Norms of Equality Implicit in Capitalism

Robert T. Miller

Abstract: In contrast to most discussions about capitalism and equality, this paper investigates not how well capitalist societies conform to some normative notion of equality (such as Rawls’s difference principle) justified by arguments in moral or political philosophy unrelated to capitalism but rather inquires into what norms of equality are implicit in the legal rules defining capitalism, that is, a system of strong property rights, broad freedom of contract, and minimal economic regulation. After first considering how norms of equality may be implicit in normative conceptual schemes that do not expressly include such norms, I first argue that, since the legal rules defining capitalism create enforceable rights without regard to the parties’ social status, class, race, and similar factors, there is a certain norm of economic equality implicit in these rules. Although such a norm is often derided as a merely formal equality, I argue that it is, in fact, of tremendous practical benefit, a fact that appears clearly when we consider economic systems in which this norm is not observed.

I next observe that there is broad agreement among those who support capitalism and even many of its critics that capitalist economies in fact tend to make all or almost all members of society better off in material terms. Since most people supporting capitalism believe that this fact constitutes at least one argument in favor of capitalism, I note that making this claim precise requires that we adopt some measure of social welfare, and because of its common use in both economic and law-and-economic scholarship, I assume that this measure should be Kaldor-Hicks (KH) efficiency. I then turn to the question of whether the system of capitalist economic arrangements as justified on the basis of their KH-efficiency implies a stronger notion of equality than the one noted above.

Since KH-efficiency weights an individual’s desires by how much he is willing to pay for (or would demand to part with) a right, it would seem that the KH-criterion implies a norm of inequality—that is, that it systematically favors the rich over the poor because the rich, having more money than the poor, would ceteris paribus have greater willingness-to-pay or willingness-to-accept for the same right than would the poor. The final section of the paper argues that this incorrect. The argument comes in two parts. First, I observe that, if, in a particular application of the KH-criterion, whether a person favors or disfavors the proposed change is entirely independent of his wealth, then the KH-criterion will favor neither the rich nor the poor. Second, I argue that because the kinds of issues dealt with by the rules defining capitalism never or almost never divide interest groups along lines of wealth (that is, do not systematically pit the rich against the poor), therefore, on the set of issues to which the KH-criterion is being applied, whether a person favors or disfavors the proposed change is generally independent of his wealth. Hence, a justification for capitalist economic arrangements based on the KH-efficiency of those arrangements does not imply a norm of inequality in favor of the rich over the poor but rather implies a norm of equality in that those arrangements promote the KH-welfare of everyone on essentially equal terms.

Most discussions about capitalism and equality concern whether the distribution of goods and services in capitalist societies, whether measured by incomes or in some other way, satisfies some normative standard of equality. That standard is typically justified on grounds independent of any that may be thought to justify capitalist economic arrangements themselves. That is, the notion of equality being used to evaluate the capitalist system is external to that system. For example, the difference principle in Rawls’s Theory of Justice is a normative criterion purportedly justified by arguments based on the behavior of rational agents deliberating in an original position behind a veil of ignorance. The

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1 Professor of Law and F. Arnold Daum Fellow in Corporate Law at the University of Iowa College of Law and Senior Scholar at the Classical Liberal Institute at New York University School of Law. For helpful comments and discussion, I think Eric R. Claeys, Robert Cooter, Richard A. Epstein, Mark J. Osiel, Mario Rizzo, Todd Zywicki, and other participants at The Ends of Capitalism Conference at the Classical Liberal Institute at New York University School of Law on February 26-27, 2015.

difference principle can be used to evaluate the laws or institutions of any society, whether capitalist, socialist, or anything else. Arguments about capitalism and equality that follow this pattern thus depend essentially on the normative justifications offered for the concept of equality invoked—that is, on some argument in moral or political philosophy. People who think capitalist economic arrangements are desirable but are not persuaded by the philosophical argument for a particular concept of equality will find no force in an argument that capitalist societies violate the demands of equality so understood. To make matters worse, unless the proffered notion of equality is extremely robust (for instance, actual universal equality of income), determining whether any actual society meets the demands of some concept of equality is may be subject to considerable empirical uncertainty.

The purpose of this essay is to not investigate whether capitalist societies conform to some standard of equality external to capitalism. Rather, I intend to investigate the norms of equality that are implicit in capitalism. First and propaedeutically, I shall argue that capitalist legal rules governing property, contract, and economic regulation already imply a certain norm of equality. This is the familiar principle that the relevant rules of laws should apply to persons without regard to their social, financial, or political positions in society. This is a weak form of equality in the sense that we need assume only a capitalist economic system to imply this norm, but it is obviously of great value in producing a wealthy and just society.

I next observe that there is broad agreement among those who support capitalism (and even many of its critics) that capitalist economies in fact tend to make all or almost all members of society better off in material terms, and that this is at least one argument in favor of capitalism. Making this claim precise requires that we adopt some measure of social welfare, and because of its common use in both economic and law-and-economic scholarship, I assume that this measure should be Kaldor-Hicks (KH) efficiency. I then turn to the question of whether the system of capitalist economic arrangements as justified on the basis of their KH-efficiency implies a stronger notion of equality than the one noted above. Since KH-efficiency weights an individual’s desires by how much he is willing to pay for (or would demand to part with) a right, it would seem that the KH-criterion implies a norm of inequality—that is, that it systematically favors the rich over the poor because the rich, having more money than the poor, would *ceteris paribus* have greater willingness-to-pay or willingness-to-accept for the same right than would the poor. The final section of the paper argues that this incorrect.

The argument comes in two parts. First, I observe that, in evaluating a proposed change under the KH-criterion, if we have a large population with many different levels of wealth, and if whether a person favors or disfavors the proposed change is entirely independent of his wealth, then the KH-criterion will favor neither the rich nor the poor. Differences in wealth will essentially cancel out. Second, I argue that, because the kinds of issues dealt with by the rules defining capitalism never or almost never divide interest groups along lines of wealth (that is, do not systematically pit the rich against the poor), therefore, on the set of issues dealt with by the rules defining capitalism, whether a person favors or disfavors the proposed change is generally independent of his wealth. Hence, a justification for capitalist economic arrangements based on the KH-efficiency of those arrangements does not imply a norm of inequality in favor of the rich over the poor but rather implies a norm of equality in that those arrangements promote the KH-welfare of everyone on essentially equal terms.

Before investigating what notions of equality are implicit in capitalism, it will be helpful to understand generally how a normative concept can be implicit in a conceptual scheme and to how a
single concept can reasonably be said to appear in different forms in different conceptual schemes, and it is with these questions that I shall begin.

In comparing competing conceptual schemes, we often find that a concept central to one scheme has no analogue in another. For instance, the final end for human beings is an essential concept in eudaemonist moral systems, but there is no concept that plays even a remotely similar role in either utilitarianism or Kantianism. For other concepts, however, there are certain analogues across many different conceptual schemes: the concepts are analogues of each other in that they play somewhat similar roles in their respective conceptual schemes. Of course, such concepts are never perfect analogues, for that would require that every concept in one system could be mapped onto a concept in another system in an isomorphic way, and then the two systems would be inter-translatable and thus would different only verbally. In some robust sense, they would be the same system, albeit dressed up in different words. Still, it sometimes makes sense to see systematic similarities between concepts in different conceptual schemes. Absolute simultaneity in Newtonian physics and relative simultaneity in General Relativity are, in obvious ways, critically different, but they are also very similar in many respects. Similarly, there are no Kantian categorical imperatives in eudaemonist systems, but there are hypothetical imperatives in which the goal to be achieved is the realization of the human being’s final end, and these imperatives in many ways function within the eudaemonist system as categorical imperatives do within the Kantian one—for instance, in guiding conduct and in assessing specifically moral praise or blame. Though not categorical imperatives, the relevant hypothetical imperatives in the eudaemonist system thus bear a close family resemblance to Kantian categorical imperatives. Not surprisingly, many of the more abstract moral concepts, such as justice or rights, turn up in some form or other in almost every moral system.

Equality is one of these concepts. Almost every moral system includes some notion of equality. In some moral systems, equality is a key concept expressly mentioned in the defining propositions of the system. For Locke, it is fundamental that the natural state of human beings is not only a state of perfect freedom but “a state also of equality, wherein all power and jurisdiction is reciprocal, no one having more than another,” since “creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should be equal one amongst another without subordination or subjection.” In Rawls’s interpretation of Kant, equality means that the members of a well-ordered society each has, and views himself as having, a right to equal respect and consideration in determining the principles by which the basic arrangements of the society are to be regulated. To adapt a phrase of Quine’s, in such systems equality is a supporting member.

In other moral systems, although the concept of equality is not expressly mentioned in the system’s defining propositions, nevertheless there is implicit in those propositions a recognizable concept of equality. For example, in eudaimonism, morality is based on the proposition that human beings have a definite natural end, and human actions are morally right or morally wrong depending on whether they are appropriately ordered to that end. Although eudaimonists like Aristotle and Aquinas

rarely if ever discuss equality as a moral notion,\(^7\) nevertheless their fundamental assumptions about morality embed a notion of equality: all human beings are equal in that all human beings have the same final end simply in virtue of being human, and so morality applies to all human beings in same manner. This is true both in the sense that morality makes the same demands on all human beings and in the sense that no one is entitled, simply by nature, to better or worse moral treatment than anyone else. To the extent that the historical Aristotle believed in natural slaves and thus did not accept a notion of human equality, it was because he thought that some human beings by nature had a final end different from, and inferior to, that of other human beings.

In terms of the explicitness with which they recognize equality as a particular moral norm, the utilitarians fall somewhere between the Lockeans and the Kantians, on the one hand, and the eudaimonists, on the other. Mill argued that “the highest standard of social and distributive justice” was that “society should treat equally well all who have deserved equally well of it,” but he understood this claim not as a separate principle conjoined to the principle of utility but as being implicit in the principle of utility itself.\(^8\) In response to Spencer’s argument that, to support their principle of the greatest happiness of the greatest number, utilitarians had to recognize a separate principle of equality affirming the equal right to happiness of all persons, Mill argued that the duty of treating people equally “is involved in the very meaning of utility, or the greatest happiness principle,” because it is of the very meaning of this principle that “one person’s happiness counts for exactly as much as another’s.”\(^9\) In other words, in assuming that pleasures and pains can be summed across persons, the principle of utility was already implicitly requiring that people be treated equally in the utilitarian calculus.\(^10\) The utility principle logically implied a norm of equality, and so this norm was not an additional, independent premise of the system. Modern utilitarians have generally followed Mill on this point.\(^11\)

Nevertheless, we can imagine a non-egalitarian utilitarianism. For example, we could divide human beings into various classes and assign to all members of the same class the same utility coefficient, which would be a real number. In performing a utility calculation, we would then multiply the numerical values of each person’s utilities and disutilities by the utility coefficient of his class. People in a class with a utility coefficient greater than one would have an outsized influence in the utilitarian calculus. People in a class with a coefficient between zero and one would still count in the utilitarian calculus, but only on a discounted basis. The desires of a person with a zero coefficient would be simply

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\(^7\) Aristotle, Nicomachean Ethics lib. V, cap. 6, 1134b2 (stating that a ruler, as opposed to a tyrant, is a guardian over what is just and over what is equal, meaning that he does not get a greater share for himself). See generally, Paul J. Weithman, \textit{Complementarity and Equality in the Political Thought of Thomas Aquinas}, 59 Theological Studies 277 (1998).

\(^8\) J.S. Mill, \textit{Utilitarianism} chp 5.

\(^9\) Id.

\(^10\) One way to think of the difference between a principle of equality being an explicit assumption of a moral system and such a principle being only implicit in the system is to imagine the system being formally axiomatized in a canonical way: if an assumption about equality appears among the axioms, then a principle of equality is an explicit assumption of the system, but if no such assumption appears among the axioms but a principle of equality can be deduced from the axioms, then a concept of equality is implicit in the system.

\(^11\) E.g., Louis Kaplow and Steven Shavell, \textit{Fairness v. Welfare} (2002) at 25 (“It is also generally supposed that each individual’s well-being affects social welfare in a symmetric manner, which is to say that the idea of social welfare incorporates a basic notion of equal concern for all individuals.). See id. at 26 (stating that since “each individual’s well-being affects social welfare in a symmetric manner, welfare economics is understood to include … a requirement that individuals count equally in an important sense.”). See also id. 25 n.16 and 26 n.18.
ignored; his pleasures and pains would become morally irrelevant. People in a class with a negative coefficient would count in the utilitarian calculus but in a matter opposite to the normal one: when an action caused such people pain, this would count in favor of performing the action, and, conversely, when an action caused them pleasure, this would count against performing the action. In such a system, there would be no recognizable form of equality. The equality that exists in the standard form of utilitarianism can be thought to consist in assigning the same positive coefficient to all individuals. As we will see, capitalism presupposes a concept of equality not all that different from that implicit in utilitarianism.

II

Capitalism I understand to be a set of economic arrangements characterized by strong property rights, broad freedom of contract, and minimal government regulation of the economy—generally regulation limited to providing public goods and remedying market failures. The relevant arrangements are, of course, embodied in laws, including the laws of property, tort, and contract, as well as the regulations addressing market failures (such as the antitrust laws and some environmental laws) and creating schemes for supplying and funding public goods. Also included would be criminal laws protecting persons and property, and, possibly, constitutional provisions limiting government action in relevant ways, such as the Takings Clause.

Now, since laws are norms, we may already be able to find implied in the laws defining capitalism a concept of equality, and I would suggest that this is in fact the case. That is, under capitalist norms, a person’s rights in property, contract, and tort are determined without regard to, among other things, the person’s social, financial, or political position in society. This principle pervades capitalist legal rules. We find it in the simplest situations, such as the common law rule that the first person to establish possession of unowned property acquires good title to it, regardless of the other personal characteristics of the claimants, and we find it in the most complex situations, such as the rule of bankruptcy law that requires that all the claims and interests placed in the same class for purposes of a Chapter 11 reorganization be substantially similar as determined by the attributes of the claims, not the attributes of the persons holding them.

This may seem to be a trivial notion of equality, but in fact it is tremendously important. Its significance is overlooked and undervalued because we live in a society in which the norm is so universally observed that it has become second nature to us. By contrast, in 1858, when Lincoln said to Douglas, “[I]n her natural right to eat the bread which she has earned by the sweat of her brow, [a black woman] is my equal and the equal of any man,” he was referring to exactly this notion of equality, and viewed in that context, its tremendous moral and practical significance is undeniable. Or consider the caste system of traditional Hindu society, which severely limited a person’s occupation (and thus

12 See generally, Milton Friedman, Capitalism and Freedom (1962).
13 Pierson v. Post, 3 Caines 175 (NY Sup. Ct. Jud. 1805). See also Richard A. Epstein, Possession as the Root of Title, 13 Ga. L. Rev. 1221, 1239 (“The rules of first possession, even their complicated water right variants, require in effect a minimal sort of state which parcels out the rights between the various contenders in accordance with set rules, indifferent as to their personal characteristics, histories or wealth.”)
15 Abraham Lincoln, Lincoln-Douglas Debates [___] (1858).
contracting opportunities) by birth, or the Soviet system of property law, which afforded vastly different protections to property interests depending on who held them, with state-owned property receiving the strongest protections, property owned by certain state-approved cooperatives receiving somewhat less protection, and private property receiving the least protection. Or again, regardless of what their laws literally provide, there are many societies in the developing world in which this norm of equality does not in fact hold because of endemic corruption in the judicial system. In such societies, the outcomes of property or contract disputes will in fact depend on the parties' familial or political connections (or lack thereof) with high government officials or their willingness to pay sufficient bribes. The immense drag that corruption of this kind imposes on the economic growth of a society is proof of the value of this kind of equality. It is only in a very wealth society where this norm of equality is almost always observed that its observance might seem a small thing.

III

Now, if we go beyond the set of laws embodying capitalist economic principles and inquire into the justifications offered for having a capitalist economic system, then very often we find in such justifications, either explicitly or implicitly, even stronger notions of equality. For example, if we read Locke as meaning that positive legal rights of property and contract of a recognizably capitalist sort reflect and implement largely-parallel natural rights held by all human beings, then Locke's whole theory of natural rights, including its explicit assumptions about equality, become presuppositions of capitalism. But this shift from capitalist economic arrangements to normative systems that can justify such arrangements tends to provide few new insights. For one thing, it would be simpler and clearer simply to investigate what concept of equality is present in the normative system to which recourse is made. For another, many different normative systems can and have been used to justify capitalist economic arrangements (above I could have referred to Hobbes rather than Locke, which would have imported a quite different account of equality), and the concepts of equality, if any, embedded in these systems can vary significantly. It would thus be untenable to suggest that the concept of equality present in any one of these normative systems that might justify capitalism as an economic system is somehow uniquely implied in capitalist economic arrangements. Even if a particular society came to adopt capitalist economic arrangements under the influence of a particular normative system, the connection between capitalism in that society and the concept of equality in that normative system would be at most a matter of historical accident, not conceptual necessity. It would be a matter to be investigated by an historian of ideas, not an analytic philosopher.

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16 See generally G.S. Ghurye, Caste and Race in India (1932).
17 [reference to come.]
18 See Andrei Shleifer and Robert W. Vishny, Corruption, 108 The Journal of Economics, 599 (1993). There is a political analogue to this kind of economic equality. For example, Lord Charnsworth observed that, before Jefferson spoke of equality in the Declaration of Independence, it was the law in England that murder was the same crime whatever the social positions of the murderer and the murdered man, and it amazed the rest of Europe when the House of Lords hanged a peer for the murder of this servant. Lord Charnsworth, Abraham Lincoln 25 (1916). Charnsworth is apparently referring to the execution of Laurence Shirley, the fourth Earl Ferrers, in 1760. In the same discussion, Charnsworth suggests a pragmatic justification for his notion of political equality: “It is safer to carry this principle [of equality] too far than not to carry it far enough.” For a somewhat similar treatment, see Robert T. Miller, Eudaimonia in America 232 First Things 25 (2013).
I noted at the outset that, in many discussions of capitalism and equality, some notion of equality external to capitalism and purportedly justified on the basis of an independent argument in moral or political philosophy is used to evaluate or criticize capitalism. The procedure above, in which some normative notion of equality external to capitalism is used to defend capitalism, really comes to the same thing. The only difference is that, in the one case, the argument is that capitalism fails to conform to the independent norm of equality, and, in the other case, the argument is capitalism is required by some independent norm of equality. In general, the reasons that make arguments of the first kind inconclusive (e.g., lack of consensus on philosophical assumptions, empirical uncertainty about whether particular societies conform to given principles, etc.) will apply to arguments of the second kind as well.

There is, however, one normative justification for capitalism that warrants special attention—the pragmatic justification based on the proposition that capitalist economic arrangements strongly tend to make everyone, or at least a very large majority of people, better off in material terms. This justification differs from others for two reasons. First, virtually all supporters of capitalism, and even many of its sharpest critics, agree that capitalist economic arrangements have this effect. Second, among those who support capitalism, it seems that a very large majority regard its propensity to make people better off in material terms is at least one argument in its favor, even if they do not regard this argument as the only argument or even the most important one. Furthermore, many people who support capitalism but hold no systematic moral views relevant to capitalism support capitalism because of its tendency to make people better off in material terms. When we rely on this justification for capitalism, therefore, the problem of unwarrantable conceptual parochialism is substantially mitigated. If there is some notion of equality embedded in the normative justification of capitalism based on capitalism’s ability to make people better off in material terms, then anyone who supports capitalism on this basis will be committed to that concept of equality, even though, because of his other normative commitments, he may be committed to other norms of equality as well.

In pursuing this line of inquiry, however, we quickly encounter an important conceptual problem. For, if we think that capitalism tends to make people better off in material terms, and if we are going to inquire closely into what a justification of capitalism on this basis presupposes about equality, then we will very likely need to explicate with some precision what we mean when we say that people are better off in one situation than they would be in another. We will need, in other words, some definite measure of social welfare. Obviously, there are no canonical or uniquely correct such measures; each of the various known measures of social welfare has advantages and disadvantages and will appear better or worse (or better or worse in the context of a given inquiry) depending on what other normative assumptions one may make. This may suggest that a justification for capitalism based on its ability to improve social welfare is not in fact different from justifications based on substantive moral conceptual schemes. The same problem of conceptual parochialism arises, albeit at one level further down in the analysis.

While there is no doubt some force in this objection, the situation is not quite as dire as it seems. There are two reasons for this. The first is that, although there are many measures of social welfare, the Kaldor-Hicks criterion is so widely used in economics and the economic analysis of law

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19 The original papers by Kaldor and Hicks suggest rather than define precisely a criterion whereby to evaluate proposed transactions, and this lack of precision is replicated almost universally in the law and economics
that it is the *de facto* natural choice, even if it cannot be uniquely well-justified from a normative point of view. That is, even though we cannot demonstrate conclusively the superiority of Kaldor-Hicks efficiency as a standard by which to judge whether proposed changes improve social welfare, nevertheless the very pervasiveness of the use of Kaldor-Hicks efficiency as a measure of social welfare lends special interest to the question of what normative presuppositions about equality the use of the Kaldor-Hicks criterion in a justification of capitalist economic arrangements imports. If we are relying on the fact that the vast majority of capitalists agree that capitalism’s propensity to increase social welfare makes this justification uniquely important, it seems reasonable to interpret social welfare in the sense that the vast majority of capitalists would interpret it.

The second reason for assigning a special place to Kaldor-Hicks efficiency in justifications of capitalism is more subtle but probably even more important. Recall that we assumed capitalist economic arrangements included not only strong property rights and a broad freedom of contract but also governmental regulation of economic matters limited to providing public goods and remedying market failures. Thus, even talking about capitalism presupposes that we can identify some goods as public goods and some situations as market failures. But identifying a good as a public good or recognizing a situation as a market failure both implicitly assume some measure of social welfare. That is, for a good to be a public good, the good must be not only non-excludable and non-rivalrous but also worth producing, that is, be such that its benefits exceeds its costs. This requires some way of measuring benefits and costs across individuals in society. For a situation to be a market failure, there must be some good that is worth producing—that is, that generates benefits in excess of the costs of producing it—but that the market is not generating because the costs of using the market system to produce the good exceed the net benefits associated with its production.\(^2\) Thus, in calling a good a public good or in calling a situation a market failure, we are implicitly adopting some measure that allows to compare benefits and costs across individuals in society. This is either the Kaldor-Hicks criterion or something very much like it.

\(^1\) See, e.g., a distinction between the costs of producing the good and the cost of using the market system to arrange its production—e.g., a distinction between the costs of the factors of production and the costs of the price system where the consumers would contract with producers to produce the good. The idea is that a different system of allocating goods and services, such as government regulation, would have in this case costs less than those of the market system and indeed less than net benefit of producing the good, so that producing the good by government regulation rather than the market system produces a net benefit on an all-in basis.
So let us assume that capitalist economic arrangements tend to produce Kaldor-Hicks improvements and that such arrangements are justified on this basis. What norm of equality, if any, is implicit in such a justification? To begin with, there is a form of equality implicit in the Kaldor-Hicks criterion directly analogous to that implicit in utilitarianism: just as the principle of utility assumes that utils are equally valuable regardless of who enjoys them (or, as I suggested above, that everyone’s utility coefficient is equal to one), so too does Kaldor-Hicks assume that a dollar’s worth of willingness-to-pay (WTP) or willingness-to-accept (WTA) from one person is equal to a dollar’s worth of WTP or WTA from another. In other words, all dollar-votes count equally. As with utilitarianism, it need not be this way. We could introduce KH-coefficients to weight different people’s WTP and WTA differently, perhaps by weighting wealthier people’s WTP and WTA less and poorer people’s more in order to take account of the declining marginal utility of wealth. Or again, in applying the Kaldor-Hicks criterion, we could simply disregard WTP or WTA based on desires we deem immoral. For instance, in Posner’s consideration of the possibility of efficient rape, we could simply omit from consideration the rapist’s WTP for non-consensual sex. The basis for doing this would the compelling moral argument that such desires deserve no recognition in the formulation of public policy. Such a maneuver would, of course, significantly change the Kaldor-Hicks criterion, but that is just the point: absent such changes, the Kaldor-Hicks criterion embeds a norm of equality to the effect that all WTP and all WTA, no matter whose they may be and no matter what desires they represent, will be treated the same.

My reference above to the declining marginal utility of wealth should remind us, however, of a common and potentially powerful objection to the norm of equality that the Kaldor-Hicks criterion embeds. That is, since the wealthy have more money than the poor, *ceteris paribus* the wealthy will have greater WTP and greater WTA that the poor (that is, a given right, the wealthy will pay more to acquirer it and demand more to relinquish it). This means that the desires of the wealthy will carry greater weight than those of the poor in applying the Kaldor-Hicks criterion, and thus the Kaldor-Hicks criterion may seem to imply a norm of inequality: the rich count for more than the poor. Posner suggests a dramatic example: a rich family and poor family each has a sick child, but the rich child is only slightly ill and, although he will be helped by taking a certain medicine, he will recover fully in any event, while the poor child will die unless he receives the same medicine. If there is only one dose of the medicine, and if the rich family is willing to outbid the poor family for the medicine, then the efficient solution is for rich family to get the medicine and for the poor child to die. This horrifying result follows from the fact that the rich family’s desire to save their child from the inconvenience of the sniffles outweighs the poor family’s desire to save their child’s life, which is turn is largely an artifact of the Kaldor-Hicks criterion of weighting desires by the WTP or WTA that back them, factors that depend in part on the wealth of the parties involved. It may seem, therefore, that in treating all WTP and WTA equally, the Kaldor-Hicks criterion embeds a norm more reasonably understood as a norm of inequality than one of equality.

IV

Now, it is certainly true that, everything else being equal, wealthier people will have higher WTP or WTA than poorer people in relation to the same rights, and so, to be sure, there is a clear sense in which the desires of the rich will count more than those of the poor when decisions are made in accordance with the Kaldor-Hicks criterion. Nevertheless, when the Kaldor-Hicks criterion is applied not in general but to the restricted set of legal rule at issue in defining capitalist economic arrangements, it turns out that the criterion favors neither the rich nor the poor but works to the advantage of both.
To see why, assume that, on a particular the issue concerning the potential reallocation of certain rights, there was no statistically significant relationship between an individual’s wealth and whether he favors or opposes the reallocation. That is, although there would presumably be a strong correlation between an individual’s wealth and his WTP for the reallocation if he favors it, as well as a strong correlation between his wealth and his WTA for the reallocation if he opposes it, assume that the rich and the poor are randomly distributed as between those who favor the reallocation and those who oppose it. In that case, neither the rich nor the poor would be systematically better off from the application of the Kaldor-Hicks criterion; the greater WTP or WTA of the rich would be randomly distributed and would effectively cancel out. Notice how such cases differ from Posner’s example of the sick children. In his example, the parties’ wealth is perfectly correlated with their preferred outcomes: the rich prefer one allocation, the poor another. In cases like that, of course, the Kaldor-Hicks criterion will tend to favor the rich over the poor, because the rich will tend to outbid the poor. But when there is no correlation between wealth and preferred allocations, allocations will not systematically favor the rich or, for that matter, the poor.

Now, with respect to the economic arrangements of capitalism that are justified by appeal to the Kaldor-Hicks criterion, the groups who are immediately benefited or harmed by the reallocation of rights and so have obvious reasons to favor or disfavor the reallocations are generally not the rich on one side and the poor on the other. That is, the issues defining rules of property, contract, and economic regulation, generally do not pit the rich against the poor. On the contrary, the factors that lead a person to prefer a rule effecting one allocation of rights rather than another will not generally include a person’s wealth, with the result, in general, the rich and poor will be randomly distributed between the sides in favor of the reallocation or against it.

For example, consider the adverse possession rule. This rule favors adverse possessors against the persons whose land they can acquire by adverse possession. There is no reason to think, however, that wealth will correlate with being either an adverse possessor or a person who loses rights to real property through the adverse possession of another. In any one instance, applying the rule will benefit one person (the adverse possessor) and harm another (the person who loses rights in land to the adverse possessor), and, in any one case, either party may be the richer party, either party the poorer party. But in the great class of all instances in which the rule is applied, the richer party is as likely to be the winner as the loser, and so too for the poorer party. Assuming the adverse possession rule is Kaldor-Hicks efficient, in each case (or at least the great majority of cases), the benefit to the party made better off will be greater than the harm to the party made worse off. Hence, as result of determining all the cases in accordance with the rule, both the rich as a class and the poor as a class will be made better off.

Or again, consider the Fair Use Doctrine in copyright. The rule benefits people who want to copy short passages from copyrighted works (copyright-users) at the expense of those who own the copyrighted works copied (copy-owners), for under the doctrine copyright-users are permitted to do so without having to pay the copyright-owners. Conversely, the persons who are harmed by the doctrine are those copyright-owners who, under a contrary rule, could expect to receive payments from copyright-users in exchange for their consent to use their copyrighted works. That is, understanding it a

21 If anything, the rule may slightly favor the poor over the rich in that a person who owns no property at all (and so is presumably poor) may acquire rights in land from another (who already owns some land and so is presumably richer than the adverse possessor).
simple-minded way, the Fair Use Doctrine pits copyright-users against copyright-owners. But there is no reason to think that the members of one of these groups are on average richer than those of the other. Indeed, when we consider not one applicable of the rule in a particular case but the great classes of persons who are copyright-users and copyright-owners, it becomes clear that the classes very largely overlap. For, anyone using a copyright under the Fair Use Doctrine is generally doing so in the process of creating a copyrighted work (as when a reviewer quotes from the book he is reviewing), and so he becomes a copyright-owner. In fact, unless this happens to be his first time benefiting from the Fair Use Doctrine, he was already a copyright owner. On the other hand, many copyright-owners own (or, if they are publishers, are in the business of acquiring) rights in works that have reproduced short passages from other copyrighted works in accordance with the Fair Use Doctrine. Hence, many copyright-owners are also copyright-users. Naturally, there will be some copyright-users who produce copyrighted works that no one ever wishes to copy, just as there will be some copyright-owners who never wish to make fair use of the copyrighted works of others. But, by and large, the classes of copyright-users and copyright-owners will largely overlap. To the extent that this is true, it follows of necessity that neither group is wealthier than the other. To the extent that the classes of copyright-users and copyright-owners do not overlap, there is no reason to think that the copyright-users who are copyright-owners are any richer or poorer on average than the copyright-users who are not copyrighter-owners. The upshot is that the greater WTP and WTA of the wealthy will not affect the question of whether having a Fair Use Doctrine is Kaldor-Hicks efficient.

Thus, although in any one instance the Fair Use Doctrine does pit one distinct group of persons against another, nevertheless as a rule that applies to copyrights generally it does not one distinct group of persons against another, much less a richer group against a poorer group. Rather, a person who is a copyright-user with respect to one right will be a copyright-owner with respect to another. Now, the Fair Use Doctrine is very likely a Kaldor-Hicks efficient rule: it replicates by law the allocation of rights that would likely result from costless transacting among the parties. For precisely this reason, a rational person who expects that he will often be a copyright-owner and often be a copyright-user with on average the same amount (as measured by WTP and WTA) at stake, will tend to favor the Fair Use Doctrine. He will do so because, even though in some cases the doctrine makes him worse off, nevertheless, on the whole, considering the entire range of cases to which the doctrine applies, he is made better off in the aggregate if the rule is applied in all relevant cases. Hence, virtually any rational person affected by the rule will favor it because, despite the results in some individual cases, applying the rule to all such cases will almost certainly work out to his advantage.22

Similar arguments would apply to a great many of the legal rules defining capitalist economic arrangements, including such diverse issues as alienability and fixture rules in property, negligence and products liability in tort, and impracticability and parol evidence in contract. In fact, it is quite difficult to construct a realistic example in which a person’s wealth would be meaningfully correlated with whether he favors or opposes a legal rule of the kind defining capitalist economic arrangements. This is even true when the rule in question on its face seems to pit wealthier interests against poorer ones, such as the doctrine of unconscionability in contract as understood by Judge Wright in Williams v. Walker-Thomas Furniture Co.23 Even there, the Kaldor-Hicks efficient rule benefits the poor as well as the rich.24

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22 Incidentally, since copyright-users include some impecunious persons who will use copyrights but never own any that anyone else would pay off, the rule, if anything, favors the poor over the rich.
23 350 F.2d 445 (DC Cir. 1965).
regard, the common law and other legal rules defining capitalist economic institutions stand in stark contrast to many statutory rules, such as the progressive income tax or social welfare legislation, which obviously benefit one economic group at the expense of another.

In general, therefore, since the legal rules that define capitalism do not divide parties according to their wealth, justifying such rules on the basis of the Kaldor-Hicks criterion imports no systematic bias in favor of the rich. Relatedly, most individuals can expect to encounter the rules sometimes from one side and sometimes from the other—that is, sometimes when the application of the rule benefits them and sometimes when it harms them. For this reason, such people will rationally favor the rule if and only if the rule on balance benefits those whom it benefits more than it harms those whom it harms. That is, regardless of their wealth, rationally self-interested people who will repeatedly face the situations governed by the rule, sometimes from one side and sometimes from the other, will tend to favor Kaldor-Hicks efficient rules because on net such rules will make them better off in the long run. With de minimis exception, the rules (though not their applications in particular cases) are Pareto efficient.

This analysis can be taken a step further. That is, if a particular person was likely to face a given kind of situation repeatedly and always on the same side, he would have incentive to support a rule that favored his side regardless of whether the rule was Kaldor-Hicks efficient. However, unless, with respect to all the situations to which the Kaldor-Hicks criterion were being applied, he was systematically on the side that loses under that criterion, he would have an incentive to favor Kaldor-Hicks efficient rules generally. That is, even if he systematically loses under that criterion in one kind of situation, since he will find himself in a great variety of situations, he will be made better off in the long run if the rules governing the great variety of situations that he faces are all determined in accordance with the Kaldor-Hicks criterion. That is, he would generally find it in his interest to lose systematically in one class of cases in order to be made better off on average in a great variety of cases.25

The argument in this section shows that capitalist economic arrangements, when justified on the basis of their Kaldor-Hicks efficiency, do not implicitly favor the rich over the poor and so do not violate the norm of equality, which is based on widely-shared normative assumptions, that requires legal rules not to discriminate among persons on the basis of their wealth. It is important to emphasize, however, what this argument does not show. For instance, the argument does show that capitalist societies treat the poor justly, only that they treat the poor equally in that their economic arrangements tend to work to the advantage of the poor as well as the rich. Justice is a much broader category than equality. Murderers treat their victims most unjustly, but it would expand the meaning of words to the point of vacuity to say that murder offends norms of equality. Thus, suppose that a correct theory of justice requires that a society take affirmative steps to ensure some minimal level of material well-being of individuals who, through no fault of their own, are unable to provide for themselves and who have no one else to provide for them. Then a capitalist society with no redistributive programs to help such people would be unjust. Its injustice, however, would not consist in having laws defining property, contract and economic regulation that somehow systematically favor the rich over the poor.

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The purpose of this article was to investigate what norms of equality are internal to capitalism in the sense that anyone supporting capitalist economic arrangements would generally become committed to those norms. After noting the notion of equality directly implicit in the capitalist laws defining property, contract, tort and regulation and arguing that the importance of this notion is overlooked because of general observance in western societies, I moved on to consider the more complex question of what norms of equality become implicit in capitalism if we assume further that capitalism is justified at least in part by its tendency to generate great wealth in a society. Here, I suggested we had to adopt either the Kaldor-Hicks criterion or else something very much to the same purpose, and I argued that Kaldor-Hicks too implies a simple but very important norm of equality. I also argued that, despite the fact that Kaldor-Hicks in a certain sense gives greater weight to the desires of the rich than those of the poor, in fact the Kaldor-Hicks criterion does not violate any norm of equality to the effect that the laws ought not systematically favor or disfavor persons on the basis of their wealth.

In considering the question of what norms of equality are implicit to capitalism, I intentionally eschewed the more usual question of whether capitalist society conform to a notions of equality based on normative considerations other than those used to justify capitalist economic arrangements. Some people will naturally see this maneuver as at attempt to evade the most important questions about capitalism and equality. I do not agree. Consider this analogy. Suppose someone challenged ZFC set, the most common formulation of set theory, on the basis that it does not countenance a set of all sets, his basis for the challenge being that many people have mathematical intuitions supporting the existence of such a set. I would find this argument very unconvincing because I think a formulation of set theory should stand or fall based on how it fits into our best theory of the world, including how it relates to physics and other disciplines. In considering challenges to capitalism based on normative notions derived from other conceptual schemes, the question should really be whether such conceptual schemes come with doctrines about economic arrangements such that implementing the scheme, including its economic arrangements, would produce a system preferable to capitalism on overall basis. The question, in other words, is not whether capitalism lives up to a norm of equality justified on the basis of some philosophical theory, but whether theory in question can be implemented in a society that, all things considered, is morally preferable to the capitalist societies the theory is being used to criticize. Since I am not familiar with any such philosophical theory, any failures of capitalism to conform norms of equality drawn from such theories seem to me of little moment.