligence could affect God, is a repudiation of the very submission to God that made the work morally

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94. RICHARD, *supra* note 86, at 112.

95. *Id.* at 116.

96. Calvin's writing is full of narration of the debased nature of the human self. For example, in *Calvin: Institutes of the Christian Religion*, he writes: "I am compelled here to repeat once more: that whoever is utterly cast down and overwhelmed by the awareness of his calamity, poverty, nakedness, and disgrace has thus advanced farthest in knowledge of himself." CALVIN, *supra* note 87, at 267 (Book II, chap. ii, § 10).

97. RICHARD, *supra* note 86, at 105.

98. MITCHELL, *supra* note 91, at 14. See also CALVIN, *supra* note 87, at 786 (Book III, chap. xiv, § 20); this section is entitled "Works are God's gift and cannot become the foundation of self-confidence for believers." Another example is the section entitled, "Man cannot ascribe to himself even one single good work apart from God's grace." *Id.* at 306, (Book II, chap. iii, § 12).

99. Hence, the absolute theological priority of faith over work in Calvin's writing. See SELINGER, *supra* note 88, at 14.

100. Chapter iii of the second book of CALVIN is entitled: *Only Damnable Things Come Forth From Man's Corrupt Nature*. CALVIN, *supra* note 87, at 289 (Book II, chap. iii).

101. *Id.* at 724 (Book III, chap. x, § 6).

significant in the first place.<sup>102</sup>

Thus, we can see that the Calvinist emphasis on the virtue of work is religious rather than ethical or philosophical. It is concerned essentially with the individual in relation to God and not in relation to fellow human beings. It embraces a paradox that living according to God's will is essential to salvation, but to undertake the task of living according to his will with a view to achieving salvation is to view God merely as a means to salvation, and is therefore sinful.<sup>103</sup> Thus, the Calvinist emphasis on work is underwritten by the moral significance of the absolute self-negation of the individual before God.

In relating his economic theory to protestant theology, Posner seems to be incorporating the ideas of Max Weber, whose famous thesis was that Calvinism and the Protestant ethic were causally necessary for the development of the modern capitalist economy.<sup>104</sup> Weber argued that the medieval disposition was intensely inimical to and condemning of the acquisition of wealth, and therefore, the Protestant infusion of religious significance into the act of money-making was a necessary condition for the development of capitalism.<sup>105</sup> Subsequent students of Calvin have laboriously demonstrated that Weber was mistaken in his assertion that Calvin infused the acquisition of material wealth for its own sake with religious significance and viewed success in the market as a sign of God's favor.<sup>106</sup> Calvin, like the medieval thinkers, was deeply hostile to any ambition to move beyond one's given place in the economic order.<sup>107</sup> It was right and good to work diligently in one's calling, but it was evil to look beyond it and evil to amass material wealth for its own sake.<sup>108</sup> An essential part of the notion of the calling in Calvin's writings is the idea that even the most lowly

102. *Id.* at 790 (Book III, chap. xv, § 3).

103. RICHARD, *supra* note 86, at 115.

104. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., Charles Scribner's Sons 1958) (1905); *see also* TAWNEY, *supra* note 64.

105. For an argument that medieval religious doctrine did not differ from the protestant doctrine on issues of economics, *see* H.M. ROBERTSON, *ASPECTS OF THE RISE OF ECONOMIC INDIVIDUALISM* (1933) *excerpted in* *PROTESTANTISM, CAPITALISM, AND SOCIAL SCIENCE: THE WEBER THESIS CONTROVERSY* 54 (R.W. Green, ed., 2nd ed. 1973); *see also* J. GILCHRIST, *THE CHURCH AND ECONOMIC ACTIVITY IN THE MIDDLE AGES* 133 (1969). Here Gilchrist criticized the Weber-Tawney thesis on the basis that it fails to recognize that the idea of work as a religious duty was well known to medieval thought.

106. *See, e.g.*, MITCHELL, *supra* note 91, at 14.

107. *See* CALVIN, *supra* note 87, at 725 (Book III, chap. x, § 6), where Calvin says: "For no one, impelled by his own rashness, will attempt more than his calling will permit, because he will know that it is not lawful to exceed its bounds. A man of obscure station will lead a private life ungrudgingly so as not to leave the rank in which he has been placed by God." *See also* ROBERTSON, *supra* note 105, at 61.

108. CALVIN, *supra* note 87, at 721-23 (Book III, chap. x, §§ 3-5).

of work is honorable if it is done in submission to God.<sup>109</sup> Thus, it is clear that the doctrine in its initial formulation by Calvin does not incorporate any notion of the moral superiority of lucrative work.

Wesley, writing in the Protestant tradition after Calvin, recognized the potential contradictions in the Calvinist emphasis on diligent work and self-denial. He thought that the injunction to be diligent would bring about economic progress and would result in the diligent becoming rich. However, he also thought that riches were inevitably corrupting, and that once a diligent person had achieved success in the market he would lose his virtue. Thus, he was of the view that in order to avoid the evil that riches would inevitably lead to, the virtuous must remain diligent and self-denying, but should give away all that they acquired to the church. The medieval notions of the obligation to charity and the commonality of property resurface, though they are modified somewhat in the sense that the obligation to give is owed directly to God rather than being owed to the needy, and the commonality of property stems from God's ownership of everything rather than from the needs of others. Wesley wrote:

I fear whenever riches have increased, the essence of religion has decreased in the same proportion. Therefore, I do not see how it is possible in the nature of things for any revival of true religion to continue for long. For religion must necessarily produce both industry and frugality, and these cannot but produce riches. But as riches increase, so will pride, anger, and love of the world in all its branches . . . . We ought not to prevent people from being diligent and frugal; we must exhort all Christians to gain all they can and to save all they can, that is, in effect, to grow rich.<sup>110</sup> What way can we take that our money-making may not sink us to the nethermost hell? There is one way, and there is no other under heaven. If those who gain all they can and save all they can will also give all they can.<sup>111</sup>

In speaking of the limits of private property, Wesley said: "Nay, may I not do what I will with *my own*? Here lies the ground of your mistake. It is not your

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109. *Id.* at 725 (Book III, chap. x, § 6), where Calvin writes: "[N]o task will be so sordid and base, provided you obey your calling in it, that it will not shine and be reckoned very precious in God's sight."

110. This text is also found in Weber's book. However, he ends the quotation after the words "to grow rich," omitting the discussion about the necessity of giving away one's riches. WEBER, *supra* note 104, at 175.

111. For a discussion of this quotation, see K. Fullerton, *Calvinism and Capitalism: An Explanation of the Weber Thesis*, in PROTESTANTISM, CAPITALISM, AND SOCIAL SCIENCE: THE WEBER THESIS CONTROVERSY, *supra* note 105, at 29-30 (first published at 21 HARVARD THEOLOGICAL REV. 163 (1928)). The quotation is found in the original at 189.

own. It cannot be, unless you are Lord of heaven and earth.'<sup>112</sup>

Of course, the validity of the Weber thesis is not dependent upon the truth of the allegation that the writings of Protestant theologians, properly interpreted, view the accumulation of wealth as virtuous. It may have been that the teaching of diligence and frugality was internalized while the teaching of abundant charity and the evil of riches was not. The general attitude toward the moral quality of materially productive and lucrative work may have changed with the Calvinist idea of the religious significance of the calling. I am not, however, concerned here with whether Calvin's theology, properly interpreted, promoted or was necessary for the rise of capitalism.<sup>113</sup> Nor am I concerned with whether, in fact, Calvinism, rightly or wrongly interpreted, was causally significant in the rise of the capitalist economy. I am concerned with whether Calvin makes a plausible and attractive argument for the moral significance and preeminence of the virtues of diligence and self-denial that could then be transplanted into the theory of wealth maximization to give it moral credibility.

#### VII. DILIGENCE, SELF-DENIAL, AND WEALTH MAXIMIZATION

Obviously, the deeply religious explanation for the moral significance of diligence and self-denial in Protestant theology cannot be directly transplanted into Posnerian theory. The argument is built on the supreme significance of the individual's relationship with God and on a particular view of who God is and what God likes. Posner, as a purely secular moral thinker, cannot invoke this conception of God at such a crucial juncture in his ethical argument. Furthermore, as we have seen, the Protestant advocacy of diligence and self-denial does not serve Posner's purpose because it also condemns the acquisition of wealth. Posner invokes the goodness of diligence and self-denial in order to justify the theoretical favoring of the rich. Yet, Protestant theology, in its more thorough espousal of the virtue of self-denial, considers the accumulation of riches to be sinful. According to Calvinist theory, the accumulation of riches could not serve, as it does in Posner's theory, as an incentive to self-denial.

We must ask then whether, once we have subtracted the theistic and anti-materialist aspects of the Calvinist arguments about these virtues, there is any residual ethical argument within Calvinism or Protestantism which could provide the foundation for the moral pre-eminence of these qualities within the theory of wealth maximization. One might argue here that the qualities of diligence and self-denial are important insofar as they will result in the individual

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112. JOHN WESLEY, *The Danger of Increasing Riches*, in 4 THE WORKS OF JOHN WESLEY (Albert C. Outler ed., Abindon Press 1984) (emphasis in original).

113. Ironically, Posner's thesis on this score seems to be the reverse of Weber's in a sense. That is, that fostering economic progress serves to foster diligence, honesty, and self-denial.

contributing to the common good through production. However, we have already seen why the argument from contribution to the common good is unavailable to Posner. Furthermore, Posner has already rejected the utilitarian argument for their significance, so we cannot look to any tendency of diligence and self-denial to promote happiness as the reason for their importance. Rather, Posner posits these qualities as of ultimate value, and the question which remains is "why?"

I would argue that the veneration of diligence and self-denial is morally problematic when it is not firmly conjoined with a conception of generosity. However, the veneration of diligence and self-denial has emotional force even without such a connection and even without any religious underpinning.<sup>114</sup> The Calvinist emphasis on submission and self-discipline provides the key to their emotional, and hence, their perceived moral significance. There is, I would argue, a feeling of accomplishment in mastering one's desires and passions, in forcing one's self, single-mindedly and relentlessly, to submit to any endeavour. One attains a feeling of accomplishment, meaning, and superiority when one succeeds in controlling one's self through submission to work.<sup>115</sup> Work is a tangible way to prove one's capacity for self-mastery.<sup>116</sup>

I would argue that the desire for self-mastery and the will to transcend human fallibility is at the emotional core of the Calvinist obsession with work. Even once we have filtered out the religious aspects of the doctrine, this idea of submission to work as a means of proving one's self remains as a compelling force in the veneration and practice of diligence and self-denial. In Calvinism, the desire to transcend one's human weakness through a religiously submissive kind of self-mastery is embraced as good. Within the religious framework, the individual is invited to understand the desire for self-mastery as a correct subjugation of the self to God. One is advised to experience this subjugation in a concrete way through diligence and self-denial in work. Once we remove God from the equation, we are simply left with the desire for self-mastery.

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114. For an interesting and succinct discussion of the ways in which the aspiration to diligence and self-denial can give meaning to the lives of people without a religious underpinning, see Michael Mann, *Forward* to POGGI, *supra* note 92, at vii-viii.

115. See A.R. Gini & T. Sullivan, *Work: The Process and the Person*, 6 J. OF BUS. ETHICS 649 (1987).

116. See WEBER, *supra* note 104, at 78, where he describes the Calvinist devotion to labor in the calling as "[s]o irrational from the standpoint of purely eudaemonistic self-interest, but which has been and still is one of the most characteristic elements of our capitalistic culture." One can also see the zeal for self-mastery in the writing of Roger W. Babson, *Religion and Business*, where he says: "Teach your boy to love work like a game. Give him work as a reward. Let him strive to control himself as a sport. Explain to him that his body is a wonderful machine like an aeroplane or a motor car and arouse in him an interest to make it do whatever he wants it to do." ROGER W. BABSON, *RELIGION AND BUSINESS* 68 (1927).

Posner, in invoking and venerating the virtues of diligence and self-denial as of paramount moral significance, harnesses the emotional force of the desire for self-mastery. However, one interesting distinction between Calvin and Posner is that Posner, while he promotes self-denial as an ultimate value, also retains the personal preference backed by purchasing power—in other words the act of valuing—as the ultimate arbiter of what is efficient and therefore good. Calvin, of course, denies any moral significance to the personal preference.

Rather than resolving the irrationality of Calvinism that exists in its paradox of the need to strive single-mindedly for self-mastery to please God, while holding that one must never presume to be able to influence or affect God to attain his grace, Posner deepens and adds further layers to that irrationality by embracing Calvin's veneration of self-negation through self-mastery and mixing it with a completely non-evaluative emphasis on self-indulgence in the veneration of the personal preference. He accepts the self-negating aspects of the Calvinist struggle for self-mastery, though the idea of religious redemption in the Calvinist admonition to self-negation is not available to him. He accepts the desire for self-mastery and self-control as morally good, but the spiritual element of self-control as the worship of God is eliminated. Upon this spiritually empty foundation of self-negation, he places an edifice of a completely non-evaluative, self-affirming ethic of preference satisfaction.<sup>117</sup> In determining what can be valued, the only limiting criteria are capacity and willingness to pay. There are no qualitative conditions placed upon the kinds of preferences that count in Posner's ethical theory.

Thus, Posner's ethical theory is a blend of, on the one hand, an anti-eudemonic self-negation, and on the other, an undiscerning theoretical glorification of gratification of the personal preference qualified only by the necessity that a personal preference, in order to count, must be backed by readiness and ability to pay. Posner's moral theory has a compelling appeal in a society that has no spiritually sustaining means of coming to terms with the desire for self-mastery, and yet is steeped in a tradition of moral philosophy that focuses on the personal preference. Posner's moral theory reflects this deeply schizophrenic aspect of modern moral culture. It embraces and entrenches the irrationality of this paradox in a way that questions neither the basis of desire for self-mastery, nor the moral significance of the personal preference.

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117. For a discussion of value scepticism in the law and economics focus on the preference, see KELMAN, *supra* note 3, at 118.



## VIII. WEALTH MAXIMIZATION AND HONESTY

Posner claims that the virtue of honesty is valued intrinsically in an ethic of wealth maximization. It is assumed that those who are honest will be wealthy because a reputation for honesty is necessary for continued success in the market. The sentiment is reflected in a speech of Benjamin Franklin:

Remember this saying, *The good paymaster is lord of another man's purse*. He that is known to pay punctually and exactly to the time he promises, may at any time, and on any occasion, raise all the money his friends can spare. This is sometimes of great use. After industry and frugality, nothing contributes more to the raising of a young man in the world than punctuality and justice in all his dealings; therefore never keep borrowed money an hour beyond the time you promised, lest a disappointment shut up your friend's purse for ever.<sup>118</sup>

Posner argues that by preferring the prosperous, wealth maximization indirectly, but intrinsically, values honesty.<sup>119</sup> Hence, Posner claims superiority over utilitarianism which values honesty only inasmuch as it can contribute to wealth, and hence to happiness. Posner argues that because he eliminates happiness from his moral calculus, he is able to narrow his focus to exclude capacity to consume as morally equivalent to honesty. There are several defects in Posner's argument.

First, it is questionable whether Posner is correct in saying that wealth maximization does not encourage self-indulgence and hedonism. The system of wealth maximization envisages a high level of consumption as well as a high level of production. If everyone were fully self-denying, then the instances of valuing would drop, and there would be less demand for continued production. Without hedonism and self-indulgence there would be less of a market for which to produce.

Second, it is also clear that Posner is incorrect in his claim that he values honesty intrinsically. It is rather the case that wealth maximization encourages honesty only insofar as honesty is useful in obtaining money and, thereby, in gaining greater advantage in the market and, hence, society. Eliminating

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118. The quotation is from Benjamin Franklin's *Advice to a Young Tradesman*, and it appears in WEBER, *supra* note 104, at 49 n.2. See also WEBER, *supra* note 104, at 180 n.112 (quoting J.A. ROWNTREE, *QUAKERISM, PAST AND PRESENT*): "Real piety favors the success of a trader by insuring his integrity and fostering habits of prudence and forethought, important items in obtaining that standing and credit in the commercial world, which are requisites for the steady accumulation of wealth."

119. See POSNER, *ECONOMICS OF JUSTICE*, *supra* note 6, at 66.

happiness from the realm of moral concern only makes more clear the instrumental nature of the value of honesty in Posner's moral theory. If it were proved that honesty was not the best policy in succeeding in the market, then Posner would no longer have any reason to encourage it. Furthermore, the scope of the notion of honesty in a system of wealth maximization must, like everything else, be determined by the question of efficiency and hence valuation.<sup>120</sup> Thus, Posner is too quick to claim a Kantian valuation of honesty independently from any causal role it might play in increasing wealth.<sup>121</sup>

#### IX. MARX, CREATIVITY, AND FULL HUMAN EXISTENCE

I shall now turn to a discussion of Karl Marx's ideas about the significance of productivity. Marx argued that the true expression of humanity lay in creativity and that the individual, in developing creative capacity in an authentic way, lives in the best way possible.<sup>122</sup> A desirable society would be one in which people were united with the objects of their production and were no longer alienated from their productive life activity by the capitalist system.<sup>123</sup> Thus, productivity derives its ethical significance from the very close relationship between creativity and the fulfillment of human potential.

An individual experiences one's particularly human existence through production, and one's relationship to the natural world is consummated through productive activity.<sup>124</sup> One comes to know and understand one's self as a human being through productive activity, and to love, value, and experience existence in the act of creating and loving the objects of one's activity.

120. For a discussion of efficient distribution of informational advantages, see A.T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L. J. 472, 478 (1980).

121. The tenacity and pervasiveness of Posner's instrumentalism has caused Englund to remark: "The present writer admits to being always caught anew by surprise by the apparently inexhaustible potential of social efficiency reasons to serve as substitute to what he would consider to be moral considerations." Englund, *supra* note 1, at 367.

122. I am dealing here with the Marx's early writing and in particular I will be looking at *Economic and Philosophical Manuscripts of 1844 & The German Ideology: Part I*, in THE MARX-ENGLES READER 66, 146 (Robert C. Tucker ed., 2nd ed., W.W. Norton & Co. 1978) [hereinafter Marx, *Manuscripts*, & Marx, *German Ideology*].

123. One can see fragments of this idea in Aristotle:

Every craftsman loves the work of his own hands more than it would love him if it came to life. Probably this happens most of all with poets, because they are exceedingly fond of their own poems, loving them as if they were their children . . . . The reason for this is that existence is to everyone an object of choice and love, and we exist through activity (because we exist by living and acting); and the maker of the work exists, in a sense, through his activity. Therefore the maker loves his work because he loves existence. This is a natural principle for the work reveals in actuality what is only potentially.

ARISTOTLE, ETHICS 9, vii (J.A.K. Thomson trans., Penguin Books 1986).

124. Marx, *Manuscripts*, *supra* note 122, at 76.

Why would this be called a moral argument for the significance of productivity?<sup>125</sup> Clearly it is not an argument that is directed to the proper treatment of one's fellow human beings or to the duties owed to others. Nor is it a religious argument about the relationship between the individual and God. Indeed, it is quite the opposite of the arguments that were seen in the Calvinist section; it is fully self-affirming with an absolute disdain for the self-denial inherent in the Calvinist conception of work.<sup>126</sup> However, I think that we can see the ethical nature of Marx's discussion of creativity in his view of all alienated labor within the structure of capitalism as a process of estrangement of the individual from the self. In Marx's view, the more effort one puts into alienated production, the greater the progress of one's dissipation as a human being. One loses one's very existence in the process of pouring one's self into production in relation to which one is estranged. Estranged labor then, is seen as a kind of suicide.<sup>127</sup>

The argument emerges as a moral one because it opposes an idea of human flourishing to an idea of human emaciation. It is not that creativity fulfills any external moral obligation, but rather that it fulfills the true nature of humanity.<sup>128</sup> Thus, unalienated productivity is good because it is an expression of the authentic existence of humanity. An individual flourishes in creative activity where he is united with the objects of his creativity. In reformulating Marx's ideas about creativity as an explicit moral theory, John McMurtry describes Marx's first positive value as follows:

'The full and free development of every individual' is the ultimate good. This full and free development of the individual means the comprehensive and unconstrained development of the individual's capacity to raise a project in imagination and then erect it in reality:

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125. The question of whether Marx's writing can be properly understood as moral philosophy has been the subject of much controversy. See Kai Nielsen, *Marx on Justice: The Tucker-Wood Thesis Revisited*, 38 U. TORONTO L.J. 28 (1988); Thomas Atwater, *Marx and a Credible Form of Eudaemonism*, 1 SW. PHIL. REV. 55 (1984); Hilliard Aronovitch, *Marxian Morality*, 10 C. J. P. 357 (1980); R.G. PEFFER, *MARXISM, MORALITY, AND SOCIAL JUSTICE* (1990); STEVEN LUKES, *MARXISM AND MORALITY* (1985); Essays, *Marx and Morality*, 7 CANADIAN J. PHIL. (Kai Nielsen & Steven C. Patten eds., Supp. 1981).

126. Marx writes:

Self-denial, the denial of life and of all human needs, is its cardinal doctrine. The less you eat, drink and read books; the less you go to the theatre, the dance hall, the public house; the less you think, love, theorize, sing, paint, fence, etc., the more you *save*—the *greater* becomes your treasure which neither moths nor dust will devour—your *capital*. The less you *are*, the more you *have*; the less you express your own life, the greater is your *alienated* life—the greater is the store of your estranged being."

Marx, *Manuscripts*, *supra* note 122, at 97 (emphasis added).

127. *Id.* at 72-74.

128. *Id.* at 76-77.

that is, to create without external limit of range or form.<sup>129</sup>

The idea reveals a deep love of humanity and a deep egalitarianism. It is a view about the moral significance of the aesthetic quality of human life. The injunction to unalienated creativity is fully self-affirming and joyful. This idealistic joyfulness in the narration of the significance of creativity can be seen in Marx's famous passage in *The German Ideology*:

For as soon as the distribution of labor comes into being, each man has a particular, exclusive sphere of activity, which is forced upon him and from which he cannot escape. He is a hunter, a fisherman, a shepherd, or a critical critic, and must remain so if he does not want to lose his means of livelihood; while in communist society, where nobody has one exclusive sphere of activity but each can become accomplished in any branch he wishes, society regulates the general production and thus makes it possible for me to do one thing today and another tomorrow, to hunt in the morning, fish in the afternoon, rear cattle in the evening, criticise after dinner, just as I have a mind, without ever becoming hunter, fisherman, shepherd or critic.<sup>130</sup>

Thus, Marx seems to envision the richest experience of human life as a flurry of creative activity directed at various and numerous goals. Gerald Cohen has criticized Marx for this conception of the good of human life.<sup>131</sup> He argues that Marx is wrong in positing creativity as the single identifying aspect of people's lives.<sup>132</sup> He argues further that Marx is misguided in thinking that productive activity must be undertaken outside of the context of specific roles within a social context in order to be authentic. In Cohen's view the experience of becoming a hunter, fisherman, shepherd, or critic is, or can be, essential to the full experience of identity as a person.<sup>133</sup> He argues that Marx was wrong in thinking that people had to become constituted purely by their relationship to the objects of their creativity rather than by their relationship to others within

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129. John McMurtry, *Is There a Marxist Personal Morality*, 7 CANADIAN J. PHIL. (Kai Nielsen & Steven C. Patten eds., Supp. 1981).

130. Marx, *German Ideology*, *supra* note 122, at 160.

131. GERALD A. COHEN, HISTORY, LABOUR AND FREEDOM: THEMES FROM MARX 137-44 (1988).

132. *Id.* at 137.

133. *Id.* at 142. Cohen says:

I now wonder why roles should be abolished, and even why, ideally, people should engage in richly various activities. Why should a man or woman *not* find fulfillment in his or her work as a painter, conceived as his contribution to the society to which he belongs, and located within a nexus of expectations connecting him to other people.

*Id.* (emphasis added).

a context of social functions and institutions.<sup>134</sup>

Marx's concept of free activity as the single identifying and fulfilling aspect of human life seems to be naive and ultimately unsatisfying in light of Cohen's criticisms. Not only does Marx's single-minded emphasis on creativity, abstracted out of social relations, seem too individualistic, but his objections to the idea of one being identified by a particular creative role seem to undermine the very goal of realization of the self through creativity. However, I would argue that the difference between Marx's position and that of Cohen is very instructive in understanding why the idea of the moral significance of creativity as self-fulfillment cannot be transplanted into the normative theory of wealth maximization.

Marx's rejection of division of labor was fueled by the extensive role that the idea played in alienating the worker from the objects of his creativity. In dividing the productive task into more and more minute portions, the worker became both more and more removed from the actual creative process and more and more dehumanized in his life's activity.<sup>135</sup> The concept of division of labor was directed to efficiency and the goal of increased production for a market. One can see this in Adam Smith's famous and fanatically enthusiastic description of the pin factory where the process of making a pin is divided into numerous different tasks: the straightening of the wire, the cutting of the wire, the separate aspects of the making of the head of the pin, and so forth.<sup>136</sup> The zeal that Smith has for the ever increased division of labor is drawn from its potential in increasing productive output to meet market demand.

In rejecting division of labor, or at least in rejecting the imposition of division of labor, it seems that Marx is seeking primarily to reject the idea that the single goal and purpose of creative activity is to produce commodities for consumption in the market. In attempting to construct an alternative view of creativity as essentially and intrinsically important to human existence, Marx devalues the socially engaged aspects of productive activity. In this respect he goes too far. He rejects division of labor because he sees it as typifying the estranged paradigm of material production. However, he is blinded to the sense in which the creative process can be undertaken in the context of a particular function in the society. In his concern to eliminate slavery to market forces, he loses the insight that fulfillment can be drawn from a single creative undertaking existing within a context of social relationships.

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134. *Id.* at 138.

135. Marx, *German Ideology*, *supra* note 122, at 190-91.

136. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 14-15 (R.H. Campbell & A.S. Skinner eds., Clarendon Press 1976) (1776).

A question for Cohen then arises regarding the extent to which he is prepared to allow market forces, or the preferences of others, to shape or to define the creative experience of individuals.<sup>137</sup> Cohen points out that a conception of the individual situated within a community, engaging in the creative process in the context of a participatory role in the community, is better than a conception of the individual engaged in disassociated free creative activity unidentified by any concept of role. However, he seems to fail to address the concern of Marx in rejecting division of labor.

Marx saw the experience of fulfillment of human potential through creative activity as what was important about material productivity. He did not see such free activity as possible for all people where response to market demand could overtake, distort, and pervert the creative process. This seems to be why he had the impetus to isolate the individual in the creative process. He sought to protect creativity, as the expression of humanity, from the sully and alienating force of response to market demand. As soon as the individual is producing *for* someone else, the self-expressive aspect of production is threatened. Allowing for role differentiated creativity infects the pure relationship of subject to object with a social character, and introduces the possibility that the creative process will be primarily directed toward satisfaction of the preferences of others, rather than the self-realization of the creator.

Marx perceived this difficulty, and thus, before allowing himself to create the fantasy portrait of the freely active individual, he addressed the concern of the market. He saw the replacement of the market by a situation in which "society regulates the general production."<sup>138</sup> Only once market regulation of production was eliminated could productive activity have, as its essence, the exploration and celebration of creative potential.

Thus, I would argue that the issue of division of labor is beside the point. Marx saw the concepts of division of labor and production, driven and defined by market forces, as inextricably intertwined. Had he been able to separate these ideas, perhaps he could have envisioned the kind of creative activity within a particular sphere of expertise and undertaken as a social role that which Cohen envisions. However, the question remains whether production within the context

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137. McMurtry addresses this point to some extent in a footnote to the above quoted passage. He writes:

Bear in mind the other-serving nature of this self-expressiveness: what realizes individual capacities (e.g., art forms) fulfills others at the same time (e.g., their aesthetic needs). The "freedom" of such individual fulfillments is in proportion to its non-constraint by economic form, and its "fullness" is in proportion to its many-sidedness.

McMurtry, *supra* note 129, at 186.

138. Marx, *German Ideology*, *supra* note 122, at 160.

of social relationships precludes Marx's reasons for valuing productivity because it perhaps necessarily directs that production to the satisfaction of the preferences of others.

In any event, within the conflict between Cohen and Marx lies the explanation of why, not surprisingly, the Marxist conception of the morality of material production cannot be adopted by the Posnerian model of the moral significance of productivity. In his veneration of productivity, Posner is completely devoted to the concept of the market as the arbiter of what is valuable. Creative endeavours that are not "valued" by anyone else do not count in Posner's moral narration of productivity. It is only because someone else is ready, willing, and able to pay for a commodity produced that the productive activity has any normative significance. Thus, the artist who creates sculptures that are a reflection of her existence and the result of authentic creative experience, but whose work is not valued in the market, is (from the point of view of productivity and hence of moral virtue) on a par with the thief and the idle heir.<sup>139</sup> Concentration on the market as the arbiter of the value of creative activity precludes reference to Marx's idea of an economic and political system that fosters and facilitates unalienated creativity. On the Marxist formulation, such creativity is morally good because it is the highest and fullest form of human existence. Once one becomes primarily concerned, as Posner is, with whether the object of production succeeds or fails to satisfy external demand, one has given up the Marxist understanding of the moral significance of production.

## X. CONCLUSION

A moral theory that condemns material productivity as *per se* vulgar and unsuitable for the virtuous person is unattractively elitist. It depends upon the creation and exclusion of an underclass of those who are unable to aspire to virtue but who provide for the material need of the virtuous. Material productivity can be morally significant in that it can represent a valuable and necessary contribution to the common good and the alleviation of the needs of others. Furthermore, engaging in the creative process can have moral significance as a fulfillment of one's humanity. Thus, a moral theory that does not give productivity, creativity, and contribution membership in the cluster of qualities which make up the notion of virtue is inadequate.

The quality of productivity, however, does not provide a morally defensible

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139. Here again surfaces Posner's equation of material advantage or capacity "to value" with productivity. Posner wrongly assumes that the market invariably rewards productive individuals and thereby reflects their presumed moral worth. See generally Posner, *Law & Economics*, *supra* note 14.

reason for preferring those who are already materially advantaged in the allocation of entitlements. People do not all have the same opportunities or capacities to engage in productive activity. Nor is the market necessarily successful in rewarding morally significant productive activity.

Posner's theory rests on an assumption that the claims of the productive bear more attention in the allocation of entitlements than the claims of the unproductive, and that productive individuals can be identified by their success in the market. I have tried to show that this assumption is unwarranted by drawing on considerations other than a principle of equality of individuals. I would argue at this point that it falls to Posner, and others who would argue that efficiency is a defensible norm for making decisions about the allocation of entitlements, to produce a more explicit and less rhetorical explanation of why and how we can, in good conscience, take this assumption to be true.



