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The recent criticism of economic analysis of law, though differing in its sources, has centered on the notion that economic efficiency always depends for its very meaning and for its application on values extraneous to it.1 Without judgments that economics cannot make about distribu-
tional fairness and about original rights, entitlements, or starting points, economic analysis gives no answers. According to this criticism, therefore, one should abandon economic analysis and return to notions of justice in law making. What the critics mean by justice, however, varies with each critic. To Ronald Dworkin it means going back to philosophy.2 To Duncan Kennedy it means ideology or his own intuitions about what is just.3 To Richard Epstein it seems to mean returning to the common law and common-law relationships.4 To others, I suppose, it means accepting what the majority wishes, as "just." All of these are, of course, what the new economic analysis of law sought to allow us to criticize, at least when they were viewed as ultimate sources of law.5

Unfortunately, the use made of economic analysis of law by many of its practitioners—for example, Judge Richard Posner—lends itself precisely to the criticisms that have been thrown at it.6 These practitioners seem

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1. It is difficult to list all the critics or their writings; there are too many of them and they write too much. A representative set (taken from just one issue each of two law journals in the same year) is: Dworkin, Is Wealth a Value?, 9 J. LEGAL STUD. 191 (1980); Epstein, The Static Conception of the Common Law, 9 J. LEGAL STUD. 253 (1980); Fried, The Laws of Change: The Cunning of Reason in Moral and Legal History, 9 J. LEGAL STUD. 335 (1980); Horwitz, Law and Economics: Science or Politics?, 8 HOFSTRA L. Rev. 905 (1980); Kennedy & Michelman, Are Property and Contract Efficient?, 8 HOFSTRA L. Rev. 711 (1980).


6. For a careful account of the various strands in the law and economics movement, including that represented by Posner and his followers, see C. Veljanovski, The New Law-and-Economics—A Research Review (1982). Veljanovski is also the compiler of
almost to say that because "we" cannot say anything "scientific or scholarly" about starting points or distributional values, we must ignore them and analyze law only on the basis of economic efficiency defined narrowly to mean wealth maximization. Elsewhere I have tried to demonstrate that the critics of economic analysis of law are correct in that, without a basis in these other values, wealth maximization is a meaningless concept. My claim is that Posner and his followers must be making surreptitious assumptions about starting points and about desirable distributions of wealth in order to define that "wealth" which they claim law does (or should) maximize.

While this argument would imply that economic analysis does not and cannot carry the day, it does not mean that the values that economic analysis tends to further can be ignored. Avoidance of waste is part of a common notion of justice, even if "waste" in any given society can be defined only on the basis of those deeper values that establish entitlements and starting points.

With these comments as background, I would like to look at three types of automobile accident law systems and contrast them with each other and with general social insurance for accidents. From this I hope to derive some notions of what kinds of things economic analysis can tell us and what it cannot tell us about law and its reform. The systems I have in mind are: (a) first party auto insurance (that is, liability on the car owner or driver for injuries to him or her self, passengers, and pedestrians); (b) third party auto insurance (that is, given the tradition of guest statutes, intrafamily immunities, and the reluctance to sue one's friends when other defendants are available, liability of a car owner or driver for injuries to those outside his or her car); (c) product liability

an excellent, if now somewhat dated, bibliography of the subject. C. Veljanovski, Bibliography in Law and Economics (1979).


10. Both guest statutes (which require higher degrees of negligence or even wanton and willful misconduct for liability to nonpaying guests in automobiles) and intrafamily immunity doctrines (which greatly limit the capacity of injured parties to recover in tort from close family members) have been in decline, not to say rout, recently. Several states have repealed their guest statutes. See, e.g., Act of Apr. 9, 1975, ch. 379, § 1, 1975
(that is, liability primarily on the manufacturer of a car for all those injured in an automobile accident, whether in or out of the car); and (d) social insurance (that is, liability on the general taxpayer for all auto injuries). I shall describe and analyze these systems not as they exist in the law today, but in their prototypical forms. I will be concerned, in other words, with a nonexistent, full first party approach in which the car owner is responsible for all in-car injuries; with a third party system in which all suits are brought against the owner or driver of "the other car"; and with a product liability system in which the car manufacturer is liable for all auto injuries. I will do this because the fundamental characteristics of each approach are highlighted when the approach is considered in its pure or extreme version.

Similarly, in this Article I shall not be concerned with fault as a basis of liability. While we tend to associate some of these approaches with fault and some with nonfault liability, each of these can be fault or nonfault based. We could have a first party system in which compensation would be received from the owner's own insurance, but only if the accident was the result of someone else's fault (as occurs under some uninsured motorist


11. One could, of course, have a social insurance system in which the compensation fund was not derived from general tax revenues, but rather from parties involved in the accident. Depending on whether such a fund "taxed" first party participants, third party participants, or producers of the products involved, that system of social insurance would be properly analyzed as a variant of a first party, third party, or product liability approach to accidents. Because I am already discussing those approaches directly, here I assume a general-revenue-based compensation fund.

12. In fact, each of these approaches has elements that are characteristic of the other approaches. To the extent that most first party plans entail driver liability to pedestrians, some third party incentives are created. To the extent passengers may sue the driver of the car they ride in, third party approaches retain first party elements. And obviously, no existing system of product liability makes the manufacturers liable for all auto accidents involving their cars. The need to show a defect and the existence of various defenses to product liability mean, in practice, that what is termed strict product liability often results in losses being assigned instead to parties other than the manufacturer on a first party or third party basis. For simplicity, I am also ignoring other possibly liable parties (like dealers or component parts manufacturers) in product liability cases. All such "realistic" deviations from the "pure approaches" here discussed would, obviously, have to be taken into account before one could begin making even tentative suggestions for law reform. See infra pp. 847-50.
insurance schemes). Conversely, we could have a third party approach in which both liability and compensation result regardless of fault (as was proposed in the old Columbia auto compensation plan of the 1930's). Product liability could, of course, require fault on the part of the manufacturer or exist apart from fault. Finally, social insurance for auto accidents, even though paid from a general tax-based fund, could be limited to compensating only those injured as a result of someone's fault or could be available to all victims in the absence of fault. It is, of course, unusual to find arguments in favor of a fault-based approach except under third party or product liability schemes. This fact might be significant in a debate on the merits of a fault test for liability. It is not, however, germane to the points I would like to make in this Article, for these can be made just as well if one assumes fault-based liability throughout as if one assumes, as I shall, liability regardless of fault.

None of the four approaches listed above establishes a complete system of incentives to minimize the sum of the cost of accidents and the cost of their avoidance. They each leave significant behavior unencumbered by the accident costs the behavior entails. Thus, they all fail to put appropriate pressure on people to make some choices differently, even though such different choices would lead to fewer accident costs. But the choices to which each approach allows a "free ride" are very different from each other. And the parties who gain and lose as a result of such free rides are also different in each system. As a result, the choice among these approaches is significant not only because of its effect on accident costs but also because of its distributional consequences. To see this we should spend a few minutes on the incentive-allocation structures created by each system.

In first party systems the cost of driving depends primarily on three factors: the accident propensity of the owner-driver; the relative safety or danger of the car for those riding in it; and the damages—that is, the cost of the accident, both to the car and to those riding in it. This is because first party insurance rates depend primarily on, and hence reflect, the likelihood and gravity of injury to the driver and to his or her passengers.


14. COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932). The Columbia plan allowed recovery by victims of car accidents from those who had injured them regardless of fault. It was inspired by workmen's compensation laws, which themselves are a form of third party no-fault system.


16. Because first party plans typically allow recoveries against the owner or driver of
In the third party system the cost of driving also depends on three factors, but two of the three are different. The first, which is the same as in first party systems, is the accident propensity of the owner-driver; the second is the relative safety or danger of the car to those outside it or in other cars; and the third is the damages—that is, the cost of the accident to those injured outside the car or in other cars. Under third party systems insurance rates depend on and reflect the likelihood and gravity of injury to people outside the owner-driver's car.\textsuperscript{17}

Product liability systems create a quite different incentive structure. In these systems, the money cost of driving does not depend on the accident propensity of the owner-driver. It is not feasible for auto manufacturers to charge different car buyers amounts based on their accident proneness.\textsuperscript{18} Instead, the cost of driving reflects the relative safety or danger of cars both to those parties within them and to those parties outside them. Similarly, the cost of driving depends on the size of damages suffered by those injured, whether in or out of the cars. Car makers have to pay damages regardless of whether the injured parties are in or out of the car they produce, and the prices that manufacturers charge reflect this liability.

As a result, product liability systems create greater safety incentives than first party or third party systems as far as the cars themselves are concerned, because they take into account the number and severity of both in-car and out-of-car accidents. But they create no financial incentives on owner-drivers to avoid accidents, because owner-driver accident proneness cannot feasibly be reflected in the purchase price of cars. First party and third party systems instead both focus on the riskiness of the owner-drivers and also take into account some of the dangers inherent in the car driven. But the first of these does so only for those injured in the car itself and not those in other cars, while the second does so only for those in

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\textsuperscript{17} Again, in practice, the likelihood and gravity of injury to passengers would introduce an element concerned with car safety into the third party system. The importance of this element depends on the frequency with which passengers sue and recover, under existing law, from their driver as against the driver of the other car. More important, probably, is the fact that the currently dominant practice does have a significant first party component because of the existence of collision insurance. Unless the company furnishing collision coverage recovers against an outside injurer, collision insurance is, of course, straight first party insurance.

\textsuperscript{18} The existence of defenses against product liability may, if they are based on the owner-driver's propensity to have accidents, mitigate, to some extent, the predominant focus of product liability on car safety as against user safety. Though contributory negligence is frequently not a defense in product suits, other defenses like assumption of the risk or unusual use of the product may have the same effect. See, e.g., D. Noel & J. Phillips, Products Liability 263-85 (2d ed. 1981). Whether such defenses affect individual driver behavior much at all is, of course, doubtful. Whether they are too individualized to affect behavior of driver categories can also be questioned. See, e.g., G. Calabresi, The Costs of Accidents (1970).
other cars and tends to ignore injuries to those in the driver's own car.

Under social insurance approaches the cost of driving does not reflect accident costs at all. These costs become part of the general tax costs of the country, which in turn reflect auto accident costs to all victims, whether in a given car or in any other car. Neither the owner-driver's nor any car's accident proneness can affect the cost of driving or decisions about driving and about how cars should be made. They do, however, affect the general level of taxes in the society.

Because none of these approaches charges for all of the risks and costs involved in automobile accidents, one would expect that each would be viewed as permitting too many accident costs of particular sorts and would be criticized for them. One also would expect that those accident costs that are not adequately controlled by each approach would become the object of proposals for regulatory action. The lacunae in financial incentives could be filled—well or badly—by regulations and criminal sanctions. And so it has been in practice (even given the "impure" nature of the approaches we actually use).

Thus, in the United States, the dominant system of third party liability has made it unnecessary to pass laws forbidding phallic spikes on the front of cars, because the risk these would entail for persons in other cars would result in insurance premiums sufficiently high to discourage those who would consider the spikes attractive. Instead, the same system has done little to further in-car safety because expenditures to protect passengers would not proportionately reduce the owner-driver's insurance rates. It is no accident, therefore, that most of Ralph Nader's reforms focused on regulations designed to require in-car safety. They did so precisely because under the dominant system in-car safety did not pay.

It is not too much of a jump to assume that were the dominant system of accident law a first party one we would not be arguing about the relative merits of requiring seat belts or air bags, nor about the crash-worthiness

19. See, e.g., 49 C.F.R. § 571.203 (1982) (impact protection for the driver from the steering control system); id. § 571.208 (occupant crash protection); id. § 571.219 (windshield zone intrusion).

20. According to legend, many years ago one member of the automobile industry produced a car with important in-car safety features. The car, however, cost considerably more than its competitors because of these features. Under the dominant third party system, car buyers understandably got no reduction in insurance rates if they chose these "first-party-safer" cars. The producer attempted to convince buyers that the extra cost was, nonetheless, worth it. Not surprisingly the producer failed in this attempt. Despite the fact that the most this could be taken to show was that buyers were unwilling to pay twice (once in their own insurance rates and once in higher car costs) for auto accident and safety costs, the incident is said to have given rise to the unproven and probably erroneous folk wisdom in the auto industry that "safety does not pay." Cf. Calabresi, The New York Plan: A Free Choice Modification, 71 Colum. L. Rev. 267, 270-71 (1971) (proposing a system in which those who choose first-party-safer cars could get reduced premiums, while allowing others to opt for third party insurance coverage).
Insurance rates would give a fair clue to the cost effectiveness of each of these. Instead, we probably would be discussing the need for laws forbidding spikes, and for regulations governing the size of cars in order to control those who would buy their own safety "cheaply" at the cost of crushing people in other cars whose damages would not be their responsibility. Similarly, one would expect that neither of these arguments would be of much interest in systems of full product liability. Manufacturers would have significant incentives to determine the cost and benefits of each alternative, because they would be liable for all of them. But these arguments would be more than replaced by debates over the need for a multitude of controls and regulations designed to restrict driving by accident prone categories, such as the young, whose dangerous propensities would no longer result in "exorbitant," indeed almost exclusionary, insurance rates. Finally, were ours a system of general social insurance one would likely find, as one does in many systems in which risk is borne at a collective level, sanctions aimed at controlling not only who can drive but also how cars should be made to achieve adequate in-car and out-of-car safety.

I speak, of course, of the real world (even though the systems I describe are pure or prototypical) and not the Coasian world of no transaction costs. In Coase's frictionless world each incomplete system of incentives would be made complete by transactions. In the absence of transaction costs, manufacturers of cars who were held liable under product liability systems could charge buyers different prices according to their accident propensities and even according to their propensity to resell cars to those of different accident proneness. But then, in such a world third party insurers would also pay car owners to adopt in-car safety measures in order to reduce the insurer's third party liability, and first party insurers would pay car owners to forego spikes and other similar toys that would raise first party rates. In other words, all systems would be equally good as

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23. An example of high automobile rates for young drivers can be found in the Allstate Insurance Company rates in Iowa. The rates on a $100,000/$300,000 personal injury, $50,000 property damage Allstate liability policy for a 1984 Chevrolet Citation are: $169/6 mos. for unmarried 16-20 year-olds; $112/6 mos. for married 16-20 year-olds; $104/6 mos. for unmarried 21-24 year-olds, $72/6 mos. for married 21-24 year-olds; $76/6 mos. for unmarried persons over 25 years old; and $60/6 mos. for married persons over 25 years old. Telephone interview with Allstate agent, Iowa City, Iowa (Jan. 20, 1984). On the extraordinarily high accident propensities of drivers between 16 and 24, and especially of unmarried males of that age, see U.S. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, FACT BOOK: STATISTICAL INFORMATION ON HIGHWAY SAFETY, table IV 1.3 (1977); Trunkey, Trauma, Sci. Am., Aug. 1983, at 28, 33.

far as economic efficiency is concerned (though they would not necessarily be equal with respect to distributional equity).  

Some transactions of the sort mentioned above actually do occur even in our far from frictionless world. And more might take place if we did not—for good reasons, like those suggested by the antitrust laws—make some agreements and transactions more difficult than they otherwise would be. The net effect remains, however, that the system of accident law we employ makes a considerable difference to which safety measures are induced and hence adopted “voluntarily” and which measures are, instead, not encouraged and so, by and large, adopted only under coercion, if at all.

If the four systems I have described have significant effects on which safety measures seem to be worthwhile in the market and which do not, they have equally or even greater effects on what categories of people bear the burden of the accident costs and the accident avoidance costs that result. Of course, just as which safety devices are worthwhile can be altered by societal intervention and regulation, so who bears which burden can be changed by sanctions and rules excluding some groups from driving or requiring some to have special qualifications in order to drive. For the moment, however, let us ignore such (admittedly crucial) collective alterations and look only at the distributional effects of the liability systems themselves.

The easiest to assess is social insurance paid out of taxes. Because (unless it is supplemented by direct regulations) it reduces safety incentives and hence probably increases accidents, this approach places added accident costs on those who suffer accidents that cannot be compensated for in money terms. Because it compensates (as well as money can) all victims from the general fisc, it puts the burden of compensation on those deemed by the tax system of the polity to be the ones most suited to pay.

More complex, and more interesting, are first party and third party systems. Third party systems burden categories of owner-drivers according to their injury causing propensity. As a result, those categories of owner-drivers that have more than their share of accidents bear the brunt of accident avoidance costs in higher insurance rates. But the cost of the accidents on which the insurance rates are based is not simply derived from the number of accidents each category of owner-driver is likely to have. It is also based on the damages caused the victims in such accidents. In third party systems the victim is taken to be the average person of average


26. An example is Allstate’s offer of a 30% discount on the medical portion of automobile insurance for cars that have air bags. Telephone interview with Myra D. West-Allen, Allstate Senior Corporate Relations Representative, Northbrook, Illinois (Jan. 20, 1984).

age and average means. We are not so segregated a society that the poor predominantly hit only the poor, or the aged hit the aged. As a result the owner-driver, whether of high or low income, or of short or long life expectancy, insures the income of an average victim for an average number of years.

This result, which is highly disadvantageous to the poor and the old (and for slightly different reasons also to the young) is in sharp contrast with what happens in first party systems.\(^{28}\) In these, frequency of accidents counts as much as in third party systems. The likely cost of each accident, however, is based primarily on the likely income and life expectancy of the owner-driver and his or her passengers. This means that a low-income driver who is likely to carry low-income passengers should get charged less for each accident than a wealthy driver whose car is more likely to be full of equally high-income passengers. Similarly, the aged driver insures his or her income for far fewer years than the middle-aged drivers, whose driving exposes a far longer income stream to risk. It is as if the high-income, middle-aged driver were habitually carrying Ming Dynasty vases in his or her car, while the aged, low-income driver carried nothing but inexpensive pottery. To charge both the same amount for each accident they are expected to have obviously overcharges the poor and undercharges the rich.

Of course, the matter is not quite so simple. It is not quite the same as if we charged owners of inexpensive houses the same fire insurance for each fire risk as owners of mansions. The aged or low-income driver who has an accident injures not only himself or herself and his or her passengers, but injures the "average person" in the other car as well. The problem again is the incompleteness of both first party and third party systems. Third party systems look primarily to the injury caused the "average" victim; first party systems look primarily to the injuries caused the owner-driver and his or her passengers. Both ignore part of the picture. What third party systems ignore increases the burden of accident avoidance that is placed on the poor and the old. What first party systems ignore diminishes the burden placed on these groups and increases the burden borne by relatively wealthy and middle-aged groups.

Product liability systems ignore the propensity of the owner-drivers to have accidents. Insofar as the aged or the young are riskier categories of drivers, product liability diminishes the burdens they bear and increases

\(^{28}\) Since the young have long life expectancies, one would think that when they are injured, the costs of the accident would be very high. Actually, this is probably not the case. Because they are usually earning relatively little, the income lost through such accidents tends to be low. Moreover, they tend either to be killed or to recover from accidents; older people seem to be more prone to accidents that leave costly permanent disabilities. Perhaps ironically, society (under all four accident law approaches) rates the longstanding disability as more costly than the rapid killing. For these reasons, insurance rates for young drivers are likely to be significantly lower under first party than under third party systems.
the burden borne by less accident prone categories. The prices of cars will reflect an average owner-driver accident propensity, which obviously favors those groups likely to have more accidents than the average. But it also shares with third party systems the characteristic of assessing the cost of each accident at average values. As a result, the poor and the aged face car prices that include the same accident cost component as the rich and the middle aged, even though the cost-danger the first groups impose per accident is, by definition, less than average while that imposed by the second group is higher than average. Once again the reason lies in the incompleteness of the factors that determine product liability. Owner-driver and passenger characteristics are de-emphasized. Car characteristics are emphasized. It follows that those who are likely to have more accidents than average are favored and that those whose accident costs per accident are less than average are disfavored.

Thus, if we were to assume that all three—first party, third party, and product liability systems—though each are incomplete and imperfect, create equally good incentives toward safety, we still might have very strong preferences toward one or the other because of their very different distributional consequences. We cannot, however, simply assume that all three are equally good at inducing safety. We must at least consider which can lead to the best combination of market incentives and governmental regulations. The analysis will focus in part on what choices are, in fact, most important to accident prevention. (Is first party safety a better pressure point than third party safety? Are accidents more cheaply reduced by making better cars or by inducing better drivers?) But it also will focus on which choices are best made or influenced by the government and which through market incentives. (Is the government effective in deciding the relative advantages of different kinds of seat belts, and of these as against air bags? Is it capable of defining high risk groups and of restricting their driving? Is it good at prohibiting phallic spikes or tank-like cars that crush all those they collide with?)

In the end such judgments, though partly based on empirical data, also must be partly guesswork. They must, in any event, be based not on the absolute capacity of the government to do any of these things, but rather on whether government regulations or market incentives have a comparative advantage with respect to the particular choice. This follows from the difficulty of creating a complete system of accident controls that employs market incentives or governmental sanctions alone.

My own judgment is that by and large the government is better at filling the holes left by first party systems than those left either by third party or product liability systems. This in part may be because the choices left to the government by third party systems seem to be highly technical ones such as seat belts versus air bags (with the result that the govern-

29. My colleague, George Priest, pointed this out to me.
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ment is more open to challenges made by industry of its competence), while the decisions that first party systems require of the state appear to be more open and shut ones (such as spikes or not, and average car sizes). But this may be just an illusion. More importantly, the choices the government must make to complete third party systems imply coercing people to protect themselves. ("You must have an air bag.") Those it must make to complete product liability systems require it to exclude or limit the driving of high risk groups (like the aged) which the state is understandably reluctant to single out and burden. Conversely, what the government must do to fill out first party systems involves primarily the prohibition or control of automobile characteristics that are likely to injure others. ("You may not have a spike on your car because it endangers other people.") And this role for government, because it is more readily acceptable to most in our country, is more likely to be successful.

It should be clear from what I said earlier about the different distributional effects of each system that it is not enough to examine which of them alone, or together with governmental regulations, seems to reduce accident costs most effectively. To do that would be to do exactly that for which the critics of economic analysis have properly taken Posner and his followers to task. In choosing among systems of auto accident avoidance we also must take the distributional preferences of our society into account. But what can we say about these? Posnerians would suggest that we cannot say anything at all. Yet, while it is often difficult to define the overarching distributional preferences of a polity if one defined them across many legal issues, it may not be so hard to identify such preferences in a specific area, like automobile accident law.

There are, in fact, rather strong indications of society's distributional preferences in this area. In recent years there has been a marked increase in governmental action forbidding or limiting insurance categorizations based on age, sex, race, and even place of residence under third party systems. All of these rules have the effect of lessening the higher burden borne under third party systems by groups that have a greater than average number of accidents. Because such rules are applied even if the result is to increase the total number of accidents (evidence that some of these groups are, in fact, accident prone does not save the "discriminatory" categorization), the rules seem pretty clearly to reflect distributional aims.

This is especially true since one cannot imagine a similar tendency

to prohibit categorization by age or wealth status under a first party plan. The notion that senior citizens should be pooled with the middle aged in a first party system and therefore be made to insure their incomes for an average life span—that is, for a period much longer than their life expectancies—would find few adherents. Of course, the elderly would be allowed to pay less than the middle aged since they are insuring a shorter income stream. The prohibition against age discrimination (in third party plans) is supported because third party plans disfavor the old and the young. An analogous age-based categorization under first party plans would look very different, exactly because the effect of the categorization under such plans would in large measure favor those groups, like the elderly, who are the object (in this area of law, at least) of society’s distributional concerns.32

The same is true about wealth and racially based classifications. In all of these, when the seemingly “efficiency based” categorization burdens a disadvantaged group it is apt to be limited or prohibited by law. When instead “efficiency” notions seem to favor such groups (as they would under first party plans) it seems perverse to “overrule the market” in order to treat “equally” disadvantaged groups who in that rare instance have an advantage.33 Even those who disdain affirmative action would agree to that.

Therefore, we can conclude that some distributional preferences—at least in limited areas of law—can be identified and that once discerned they will properly help to shape the law in that area. Would they not, however, as some of the critics of economic analysis suggest, also determine the result regardless of waste avoidance considerations?34 I think not. Indeed, the behavior of some courts in automobile cases suggests the

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32. This was brought home to me some years ago when I was asked to be one of several consultants to a state which sought to reexamine its automobile accident laws. It was made clear to the consultants that any reform should bar discrimination in rates based on age. When I pointed out that a possible reform proposal we might come up with would be a first party plan, and that such a plan would favor the elderly if age could be taken into account, the consultants were immediately instructed that under such a plan age should be retained as an acceptable rating factor.

33. Distinctions based on sex have not had the same recent history. Thus, sex classifications under third party plans have been attacked even though they have favored women, and especially young ones. See supra note 23. Many analogous “statistically” based distinctions between men and women, however, have traditionally disfavored women. See, e.g., Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 103 S. Ct. 3492, 3497-99 (1983) (holding that Title VII forbids use of sex-segregated actuarial tables that disfavor women because of their alleged longer life expectancies). As a result, it is not surprising that many women wisely might seek to do away with all such distinctions, including those that seem on the surface to favor them. This is especially true if, as is the case, the favorable distinctions themselves have been viewed in society as symbols of differences between men and women that have been used to support discriminatory practices against women.

34. This is essentially the position taken in Dworkin, Why Efficiency?, 8 Hofstra L. Rev. 563, 570-72 (1980). For a contrasting view, see Baker, Starting Points in Economic Analysis of Law, 8 Hofstra L. Rev. 939, 954-57 (1980).
opposite, and emphasizes the need for careful economic analysis designed to identify and further better combinations of distributional and waste avoidance goals.

There are many reasons behind the rise of product liability in automobile cases. Some derive from the desire to increase victim compensation. Others stem from legal process constraints on the courts. Thus, even though certain courts seem to want to establish no-fault liability for automobile accidents, perhaps for compensation reasons, they cannot impose an effective first party plan because they cannot easily require compulsory insurance. Similarly, since the existing third party system is based on fault, it is hard for courts to ditch the requirement all at once and keep third party liability. To those who find the current erosion of third party fault standards too slow, increased product liability in auto cases becomes an attractive alternative. Under it, no-fault liability can be imposed without requiring compulsory insurance because the automobile makers are large enough to self-insure if they choose to do so. I would suggest, however, that these desires for no-fault liability combined with legal process constraints do not fully explain the pressures toward increasing automobile product liability cases. Another underlying factor may be the diminished effectiveness of third party liability given the gradual decline of fault and the rise of distributionally based restrictions on insurance categorizations.

Third party liability seeks to reduce the sum of automobile accident costs and the costs of their avoidance in significant part by making driving more expensive for those categories of drivers who are accident prone. One can debate whether truly fault-based third party system liability, without insurance, would do more; but it is hard to imagine the existing system as being anything other than a categorical or structural, rather than an individual, deterrence approach. Second, third party liability

35. Doubts about the fault system, the desire to afford accident victims a financially responsible defendant, and reluctance to abandon fault completely in a third party system combined to induce the California Supreme Court to expand greatly the “nondelegable duty” exception imposing liability on employers of independent contractors in an opinion in which the late, great Chief Justice Traynor made his reasons for the move quite explicit. See Maloney v. Rath, 69 Cal. 2d 442, 446-48, 445 P.2d 513, 515-16, 71 Cal. Rptr. 897, 899-900 (1968).

36. This is but another example of what I call the common-law end run, by which courts get around limitations on their authority or capacity to reform one area of law by altering a nearby area that they can control. Another dramatic recent example of this is the development of product liability for machine tool manufacturers to get around workmen’s compensation laws deemed dated by courts. See G. Calabresi, A COMMON LAW FOR THE AGE OF STATUTES 143 (1982). A common defect of such “solutions” is that they multiply administrative costs unnecessarily. Id; see also infra note 38.

37. Perhaps a system of uninsurable tort fines, based on fault, might lead to individual deterrence rather than just to category deterrence. One would need to be extremely wise, however, to devise a fine large enough to deter individual negligence but not so large as to induce risky categories of people to abstain from those activities that might lead to accidents in which they would be subject to the uninsurable penalty. This last would,
seeks to reduce the sum of accident and safety costs by inducing manufacturers to produce cars that deliver considerable out-of-car safety. Its advantage over product liability, however, lies not in this second set of incentives, because product liability induces manufacturers to produce cars which deliver in-car as well as out-of-car safety. If, then, third party plans are to be preferred on accident prevention grounds over product liability systems, it must be because product liability systems do little to induce less driving or safer driving by accident prone drivers. The moment the law, for good reasons, forbids third party plans from charging higher prices to those categories that are accident prone, the advantage third party approaches have over product liability approaches is lost.

It is not hard to see why those courts that are not enamored with fault-based approaches and that, therefore, seek greater victim compensation, are inclined to expand product liability after realizing that third party liability is not likely to do much (given existing and expected restrictions) to further car safety. After all, product liability does induce product safety. Although it fails to induce user (driver) safety, the courts can readily believe that inhibited versions of third party liability will also fail in this respect.

I do not, of course, mean to suggest that courts actually engage in this kind of rather sophisticated reasoning. Indeed, the burden of my argument is that if they did they would be quite dissatisfied with product liability, for it turns out that other approaches exist that can retain crucial incentives on drivers without thereby violating distributional goals of our society. Rather, what I am saying is that courts, without much sophisticated reasoning of the sort that economic analysis could furnish, intuit that third party plans fail to do the very thing that they are meant to do (deter drivers), believe that product liability plans do what they are meant to do ((a) induce manufacturer attention to all around car safety and (b) compensate victims), and all too easily conclude that the latter is a desirable system of auto accident law.38

The trouble with that conclusion is that it depends on the unexamined, indeed unconsidered, premise that society's distributional goals render deterrence of owner-driver categories impossible. Only if one makes that assumption can one conclude that little is lost by moving to a system, like product liability, which emphasizes car-safety incentives to the exclusion of driver-safety incentives. It is precisely at this point that the kind of analysis of law which has come to be associated with economics can play a part. It can point out that first party systems can, consistently with the expressed distributional goals of favoring the aged and the poor, deter

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38. Apart from all the other problems (discussed in text) with that conclusion, the product liability solution entails extraordinarily high administrative costs. In order to simplify matters, in this Article I have not focused on these costs as a major consideration in the choice among accident law systems. They are, of course, crucial. See id. at 226.
driving by those categories of owner-drivers who impose higher accident costs on society. The incompleteness of first party plan incentives serves to further society’s distributional goals, while that of third party plans undercuts these goals. Neither, as I said earlier, gives a full or perfect system of safety incentives (and product liability also does not), but first party plans can be permitted to enforce their (admittedly partial) safety producing incentives because they favor society’s distributive norms, while third party approaches are limited even in the partial ways in which they work toward safety, because those ways offend distributive concerns.

Does all this mean that economic analysis of law can tell us to prefer first party over third party or product liability plans? Of course not. (Though in the end that is the conclusion to which I incline.) It does not even tell us which among first party, third party, or product liability approaches, combined with governmental regulation, induces optimal safety, given some expressed desire to favor the poor and the aged. And it certainly does not tell us what weight to give to other distributonal goals that the society seems to value (like making sure that trial lawyers are well fed). It does, however, give us an analytical structure that allows us to see far better what is at stake in the choice among the systems discussed.

An appropriate analysis of the choice among systems would take as given the desire to lessen burdens of driving on the aged and the poor, and then compare the safety inducing potential of each approach when aided by whatever governmental regulations it needs to fill in its lacunae. But it would equally ask what the distributional consequences of that regulatory completion would be. Thus, an analysis of product liability would ask the following questions: Just how important is control of owner-drivers to automotive safety? If it is important, can product liability’s lack of attention to it be remedied by governmental restrictions on accident prone categories? If it can, would that remedy disfavor the same groups that we did not permit to be disfavored under third party plans? Similarly, an analysis of first party plans would consider their lack of effectiveness in inducing out-of-car safety (of both car structures and driver characteristics) and examine the government’s capacity to fill that gap by sanctions and rules. But, it also would look at the distributional consequences of such sanctions and rules. Finally, a consideration of social

39. Analogously, an analysis of third party plans would consider their lack of effectiveness in inducing in-car safety of car structures and driver characteristics, and the government’s ability to fill these gaps. It is worth noting that the incompleteness of these systems runs not only to car characteristics, but also to driver characteristics. Thus, first party plans tend to pay more attention to control of driver categories with bad driving habits that endanger people in the car, while third party plans focus on those driver categories that are especially dangerous to people outside the car. In all likelihood this distinction is not of great importance, however, because there is no evidence that I know of to suggest that accident prone driver categories differ in their in-car and out-of-car accident potentials. I also know of no one who has looked, though, and it is possible that if one did, one would find that such differences exist.
insurance approaches would take for granted their distributional primacy, but would ask what would happen to that primacy if the government tried to make up for that system's absence of financial safety incentives through direct control of how cars are made and who can own or drive them.

If one could agree at the end of all this analysis that, for example, first party and third party plans (each with its regulatory addendum) were equally good (or equally uncertainly good) at reducing the sum of accident and safety costs, but that the distributional effects (given extraneous and visible societal indicia of these) of first party plans were more favorable than those of third party approaches, then one would be close to concluding that first party plans would be preferable to third party ones. The same would be true, a fortiori, if first party plans achieved better deterrence and had favorable effects on the expressed distributional preferences. One would be close, but still not there—because one would still have to consider other 'unexpressed' distributional preferences (such as those that may require accident law systems to produce sufficient litigation to feed lawyers). Despite the possible existence of such other unexpressed distributional goals, however, the analysis (if followed by the agreement postulated) would make it possible for scholars to define first party plans as preferable to third party plans given the demonstrated distributional preferences, and subject only to other unspoken ones. And that would be no mean achievement.

Even in the absence of such agreement or of such clearly expressed distributional preferences, this kind of analysis can be extremely helpful. It can do a great deal to indicate and clarify the disagreements and uncertainties that exist with respect to both accident avoidance possibilities and distributional preferences. Only if these are highlighted can authorized decision makers choose among systems of accident law intelligently. These decision makers do not pick among the possibilities as scholars would, but rather select because they themselves are selected and empowered by society to make good guesses (when data leave doubts) and to make controversial distributional choices. It is they who must choose whether product liability systems, despite their flaws, are desirable because such systems (Guido Calabresi’s views to the contrary notwithstanding) feed a worthy collection of lawyers. It is they who must choose, once economic analysis has done its best and indicated the costs and distributional effects of driving by the aged under different systems, whether to alter the systems to

40. I say “Guido Calabresi notwithstanding” because my conclusion in The Costs of Accidents that there is no justification for staying with the current system could be based only on my belief that there was no distributional argument in favor of feeding lawyers well. That position, though correct in my judgment as a citizen, was not derived from any special skills that I as a scholar brought to the issue. To give it as self-evident was therefore, as I recently wrote in an unusual display of self-criticism, self-indulgent at best. See Calabresi, The New Economic Analysis of Law: Scholarship, Sophistry, or Self-Indulgence?, 68 Proc. Brit. Acad. 85, 97-98 (1982); see also infra note 41.
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induce more or less driving by the aged or, for example, to subsidize taxis for persons beyond a certain age.

Economic analysis of law, nevertheless, need not abjure assumptions and guesses about either distributional preferences or accident avoidance capacities. It must, however, make the basis, and especially the tenuousness, of its assumptions clear; in this way, those empowered to choose can determine, or at least guess at, the weight the assumptions deserve to be given. The object, if there is uncertainty about distributional goals or accident avoidance effectiveness, must not be advocacy but the enlightenment of those who must choose—those of whom it can be said that their province, like that of good government, is to make good guesses.41 This does not mean that economic analysis of law will fail to be normative. It will be fully normative in those rare instances in which distributional preferences and safety effects are clear.42 More often it will be contingently normative.

41. The distinction is not a simple one. Scholars, like everyone else, have a right—as citizens—to be advocates and to push that about which they feel strongly. And they can, and I believe should, be advocates in their scholarship for those positions about which their scholarly training (whether in fact-finding or in analysis) gives them a special capacity or knowledge. They should not, however, masquerade as based on scholarly skills any advocacy for positions about which they have no more advantage than the next person. See id. at 98-107.

But this statement makes the distinction sound too easy. For one thing, advocacy-as-citizen takes place best in context, and often the context is set by the scholarly work. An analysis of first and third party plans, for example, may lead the scholar to the conclusion that first party plans favor the very poor. He or she may, however, conclude that that would not be true if under third party plans (a) there were no compulsory insurance, (b) the very poor failed to insure, and (c) because they had no money at all, the very poor could not be made to pay damages to the victims who would end up bearing the losses. Under such circumstances, those very poor who did not insure would be better off than under a first party system. So far, so good—but who can resist (or should resist) arguing at that point that this “benefit” to the very poor is undesirable because it favors those among the poor who are irresponsible (and do not insure) over both those who are responsible (and do insure) and those who are trying to get out of poverty and so have put a tiny bit aside. This is, I suggest, a good argument and deserves to be made, but it is not in itself based on scholarly skills. It is, instead, a direct appeal, properly made, to the readers’ intuitions and to those people who are empowered in the society to make distributional judgments. But it looks like more, precisely because it is apt to be made by a scholar whose scholarship has created the context in which this citizen advocacy can, and should, take place.

All this is not to say such contextual advocacy should be abjured, but only that one should be as honest as one can be, with oneself and with others, about what role one is playing in that advocacy.

42. Fully normative means only that the scholar urges a position on the basis of the distributional preferences he or she finds, either through analysis or empirically, to be those held, or that should be held, by that society on the issues at stake. This is far from saying that the scholar’s view should then win out. He or she may be wrong either in analysis or fact finding, other unexpected distributional preferences may trump those the scholar thought to be the only relevant ones, and other considerations of justice, which I have not discussed in this Article, may predominate. See id. at 107-08. It does mean, however, that the scholar can argue as a scholar for what, under existing knowledge, seems to him or her to be correct and desirable.
"If you, decision maker (court or legislator as the case may be), believe that our distributional preferences in automobile cases are simply to favor the elderly and those of lower incomes, and if you also believe that first party safety incentives (as analyzed by the lawyer-economist) are as or more effective (with or without regulatory addenda) as third party or product liability incentives, then you ought to favor/legislate first party systems." This is far more than mere positive analysis, and can powerfully serve the aims of law reform that were at the heart of the law and economics movement when it first began.

I began this Article with the statement that the critics of economic analysis of law correctly attacked that kind of analysis when it chose to ignore two related problems: distributional preferences and original entitlements or starting points. In this Article I have tried to show how, in the context of different systems for controlling auto accidents, economic analysis can come to terms with, and even use distributional preferences to further what it seeks to do. I have not, however, sought to examine further the problem of entitlements or starting points.

Absent a notion of appropriate starting points (a place to stand on, as it were) we do not know what value to give to things and so we cannot say what waste is, let alone say that we have reduced it. We cannot assert that we have reduced the sum of accident costs and the costs of their avoidance because we cannot know what value to give to either. We can choose a system that maximizes corn production, for example, but this may be the height of wastefulness if people do not value corn. And, whether or not they value corn depends on their tastes, which in turn depend on what place they started from.43

What is also true, and all too often ignored by the critics of economic analysis of law, is that, absent such a notion of starting points, we cannot say anything about distribution or equality either. We cannot meaningfully say that we have treated Marshall and Taney equally, or justly favored Marshall over Taney, without a concept of what it is to treat them equally. That depends on how Marshall and Taney value things, which again depends on their tastes and, hence, once again on starting points. We can, trivially, require that both Marshall and Taney have an equal amount of corn, but Taney may love corn and Marshall may despise it, and that would hardly achieve equality (assuming equality to have been our distributional goal). Indeed, to give an equal amount of corn to Marshall and Taney (without a notion of tastes based on starting points) is as irrelevant to achieving distributional goals as maximizing corn production is to waste-reduction goals, and for the same reason.

The point of all this is not to introduce a discussion of taste shaping and starting points. That is far beyond the scope of this Article. It is rather to reaffirm that, since one of the functions of law is to define starting points,

43. For a more complete discussion of this point, see id. at 90-92 and works there cited.
any critique of a given set of legal rules that ignores the entitlements or starting points established by those rules is bound to be incomplete and inadequate. But it is also to affirm that the same inadequacy applies equally to “distribution” based critiques of legal rules as to “efficiency” based ones. In other words, the inadequacy should be every bit as troublesome for the suggestions made by most of the critics of economic analysis of law as it is for those made by the practitioners of it.

Despite the fact that without a consideration of starting points and taste shaping any analysis of law is inadequate (given, as I said, that a prime function of law is to define entitlements in order to shape tastes), most legal analysis does not aspire to that level of discourse. It takes some tastes, and hence some starting points as given, and proceeds from there to suggest and criticize what can be termed middle level decisions. To date, economic analysis can pretend to do no more. It also needs to pretend to do no less. Done carefully, and with full consciousness of its limits, it can fit comfortably in that area of middle theorizing that defines much of American legal scholarship.