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Essay

The Economists' New Arguments

Brett H. McDonnell†

Adam and Max, two law professors and longtime friends, have just run into each other at an Association of American Law Schools (AALS) meeting. Adam has long been a zealous partisan of the law and economics approach to legal analysis. Max, though he has some training in economics, is more skeptical about that approach. The two old friends have discussed various aspects of this subject over the years, and in this meeting they renew their discussion. The topic this time: Fairness Versus Welfare,¹ the new book (formerly a mammoth article in the Harvard Law Review)² by two leading advocates of law and economics, Louis Kaplow and Steven Shavell.

ADAM: Max, my old friend, how are you? Have you read the great new book by Louis Kaplow and Steven Shavell?

MAX: I am just fine, Adam. In response to your question, I have indeed read a new book by Kaplow and Shavell. I assume we are both talking about *Fairness Versus Welfare*? As to whether or not it is a *great* new book, I reserve judgment on that point. Perhaps you can convince me otherwise, but I don't see why it has gotten so much attention.

ADAM: I'm surprised at you, Max. After all, Kaplow and Shavell have come up with a powerful and explosive new argument for why all scholars engaged in a normative analysis of

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1. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002) [hereinafter *FAIRNESS*].

2. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001). Before that, it was a short piece in another journal. Louis Kaplow & Steven Shavell, *The Conflict Between Notions of Fairness and the Pareto Principle*, 1 AM. L. & ECON. REV. 63 (1999). References in the following are to the book version.

the law should restrict themselves to doing welfare economics.³ They show that any argument that is not based on welfare economics, that is, any argument that does not focus on a policy's net effect on the welfare of individuals, is illegitimate.⁴ I can understand how an old law and economics skeptic such as yourself may refuse to be won over by this argument, although I suspect that's just a case of an old dog refusing to learn new tricks. But what I don't understand is how you can fail to see why scholars are bound to pay attention to Kaplow and Shavell's argument. After all, most legal scholars spend much of their time doing normative analysis that is very often grounded in non-welfare analysis. *Fairness Versus Welfare* suggests that such time is wasted and potentially pernicious. Surely such an argument deserves serious attention, right?

MAX: I read the book carefully but came away from it quite puzzled. Kaplow and Shavell do, on many, many occasions, say they have made an argument in favor of the position you just described. In all *Fairness*, however, I failed to find any actual argument in favor of welfare economics over alternative approaches. There are a few cogent criticisms of some particular non-welfare arguments—or, using their term for all non-welfare-based approaches, “fairness” arguments⁵—but I found no general argument whatsoever for accepting welfarism and rejecting fairness.

ADAM: What do you mean, no general argument? How can you miss it—they make it over and over again?⁶ To understand them, you must remember that by “fairness” Kaplow and Shavell mean, as you just noted, approaches that choose between alternative social outcomes based partly on criteria other than impact on the welfare of individuals.⁷ Thus, both Kantian deontological ethics and many versions of libertarian liberalism, such as that of Robert Nozick, are fairness theories in their terminology.

MAX: I must note at the outset that what you and Kap-

3. FAIRNESS, *supra* note 1, at 3.

4. *See id.* at 3–4.

5. In Kaplow and Shavell's terminology, “fairness” theories include any which are not completely grounded in the effects of policy on human welfare. Mixed theories that give some but not total weight to welfare effects are thus fairness theories. *Id.* at 5–6.

6. *See, e.g., id.* at 7–8, 52–54, 104–05, 185–86, 189, 236–38, 259, 320–22, 465–66. No guarantees that this list is exhaustive.

7. *See supra* note 5 and accompanying text.

low and Shavell mean by the "welfare" of individuals is a big question. Much ink has been shed over the definition of "welfare." Amartya Sen's prodigious career, for instance, has been dedicated in large part to trying to understand that term.⁸

ADAM: Kaplow and Shavell basically follow modern welfare economics in defining welfare with respect to individuals' preferred states of affairs—a person's welfare increases if she moves to a state that she prefers to her prior position—although they grant that sometimes one may want to define welfare in terms of what individuals would prefer given full information about the state of affairs.⁹

MAX: That informational provision right there opens up a big can of worms. Anyway, go on for now. Perhaps later we will talk a bit more about their concept of welfare.¹⁰

ADAM: Given their definition of fairness, Kaplow and Shavell argue that any fairness theory must in some possible circumstances prefer a policy that makes *everyone* worse off than some other alternative policy.¹¹ That is, all fairness theories must violate a weak version of the Pareto criterion.¹² Their general proof of this is simple and obvious where everyone is symmetrically situated. The argument is more complicated in the asymmetric case, and indeed Kaplow and Shavell make that argument in a separate article rather than in the book.¹³ In the book, they apply the argument in symmetrical cases to a number of more particular settings, such as contracts, torts, civil procedure, and criminal law.¹⁴

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8. See, e.g., AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT (The MIT Press 1982) (1982); AMARTYA SEN, COMMODITIES AND CAPABILITIES (7 Professor Dr. P. Hennipman Lectures in Econ., 1985) [hereinafter SEN, COMMODITIES].

9. FAIRNESS, *supra* note 1, at 18, 410–13.

10. See *infra* notes 43–49 and accompanying text.

11. FAIRNESS, *supra* note 1, at 8 & n.14.

12. See *id.* at 54 n.76. Under such a weak version of the Pareto criterion, outcome A is preferred to outcome B if all persons are better off under outcome A than outcome B. Under a strong version of the Pareto criterion, outcome A is preferred to outcome B if at least one person is better off under A than under B and no one is worse off. See Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L.J. 173, 176 (2000) (discussing the Pareto principle in relation to an individual's preference rather than becoming better off).

13. See Louis Kaplow & Steven Shavell, *Any Non-welfarist Method of Policy Assessment Violates the Pareto Principle*, 109 J. POL. ECON. 281 (2001).

14. See FAIRNESS, *supra* note 1, at 104–05, 185–86, 189, 236–38, 259, 320–21.

I won't repeat the proof to you, but the basic idea is simple and in retrospect pretty obvious, especially in the symmetric case, where everyone has the same preference over alternative outcomes. By definition, fairness theories do not always follow welfarism. Consider a case where fairness conflicts with welfare. If welfare is reduced, then it must be that each person is worse off, since everyone has the same preferences over the outcomes. And so the outcome preferred by fairness is Pareto inefficient. Thus, anyone who advocates any fairness theory is committed to making everyone worse off in some circumstances. Since making everyone worse off is obviously objectionable, fairness approaches are untenable. The proof is more involved for the nonsymmetric case, and more creative, but they manage to apply their argument to that case also.

MAX: I agree that fairness, so defined, must conflict with Pareto efficiency on some occasions. Or, I largely agree. In the nonsymmetric case, the argument requires a few auxiliary assumptions. In particular, fairness theories must be continuous in the sense that fairness does not act merely as a tiebreaker in cases where the Pareto criterion does not rank two alternatives.¹⁵ Let me grant that assumption. Still, it is one thing to say that welfare and fairness approaches must sometimes conflict, but it is quite another thing to argue that because conflict is inevitable we should only follow a welfarist approach. One must have some way of moving from the fact of conflict to a conclusion that one approach is superior.

Kaplow and Shavell give us no way to make that move. They simply assume that violating the Pareto criterion is obviously objectionable, and so we must reject any approach that does.¹⁶ But, as you just noted, Pareto efficiency is a welfarist criterion—indeed, when you get right down to it, Pareto efficiency is pretty much *the* welfarist criterion.¹⁷ Kaplow and

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15. See Kaplow & Shavell, *supra* note 13, at 284. Professor Chang and Kaplow and Shavell discuss this assumption in a recent volume of the *Yale Law Journal*. See Chang, *supra* note 12, at 223–24 (criticizing Kaplow and Shavell's use of the assumption that fairness theories must be continuous); Louis Kaplow & Steven Shavell, *Notions of Fairness Versus the Pareto Principle: On the Role of Logical Consistency*, 110 YALE L.J. 237, 242–47 (2000) (rebutting Chang's argument); see also Howard F. Chang, *The Possibility of a Fair Paretian*, 110 YALE L.J. 251 (2000) (replying to Kaplow and Shavell's rebuttal).

16. See FAIRNESS, *supra* note 1, at 56 (arguing that Pareto compliance has significance when determining appropriate criteria for making policy choices).

17. See discussion *supra* p. 89.

Shavell only require that social welfare functions depend on individuals' well-being and that they be increasing functions of individuals' well-being.¹⁸ One cannot rely on welfarism's key principle to show that non-welfarism is objectionable—that is simply circular and question begging. Yet that is precisely what Kaplow and Shavell do. Why are non-welfarist approaches objectionable? we ask them. Because they sometimes decrease welfare, they answer. That answer is persuasive only to someone who already accepts welfarism. Indeed, Kaplow and Shavell themselves point out that their argument is tautological.¹⁹ As I understand the term "argument," this is no argument at all. We are perilously close to Monty Python territory here.²⁰

ADAM: I think that simply bringing out the conflict between fairness and welfare is much more powerful than you admit. After all, any argument must eventually reach a point where no further reasoning is possible; one simply accepts or rejects the underlying premises. The Pareto criterion is compelling because of its minimalism. Who could say no to making *everyone* better off? Who could advocate making everyone worse off? Until now, fairness advocates have, through muddled thinking, managed to avoid the conflict between this simple, obvious criterion and their preferred approaches. When confronted with the conflict, they will have a hard time defending their positions.²¹

MAX: You are right that in the end any argument

18. FAIRNESS, *supra* note 1, at 24.

19. *Id.* at 7, 58.

20. For example:

MAN: Well, an argument's not the same as contradiction.

MR. VIBRATING: It can be.

MAN: No it can't. An argument is a connected series of statements to establish a definite proposition.

MR. VIBRATING: No it isn't.

MAN: Yes it is. It isn't just contradiction.

MR. VIBRATING: Look, if I argue with you I must take up a contrary position.

MAN: But it isn't just saying "No it isn't."

MR. VIBRATING: Yes it is.

GRAHAM CHAPMAN ET AL., 2 THE COMPLETE MONTY PYTHON'S FLYING CIRCUS: ALL THE WORDS 87-88 (1989).

Other critics have noted how unsatisfying this tautology is. See Jules L. Coleman, *The Grounds of Welfare*, 112 YALE L.J. 1511, 1523-24 (2003); David Dolinko, *The Perils of Welfare Economics*, 97 NW. U. L. REV. 351, 363-64 (2002); Michael B. Dorff, *Why Welfare Depends on Fairness: A Reply to Kaplow and Shavell*, 75 S. CAL. L. REV. 847, 857-61 (2002).

21. See FAIRNESS, *supra* note 1, at 58.

reaches a point where further reasoning adds nothing. The question is, How far has a particular argument taken you from its unreasoned premises to its conclusions? My point is that in their core argument, Kaplow and Shavell really have taken us nowhere at all. The core unargued premise of their argument is that Pareto efficiency is obviously right and must prevail over any conflicting principle.²² Their conclusion is that welfarism is better than fairness theories.²³ Yet Pareto efficiency is the core defining feature of welfarism.²⁴ Arguing from Pareto efficiency as a premise to welfarism as a conclusion just isn't very imaginative, interesting, or illuminating.

Let's put it this way: Do you expect fairness theorists to simply throw up their hands and concede when confronted with this book? I can see it now: Ronald Dworkin coming out and admitting, "Gee, I guess I've just been completely wrong all these years." It's not going to happen. Fairness theorists are quite committed to intuitions favoring fairness over efficiency when in conflict, and they are quite unlikely to abandon them when confronted with Kaplow and Shavell's so-called "argument." If anyone denies the simple obvious attraction of Pareto,²⁵ Kaplow and Shavell have nothing left to throw at them.

ADAM: Sure, confirmed fairness theorists aren't going to just give up. But younger and less-committed scholars should be persuaded by this book.

MAX: Not if they are the least bit clearheaded and aren't already strongly inclined toward welfarism.

Indeed, the conflict between fairness and welfare can be used to argue in favor of *fairness* over welfare. Kaplow and Shavell's "argument" demonstrates the obvious: Sometimes fairness criteria and the Pareto criterion conflict—that is, sometimes fairness criteria lead to inefficiency; likewise, the Pareto criterion sometimes leads to unfairness.²⁶ Furthermore, all welfarist approaches must accept the Pareto criterion.²⁷ Therefore, the Kaplow and Shavell theorem can be restated as showing that any welfarist approach, or any social welfare

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22. See *supra* note 16 and accompanying text.

23. See *supra* note 6 and accompanying text.

24. See *supra* note 17 and accompanying text.

25. As some do. See Daniel A. Farber, *The Problematics of the Pareto Principle* 1–3, 37–38 (2003) (unpublished manuscript, on file with author).

26. See discussion *supra* p. 89.

27. See *supra* note 17 and accompanying text.

function, must in some circumstances lead to an outcome that is unfair. If one is committed to fairness, then one must reject welfarism. This mirror image of Kaplow and Shavell's reasoning is every bit as logically valid.

In the past, the conflict between welfarism and fairness has been used precisely in this way. A leading example is Amartya Sen's famous article on the impossibility of a Paretian liberal.²⁸ Sen showed that on a particular interpretation of liberty as requiring that persons have the right to make certain decisions affecting themselves, Pareto efficiency must in some circumstances conflict with liberty.²⁹ In a sense, Kaplow and Shavell have merely reworked Sen's theorem.³⁰ Sen used his theorem, however, to argue that Pareto efficiency is problematic.³¹ After all, one of the core intuitions supporting Pareto efficiency is a notion of self-determination—surely everyone would agree to an alternative that makes everyone better off.³² Sen's demonstration that liberty and Pareto efficiency conflict calls that intuition into question.

ADAM: Kaplow and Shavell recognize that move on Sen's part. They say that Sen's definition of liberty is problematic because it rules out certain kinds of welfare-improving bargains between persons.³³

MAX: It's quite normal for theories of liberty to rule out some kinds of bargains. For instance, contracts to put oneself into slavery are prohibited by the Thirteenth Amendment.³⁴

Daniel Farber also anticipated the Kaplow and Shavell theorem. He argued that environmental principles and Pareto efficiency may conflict, but nonetheless, environmental principles should sometimes prevail even if they are Pareto inefficient. If one uses environmental principles to decide between two alternative states of affairs that are equally Pareto efficient, then consistency commits one to preferring environmentally better outcomes that are just slightly inefficient in some

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28. Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970).

29. *Id.* at 157.

30. As Kaplow and Shavell themselves recognize. See FAIRNESS, *supra* note 1, at 54 n.75.

31. See *id.* ("Sen interprets the conflict he adduces as raising questions about the underlying appeal of the Pareto principle.").

32. As Kaplow and Shavell put it, if one insists upon fairness even where it violates the Pareto principle, "To whom is one being fair?" *Id.* at 54.

33. See *id.*

34. See U.S. CONST. amend. XIII, § 1.

cases. Like Sen, Farber took this as an argument against Pareto, not environmentalism.³⁵

Michael Dorff has argued that Kant took a similar stance against utilitarianism. Although in most instances utilitarianism seeks to safeguard individual rights, the philosophy is flawed because it will not always do so.³⁶ Where utilitarianism conflicts with rights, Kant said that rights must triumph because the paramount value is individual autonomy.³⁷ Only autonomous individuals can choose the conception of good that they wish to pursue.³⁸

Thus, even though Kaplow and Shavell are right that welfare and fairness must sometimes conflict, we can go either way from there. Those already inclined to welfarist approaches will conclude that we should reject fairness. Likewise, those inclined to fairness approaches will conclude that we should reject welfare. We need more to avoid a stalemate. Kaplow and Shavell give us no more.

ADAM: Kaplow and Shavell make a strong point, though: The Pareto inefficiency of fairness in the symmetric case³⁹ should be quite troubling to many fairness advocates.⁴⁰ After all, the symmetric case is quite similar to the Rawlsian original position, a thought device whereby, in deciding how to structure basic political institutions, the decision makers are placed in a position where they are unaware of the place they will occupy in the resulting society.⁴¹ Surely those decision makers would choose rules that make them better off rather than worse off, right? Then, in light of Kaplow and Shavell, aren't they committed to a welfare economics approach?

MAX: I agree that this is where they come closest to making an actual argument in favor of their position. Close, but no cigar. First, not all fairness advocates follow the Rawlsian

35. See Daniel A. Farber, *From Plastic Trees to Arrow's Theorem*, 1986 U. ILL. L. REV. 337, 346 n.22.

36. See Dorff, *supra* note 20, at 860.

37. See *id.* (stating that Kant ranked autonomy above all other values); see also IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 9 (Lewis White Beck trans., The Liberal Arts Press, Inc. 1959) (1785) (discussing the supreme importance of an individual's good will).

38. See Dorff, *supra* note 20, at 860–61.

39. The symmetric case is where all actors are similarly situated—e.g., all are equally likely to be victims and tortfeasors in the tort context. FAIRNESS, *supra* note 1, at 52.

40. See *id.* at 57–58.

41. See JOHN RAWLS, *A THEORY OF JUSTICE* 17–22 (1971).

original position approach. They would find the symmetric cases in the book contrived, unrealistic, and unpersuasive.⁴² If you don't buy into the premise that such situations provide good guidance on the rules of ethics, the rest of Kaplow and Shavell's argument is of little consequence.

As for those who do buy into something like the original position approach, the key issue is *what* those in the original position would choose to maximize. Kaplow and Shavell simply assume that it is welfare. Rawls argues, at some length, that it is what he calls primary goods.⁴³ Sen has an entire book arguing that it is what he calls capabilities.⁴⁴ In a footnote, Kaplow and Shavell recognize that Rawls and Sen disagree with them on this essential point, but then dismiss the disagreement in a simple paragraph arguing that weighting goods differently from how individuals actually weight them will sometimes make those individuals worse off.⁴⁵ They ignore Sen's arguments as to why various notions of well-being deal inadequately with how material deprivation can shape a person's preferences.⁴⁶ They also ignore a major motivation for Rawls's use of an index of primary goods: An index provides an objective measure on which all can agree in deciding basic social structures.⁴⁷ By contrast, direct measures of well-being that allow interpersonal comparisons of well-being are notoriously difficult to construct—very likely impossible in practice, even if not theoretically impossible, as some economists have maintained.⁴⁸ Kaplow and Shavell blithely dismiss this problem in a footnote.⁴⁹

More generally, Kaplow and Shavell assume an almost unbreakable link between what individuals prefer and what is good for them, their welfare.⁵⁰ There is a huge body of literature

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42. See, e.g., Linda C. McClain, "Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. CAL. L. REV. 1171, 1192 (1992); Michael D. Weiss, *A Jurisprudence of Blindness: Rawls' Justice and Legal Theory*, 42 DRAKE L. REV. 565, 582-87 (1993).

43. See RAWLS, *supra* note 41, at 90-95.

44. See SEN, *COMMODITIES*, *supra* note 8.

45. See FAIRNESS, *supra* note 1, at 29-30 n.27.

46. See SEN, *COMMODITIES*, *supra* note 8, at 29-30.

47. See RAWLS, *supra* note 41, at 95.

48. See, e.g., Lionel Robbins, *Interpersonal Comparisons of Utility*, 48 ECON. J. 635, 637, 640-41 (1938).

49. See FAIRNESS, *supra* note 1, at 24 n.15.

50. *Id.* at 23. The "almost" refers to Kaplow and Shavell's caveat that individuals may sometimes lack the knowledge to understand how situations

discussing that link between preferences and welfare,⁵¹ but Kaplow and Shavell barely even address it, except for conceding that welfare should be defined in terms of individuals' preferences given adequate knowledge about alternative states.⁵² You caught that recent series of Dilbert cartoons, right, Adam? Dilbert was taking a mind-altering drug that made him happy despite a variety of side effects such as the growth of an exoskeleton. Here, let me show you; I keep a copy in my wallet:

DILBERT® reprinted by permission of United Feature Syndicate, Inc.

Did Dilbert's drug-induced choices really improve his welfare? Scott Adams suggests the answer is no, and who am I to argue with Scott Adams?

Kaplow and Shavell's failure to adequately explore what constitutes "welfare" really matters. Rawls is the leading political theorist of our age and a leading advocate of fairness. Sen is one of the leading welfare economists alive and a Nobel laureate. He has thought as deeply about these questions as anyone I know. If Kaplow and Shavell are to succeed, they must take on these thinkers. Yet they barely even attempt to refute either Rawls or Sen, much less engage the general literature on the connection between preferences and welfare. It can't be that they just did not have enough time or space to confront their strongest opponents on this crucial point; they are willing to engage at length with much lesser lights on much lesser points. For instance, they go on for fourteen pages on the alleged inadequacies of the literature advocating a retributive theory of

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affect their well-being. *Id.*

51. See Farber, *supra* note 25, at 7–15 (overviewing the literature on the topic of preferences versus welfare through an analysis of the Pareto principle); see also Dolinko, *supra* note 20, at 364–84 (discussing preferences whose satisfaction harms the individual, adaptive preference, and the coherence of the concept of preference satisfaction).

52. See FAIRNESS, *supra* note 1, at 410–13.

punishment.⁵³ I strongly suspect that they give Rawls and Sen a miss because they just don't have any good responses to them.

ADAM: I think you are being a little unfair . . .

MAX: Maybe, but am I advancing well-being?

ADAM: Yeah, yeah, I think you are being a little unfair, although it would be interesting to read more about what Kaplow and Shavell have to say about Rawls on primary goods and Sen on capabilities. Actually, in a recent manuscript Kaplow engages this debate.⁵⁴ The first part of his paper presents a formal version of the argument that approaches such as those taken by Rawls and Sen will in some circumstances make everyone worse off.⁵⁵ The second part addresses arguments in favor of non-welfarist approaches.⁵⁶ Kaplow thinks that Rawls's point has some merit but characterizes it as a merely "instrumental" criticism that only focuses on how to measure well-being, not whether well-being is the correct "normative ideal."⁵⁷

MAX: I find it odd for an economist to criticize a position as merely instrumental. Economics is instrumental down to its core. If for deep systematic reasons we cannot devise a measure for making interpersonal comparisons of well-being, then what purpose does the concept of well-being serve? How can an allegedly scientific theory be grounded on maximizing well-being if we can never actually tell when we have succeeded? I also think that Sen's critique of welfare economics goes normatively deeper than Rawls's.

ADAM: Kaplow also has an answer to Sen in that recent paper. Kaplow denies that we should be suspicious of preferences that have adapted to deprivation.⁵⁸ As an example, he uses a choice between providing medicine to two people, one with a minor illness and the other with a serious illness that would normally cause substantial pain, but due to a neurological process the second person is numb to the pain.⁵⁹ Kaplow argues that we should not ignore this numbness; the medicine

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53. *Id.* at 303–17.

54. See Louis Kaplow, *Primary Goods, Capabilities, . . . or Well-Being?* 1–23 (2003) (unpublished manuscript, on file with author).

55. *Id.* at 4–14.

56. *Id.* at 14–22.

57. *Id.* at 16–17.

58. See *id.* at 18–20.

59. *Id.* at 19.

should go to the person with the lesser illness.⁶⁰ In general, we should not let objective indicators trump subjective perceptions of well-being.⁶¹

MAX: I agree with the outcome of the hypothetical, but the choice of hypothetical shows me that Kaplow has an inadequate understanding of well-being. He seems to equate well-being simply with increasing pleasure and decreasing pain as subjectively experienced by the individual. Thus, Kaplow's response commits him to saying that Dilbert really is better off with his drug, exoskeleton and all. Thoughtful utilitarians have been trying to move away from that sort of position ever since John Stuart Mill.⁶²

Moreover, I think Kaplow and Shavell will find it very hard to square this position with their concession that uninformed choices do not necessarily count.⁶³ The line between preferences based on deprivation and choices based on bad information is blurred at best. Consider the following cases:

- buying a CD and getting a different artist than that on the label;
- buying a CD not knowing about subliminal messages that will induce the listener to buy a certain product;
- buying a CD when drunk, having fallen for a song that when sober one would abhor;
- buying a CD after having been forced against one's will to listen to a song while sleeping, resulting in musical addiction;
- buying a CD after getting hooked on a song because of repeatedly listening to it on a Clear Channel radio station;
- buying a CD of a particular type of music that one might recognize as quite shallow and uninteresting if one had the benefits of a better musical education.

Now, the situations are obviously different, and there are very good legal and policy reasons for treating them differently.

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60. *Id.*

61. *See id.* at 18–20.

62. JOHN STUART MILL, *UTILITARIANISM* (1863); *see also* J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 12–27 (1973) (discussing whether well-being should be measured subjectively).

63. *See supra* note 52 and accompanying text.

If you think about this list, however, then you'll see that the line between questioning a decision because it was made based on mistaken information or because it was made based on suspect preferences is more provisional and harder to draw than Kaplow and Shavell's framework suggests. Preferences are not given, as economists assume; they develop over time based on one's information and experience.⁶⁴ If one's information and experience are systematically distorted, then one's preferences will likely be distorted as well. In the wrong hands this can lead to dangerously paternalistic prescriptions, but that's not reason enough to refuse to confront the issue altogether.⁶⁵

ADAM: I want to move on to another argument that Kaplow and Shavell make to support their position: logical consistency.⁶⁶ Suppose that you buy at least some of their examples and think that in those cases we must follow Pareto efficiency and welfare economics over fairness. Admitting that fairness theories are sometimes wrong shows that the theory is logically unacceptable. As Kaplow and Shavell put it, "demonstrating that a theory, in some part of its intended domain of application, contradicts a principle to which one subscribes, shows the theory to be unacceptable."⁶⁷ Thus, one cannot brush off their examples as simply odd cases of little concern. Fairness advocates must refute the examples or admit that anyone committed to logical consistency must reject their theories.

MAX: This point is not very compelling, and once again I don't think it's an argument in favor of welfare over fairness. First off, I don't think that too many people are really committed to logical consistency in moral and political theory. Some philosophers say they are, but precious few will really stick to that commitment in a pinch. For instance, when confronted with intuitively troubling examples that clearly flow from basic utilitarian premises, most utilitarians will perform all sorts of theoretical hocus-pocus to sidestep the conclusions that their theory seems to suggest.⁶⁸ Moreover, their idea of consistency isn't quite logical consistency anyway. Without engaging in a mistake of logic, one can quite logically be willing to apply a

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64. See Dolinko, *supra* note 20, at 374-75 (citing references).

65. Dolinko thinks that the problems of erroneous or adaptive preferences call into question the very intelligibility of Kaplow and Shavell's notion of well-being. See *id.* at 368-78.

66. See FAIRNESS, *supra* note 1, at 56.

67. *Id.*

68. See *infra* note 75 and accompanying text.

theory in one domain of application but not in another, where it has been shown to produce undesirable results. The oddness and underexplained nature of their notion of consistency makes it less attractive.

Second, the consistency argument doesn't support their position if you do not agree with Kaplow and Shavell's initial assumption that Pareto is the optimal criterion. That is, if given a choice between the Pareto principle and fairness, you choose fairness, then their notion of consistency commits you to rejecting the Pareto principle overall. We have already seen that they really don't have any arguments compelling agreement with them on that basic choice; with fingers crossed, they just hope people will intuitively choose Pareto when presented with fairness as a competing alternative. The idea of consistency adds nothing to support their initial claims.

Third, logical consistency is a two-edged sword. Kaplow and Shavell don't dwell on it, or pay much attention to it at all, but there are plenty of examples in the literature (for instance, sadists, or organ harvesters who kill innocent people to save the lives of many other people) where advocates of utilitarianism, and often welfarism more generally, are hard put to defend the answers that their system seems to give.⁶⁹

ADAM: Actually, in a recent paper Kaplow and Shavell acknowledge that point.⁷⁰ They admit that utilitarianism, and welfarism more generally, must be able to answer such attacks, or else logical consistency would demand rejecting those approaches as well.⁷¹ They suggest, though, that their argument against fairness, especially in the symmetric setting, goes more to the core of fairness principles than do most arguments-by-counterexample directed against utilitarianism and welfarism.⁷²

MAX: I congratulate them on acknowledging the point. In that paper, however, they have few answers to any of the standard attacks on utilitarianism. One standard attack that they do discuss at some length in the book is objectionable pref-

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69. See, e.g., *CONSEQUENTIALISM AND ITS CRITICS* (Samuel Scheffler ed., 1988); SMART & WILLIAMS, *supra* note 62.

70. See LOUIS KAPLOW & STEVEN SHAVELL, ALL INDIVIDUALS MAY BE MADE WORSE OFF UNDER ANY NONWELFARIST PRINCIPLE 11–12 (John M. Olin Ctr. for Law, Econ. & Bus., Harvard Law Sch., Discussion Paper No. 350, 2002), at <http://ssrn.com/abstract=304385> (last visited Aug. 28, 2003).

71. See *id.*

72. See *id.* at 11 n.26.

erences.⁷³ They grant that there are some troubling instances where it seems intuitively wrong to give positive weight to the preferences of some people, such as bigots and sadists, even though they may genuinely derive pleasure from the pain and hardship of others.⁷⁴ Nevertheless, they try to defend welfarism in such cases by arguing that it is difficult to know when we should ignore objectionable preferences and when not.⁷⁵ Fair enough, but that really does not deal with those cases where preferences are clearly objectionable. They accuse the literature on objectionable preferences of not providing a “general affirmative justification” for ignoring such preferences.⁷⁶ In light of our conversation today, that is really the pot calling the kettle black.

Kaplow and Shavell also claim that objectionable preferences will rarely triumph in a welfarist calculation that gives them weight.⁷⁷ This may be so, but “rarely” is not “never,” and if we find the welfarist conclusion on those occasions unacceptable, then the logical consistency point kicks in, and Kaplow and Shavell’s own logic demands that we reject welfarism altogether.

ADAM: That would be a very weak basis for rejecting an entire approach to justifying public policy—the sadist examples are unusual cases where our intuitions may be misleading. As I mentioned earlier, Kaplow and Shavell’s examples against fairness go more to the core than do the examples against utilitarianism.⁷⁸

MAX: Maybe, but maybe not. Kaplow and Shavell’s entire “argument” against fairness has the same weak structure: They come up with unrealistic examples well removed from real life and then trust that our intuitive reaction to those examples will carry us along to their preferred conclusion.⁷⁹ Moreover, I’m not convinced that the objectionable preference counterexamples are that far removed from the core of welfarism. Welfarists, especially Kaplow and Shavell, generally take it as obvious that we should take the satisfaction of people’s

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73. FAIRNESS, *supra* note 1, at 418–31.

74. *Id.* at 418–19.

75. *See id.* at 421–26.

76. *Id.* at 426.

77. *See id.* at 427–28.

78. *See supra* note 72 and accompanying text.

79. *See Dolinko, supra* note 20, at 386.

preferences as a good thing.⁸⁰ But why should we? Is the satisfaction of any preference really a good thing for society? When a sadist gets pleasure from torturing someone, it is clear to me that the sadist's pleasure does not make society better off in any way that should be recognized as valid, even putting aside the harm to the victim and the horror others may feel. The objectionable preference cases illustrate that the attractiveness of satisfying any and all preferences must be argued for, not simply assumed. Yet Kaplow and Shavell have no argument. They see the desirability of satisfying preferences as intuitively obvious, with no need to argue in its favor.⁸¹ As I noted earlier, there is quite a bit of scholarship attacking this assumption that is so central to their position, but they ignore it.⁸²

Indeed, I am rather puzzled by Kaplow and Shavell's general attitude toward intuitions. Much of the time, as in the section on objectionable preferences, they are skeptical about intuitions. They say we should not accept intuitions uncritically and mention a variety of flaws in everyday psychology that may make our intuitions misleading in some circumstances.⁸³ They also trot out a functionalist explanation of intuitions as working to advance social welfare, although in atypical cases intuitions may fail to do so.⁸⁴ This suggests we should trust reason rather than intuitions when we engage in moral theory and policy making.

Yet, in the end, Kaplow and Shavell's entire argument is based on nothing more than intuition. They present examples where fairness leads to Pareto inefficiency and expect our intuitions to side with Pareto over fairness.⁸⁵ How can we tell when we should trust our intuitions and when not?

ADAM: We should trust them when they point to welfarist conclusions, of course. Anyway, I find Kaplow and Shavell especially persuasive when they are shooting down a variety of bad arguments made by many fairness advocates. I finished the book relatively convinced by their argument that fairness advocates have failed to come up with good arguments to support their position. Fairness advocates must explain why it is sometimes best to make people worse off. Why should we ask society

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80. See *supra* note 50 and accompanying text.

81. See *supra* note 50 and accompanying text.

82. See *supra* note 52 and accompanying text.

83. See FAIRNESS, *supra* note 1, at 72 n.108.

84. See *id.* at 64–69; *infra* notes 94–102 and accompanying text.

85. See FAIRNESS, *supra* note 1, at 420 n.49.

to sacrifice without being given a good reason why?⁸⁶

MAX: It is often easier to shoot down bad arguments by your opponents than it is to come up with constructive arguments in favor of your position, as Kaplow and Shavell are well aware. Nonetheless, I agree that they score some decent points against certain fairness advocates, and we shall discuss some of those points soon enough. But here, too, Kaplow and Shavell fail to produce a real argument.

First off, they generally ignore most of the real heavy-weights opposed to them. I already mentioned Rawls and Sen,⁸⁷ most of whose core arguments they do not confront. Rawls, in particular, has a few arguments as to why society should follow his notion of fairness. Those arguments constitute *A Theory of Justice*, the leading political theory work of our time.⁸⁸ Just to pick out a few others at random, there is Nozick and his rights-based libertarian theory⁸⁹ or Walzer⁹⁰ and Sandel⁹¹ with their communitarian approaches. Kaplow and Shavell largely focus on legal scholars, which I suppose makes sense given the institutional context for their book's genesis. Given the scope of their claims, however, Kaplow and Shavell must move beyond the law reviews and take on their serious foes. For the most part, they haven't.

Furthermore, even if we agree that fairness advocates lack positive arguments for their positions, where does that leave us? Why is the burden of proof on them to justify their position? Given Kaplow and Shavell's lack of affirmative justification for their position, where the burden of proof lies is crucial. Yet they provide no good reason why the burden should be on their opponents. Once again they seem to fall back on the intuitive obviousness of the value of satisfying preferences. They assert that given the conflict between welfare and fairness, and the alleged obvious appeal of welfare, the burden of proof is on fairness advocates.⁹² This is not an argument for their posi-

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86. *Id.* at 59–60.

87. *See supra* notes 43–49 and accompanying text.

88. *See* RAWLS, *supra* note 41.

89. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974). Kaplow and Shavell cite Nozick a few times on the subject of criminal punishment, but never really grapple with him. *See* FAIRNESS, *supra* note 1, at 312 n.40, 314 n.46, 365 n.153.

90. *See* MICHAEL WALZER, SPHERES OF JUSTICE (1983).

91. *See* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

92. *See* FAIRNESS, *supra* note 1, at 59, 468–69 (arguing that reliance on

tion—it is a mere assertion of that position; it is a claim without a warrant. If you don't start out preferring welfare over fairness, then there is no reason at all to accept their allocation of the burden of proof.

ADAM: But Kaplow and Shavell rightly argue that many fairness advocates simply assume the correctness and obviousness of their position.⁹³ Given the demonstrated inconsistency of fairness theories and a clearly attractive and minimalist alternative such as Pareto efficiency, isn't it incumbent upon fairness advocates to produce positive arguments for their position, rather than merely assuming and asserting its correctness?

MAX: Once again, kettle meet pot; pot, kettle. That's *all* Kaplow and Shavell do—merely assume and assert the obviousness of their position, and in particular of Pareto efficiency. Unless they offer more in the way of arguments and reasons, we seem to have reached a stalemate.

ADAM: I don't think that Kaplow and Shavell are completely empty and circular at this point. Given a face-off between competing intuitions favoring Pareto efficiency and fairness, one effective strategy is to explain away the appeal of one set of intuitions. Kaplow and Shavell spend quite a bit of time and effort successfully combating intuitions favoring fairness.⁹⁴ If they are right, then one should ignore those intuitions in cases where they conflict with efficiency.

Fairness intuitions generally are manifestations of widely accepted social norms. Kaplow and Shavell argue that the leading evolutionary and functional explanations suggest that social norms arise because welfare is ordinarily advanced when people follow them.⁹⁵ For instance, commercial transactions will work better if participants trust one another because they adhere to promise-keeping norms.⁹⁶ Similarly, fewer torts will occur if people believe that they should be aware of the effects their actions have on others, and believe that if they aren't aware, and injure another, they should be punished.⁹⁷

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notions of fairness may result in legal policy inferior to that which might be chosen if welfare economics played a larger role).

93. *Id.* at 59.

94. *See id.* at 62–81.

95. *Id.* at 71.

96. *See id.* at 204–06.

97. *See id.* at 135–36.

These norms help reduce overly selfish behavior.⁹⁸ They also provide useful guides to correct behavior, freeing people from the burden of trying to think through what to do in every new situation.⁹⁹ That is, social norms are good proxies or rules of thumb. To succeed in those two uses, though, norms must generally be quite simple and broad.¹⁰⁰

The simplicity of social norms is their weakness when it comes to formal policy analysis. Norms need to be simple, broad, unchanging, and easily understood.¹⁰¹ Policy analysts, however, often think about policies that have myriad effects on multiple people in complex modern societies. Moreover, new technological and sociological facts may make old norms perform poorly in new situations. If the original point of norms is to advance efficiency, but a more sophisticated analysis shows that in a certain situation traditional norms no longer promote efficiency, then surely it makes sense to ignore those norms and instead look to what promotes efficiency and advances social welfare.¹⁰²

MAX: I grant that this is a real argument against fairness intuitions, although not one in favor of welfarist intuitions. However, I don't think it's a very strong argument. Moreover, it makes me wonder whether engaging in welfarist policy analysis makes sense even from a welfarist perspective.

First off, the evolutionary and functionalist explanations of norms as advancing welfare may not be the best explanations for many norms. Some norms may be ideological props to defend the position of the powerful against the weak. More generally, norms may advance the interests of a subgroup but hurt society as a whole. Honor among thieves, for instance, is usually not a good thing for those of us who are not thieves.¹⁰³ For an example closer to home, many of the ethical rules governing lawyers may serve to restrict entry into the profession, and hence raise legal salaries, rather than help our clients or society. If norms are not really there to advance social welfare, then the argument for ignoring norms when policy analysis shows them to conflict with welfare falls apart.

ADAM: Perhaps. Some norms probably are not best

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98. *Id.* at 64–65.

99. *Id.* at 68–69.

100. *See id.* at 66, 69.

101. *See id.*

102. *See id.* at 73–77.

103. *See id.* at 64 n.92.

explained as welfare enhancing in origin, but I think that many probably are welfare enhancing in effect. To really nail this point, one would need to engage in a broad, wide-ranging social science analysis of the origins of social norms, which you have not done.

MAX: Indeed I have not. Neither, of course, have you or Kaplow and Shavell.

I wonder whether one could run this argument in reverse. That is, might it be that norms and intuitions favoring Pareto efficiency naturally tend to arise in people because in most instances Pareto efficiency tends to advance fairness? In a society where a basic principle of fairness has structured the underlying institutions, people may naturally come to care about the welfare of others because well-functioning institutions bring them into helpful interactions with others. Pareto efficiency, then, may be a good proxy for advancing fairness. If so, when the two conflict, isn't it fairness, not efficiency, that we should follow?

ADAM: That strikes me as more clever than convincing, and really not all that clever. Kaplow and Shavell's argument has weight because it draws on a longstanding tradition of evolutionary and functionalist explanations of social norms. That tradition may not always be right, but it is well developed. Your argument-in-reverse is just out there on its own.

MAX: I concede that it's not my best argument, but it's at least interesting.

ADAM: I hear that "interesting" is not a term of praise back at your home in Minnesota.

MAX: Another problem with Kaplow and Shavell's functionalist critique is that even if advancing welfare explains the origin of many norms, it does not necessarily give us a reason to continue following those norms. For instance, the urge to protect children in one's care can be explained as an evolutionary adaptation that enhanced the chances of passing on one's genes, since children in one's care will typically be one's biological offspring. Does that mean that we have no reason to indulge that urge and take care of adopted children as if they were our own? Not at all—taking good care of children under one's protection is the right thing to do for reasons beyond the biological circumstances giving rise to the instinct.

ADAM: Taking good care of children in one's care presumably advances efficiency even if they are not one's biological offspring.

MAX: Yes, but that misses the logic of my point—the biological urge probably comes only from the benefits to one's offspring, not society more broadly. Yet that urge has given rise to values that we believe people should affirm and follow even outside the context in which it evolved. Evolutionary origins may certainly be of interest in understanding the appeal of many norms, but they aren't the only reason we have to follow those norms.¹⁰⁴

Anyway, my biggest problem with Kaplow and Shavell's fairness-norms-as-welfare-enhancing line of argument is that, by its own standard, the argument proves that welfarist policy analysis does not advance welfare. On Kaplow and Shavell's own showing, fairness norms are usually adequate policy and behavior guides.¹⁰⁵ They fail to give the right answers in a relatively limited class of circumstances, especially as complex modern society becomes more removed from the simpler times when such fairness norms formed.¹⁰⁶ For welfarist analysis to be worthwhile, on welfarist grounds, its expected gains should outweigh its expected costs—otherwise, engaging in the analysis would be inefficient. But how great are the expected benefits from employing a welfare analysis, as opposed to simply relying on conventional fairness norms and the fairness theories that arise from them? According to Kaplow and Shavell, the benefit lies in the increased welfare that results from better policy. They say that sometimes-simplistic norms produce answers that hurt rather than enhance welfare, while a welfare-based policy analysis is more sophisticated and empirically grounded, leading to welfare gains where norms give the wrong answer.¹⁰⁷

But how often will policy analysis be sufficiently strong, clear, and unambiguous to actually lead to a different result than norms? Consider the many obstacles. First, one must engage in a positive analysis of different policy alternatives, including the likelihood and magnitude of each policy's impacts. I am too inexperienced in other social sciences to speak about them, but if that policy analysis is grounded in economics, as

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104. For a good, brief discussion of the relationship between evolutionary selection and what he calls "reflective selection," see Amartya Sen, *Foreword to ECONOMICS, VALUES, AND ORGANIZATION*, at vii, ix–xi (Avner Ben-Ner & Louis Putterman eds., 1998). For a longer discussion that strongly criticizes Kaplow and Shavell, see Coleman, *supra* note 20, at 1529–37.

105. See FAIRNESS, *supra* note 1, at 62–69.

106. See *id.* at 73–77.

107. See *id.*

Kaplow and Shavell clearly contemplate and conform to in other writings, then the whole project is pretty well doomed right from the start. Economists are notorious for having arguments on both sides of any issue. Harry Truman didn't plead for a one-handed economist for nothing. Economic theory almost always suggests a variety of effects pointing in different directions, making it necessary to estimate empirically the size and probability of the different effects. Yet empirical economics is chronically underdeveloped and underpersuasive. This is certainly true in the field of law and economics. The end result is that analysts on each side of a policy split can almost always marshal equally balanced economic arguments to support their preferred position.¹⁰⁸ And, I assure you, there are more than two sides to most policy splits.

ADAM: That seems like a rather overly negative view of positive economic analysis. Fine, economics is rarely, if ever, conclusive, but surely we can say that sometimes, maybe even often, one side of a debate has stronger, more convincing arguments than the other. Economists can never be certain, but they can have a pretty good idea that some effects are more likely than others.¹⁰⁹

MAX: I disagree. I'm not trying to be nihilistic, either. I agree that in many cases some empirical predictions will be more plausible than others. What I deny is that economists are frequently, or ever, able to achieve consensus on predictions in cases where significant social conflict exists—that is, in the cases that actually matter for legal and public policy analysis. Legal and social conflict is most likely to exist precisely in those cases where empirical arguments are complicated and uncertain—if the empirical effects were clear-cut, serious conflict would be unlikely. Even Kaplow and Shavell say that welfare analysis matters most where complex modern society has moved beyond the simpler circumstances in which fairness norms evolved.¹¹⁰ But the very complexity of such situations makes empirical analysis more ambiguous.

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108. See GEORGE J. STIGLER, *The Politics of Political Economists*, in *ESSAYS IN THE HISTORY OF ECONOMICS* 51, 63 (1965) ("The apparatus of economics is very flexible: without breaking the rules of the profession . . . a sufficiently clever person can reach *any* conclusion he wishes on any *real* problem . . . . In general there is no position . . . which cannot be reached by a competent use of respectable economic theory.").

109. See FAIRNESS, *supra* note 1, at 458.

110. See *id.* at 73–77.

Let me distinguish social scientists from natural scientists. The latter have developed empirical methods strong enough to at least sometimes be able to decide live conflicts. The former have failed to do so. Can you point me to any interesting policy argument that has really been resolved by positive economic analysis, or any other sort of social science? To decide this point one would have to go through the whole literature of economics, or social science more generally, which is obviously way beyond our scope here. I'm not optimistic about the result, though.

ADAM: How about international trade and the theory of comparative advantage as an area where the vast majority of economists agree?¹¹¹

MAX: I don't think even comparative advantage does the trick. Virtually all economists agree on the theory, but there are countervailing arguments. Recent theories of regional advantages due to increasing returns to scale suggest that under some circumstances some degree of protectionism may make sense as a way of promoting infant industries.¹¹² There is now a messy empirical debate as to the relative importance of these two theories of international trade and the implications for trade policy.¹¹³

ADAM: Kaplow and Shavell recognize the problem of empirical uncertainty. They suggest, though, that as more legal scholars recognize the need for empirical analysis, more of it will be forthcoming, and we will gradually build a better body of positive work in which to ground our normative analyses.¹¹⁴

MAX: Their faith is touching, but misplaced. Only time will truly tell, but modern economics has already had several decades to get its empirical act together, so far to very little avail. Even law and economics has had at least three decades of many researchers plugging away at its agenda, with astonishingly little empirical work of any real value to date.¹¹⁵ Expecting economists to mend their ways is a lot like hopeful but foolish brides who marry expecting to be able to reform their new

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111. PAUL KRUGMAN, *THE AGE OF DIMINISHED EXPECTATIONS* 128 (The MIT Press 1994) (1990) ("[C]omparative advantage is one of the few ideas in economics that is true without being obvious." (citing Paul Samuelson)).

112. See Douglas Clement, *Trading Places: Why Do Nations Trade and Where Do Industries Locate? A Recent Fed Paper Considers Recent Theories*, REGION, Dec. 2002, at 11.

113. See *id.* at 11–12.

114. FAIRNESS, *supra* note 1, at 458.

115. See Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 810–12 (1999).

husbands. Indeed, if you want good empirical data, you're far better off talking to sociologists¹¹⁶—in legal academia, that would mean dealing with "law and society" scholars. I don't recommend talking to a sociologist for too long, though—it may lead to a proliferation of two-by-two tables.

Even if a helpful positive analysis of the effects of competing policies is available, welfare analysts must also conduct a normative analysis of those likely outcomes. Here, the prospects for economic analysis are even more dire. As Kaplow and Shavell seem to admit,¹¹⁷ on its own, Pareto efficiency is rarely a strong enough criterion to provide an answer to most interesting problems because such problems involve tradeoffs—any given policy will help some people but hurt others. One must sort through the distributive effects of each policy to determine which policy enhances welfare the most. In terms of the welfare economics framework, one must choose among social welfare functions. Alas, welfare economics has given us very little help in making that choice. As several critics of Kaplow and Shavell have already observed,¹¹⁸ which social welfare function you follow will usually have a decisive impact as to what policy you advocate. Yet Kaplow and Shavell really tell us nothing about how to choose among social welfare functions. I strongly suspect that one's underlying visions of fairness will strongly influence how this choice is made.¹¹⁹ If so, then it remains quite unclear whether welfarist policy analysis has added anything at all to what we would get simply by considering fairness norms.

ADAM: Yes, that's a problem, but Kaplow and Shavell provide a partial answer. To get the right distribution of income or wealth in society we should focus on tax and transfer policy. In other areas of policy, we should focus solely on efficiency, here understood as Kaldor-Hicks rather than Pareto efficiency.¹²⁰ If the effects of efficient policy are troubling in terms

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116. See Robert Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 627 (1986).

117. See FAIRNESS, *supra* note 1, at 56.

118. See Dorff, *supra* note 20, at 897–98; Daniel Farber, *What (If Anything) Can Economics Say About Equity?*, 102 MICH. L. REV. (forthcoming 2003) (manuscript at 3, on file with author).

119. See Dorff, *supra* note 20, at 898; Farber, *supra* note 118, at 3.

120. A choice is Kaldor-Hicks efficient if it is potentially Pareto efficient; that is, if it would be possible to compensate everyone made worse off by the move so that they were not worse off, while some persons remained better off. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 43–44 (3d ed.

of distribution, they can be corrected through a progressive income tax.¹²¹ Tax policy is the most efficient way to redistribute income—Kaplow and Shavell have argued this in a series of papers over the years, and the argument has come to be widely accepted by law and economics scholars.¹²² Thus, any indeterminacy caused by redistributive concerns can be confined largely to tax policy.

MAX: That's not a bad answer, but I have several problems with it. First, the remaining indeterminacy in the area of tax policy may be severe and important. Second, focusing on achieving Kaldor-Hicks efficiency in other areas may be quite indeterminate, both because of the difficulties of positive analysis and because measuring Kaldor-Hicks efficiency in practice is not easy. Third, we may care about inequalities in areas other than income or wealth or characteristics closely tied to income or wealth. For instance, we may care about equal opportunity and access to education, or about access to political power. Tax policy does little to address such inequality.¹²³

Moreover, in a series of articles Chris Sanchirico has applied the theory of the second best to show that Kaplow and Shavell's argument on the use of tax policy is dubious.¹²⁴ Tax policy itself is an imperfect way of redistributing income and wealth—it has serious distortionary effects. In general, when a given policy instrument is imperfect, it's wise to augment it with other instruments to help achieve one's goals. Thus, policy areas other than taxation should be evaluated for their distributive effects.

ADAM: Yes, but Kaplow and Shavell have fought back,

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121. FAIRNESS, *supra* note 1, at 33–34.

122. See COOTER & ULEN, *supra* note 120, at 112; Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000) [hereinafter Kaplow & Shavell, *Favor the Poor*]; Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) [hereinafter Kaplow & Shavell, *Redistributing Income*]; Steven Shavell, *A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Taxation?*, 71 AM. ECON. REV. 414 (1981).

123. Cf. Michael J. Meurer, *Fair Division*, 47 BUFF. L. REV. 937, 970 n.117 (1999) (raising this objection to law and economics generally).

124. See Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003 (2001) [hereinafter Sanchirico, *Deconstructing*]; Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797 (2000).

showing that Sanchirico's point is theoretically valid but empirically unimportant.¹²⁵

MAX: They have not "shown" any such thing—again, they have merely asserted it. That debate is still quite open, and I suspect it will remain so indefinitely—once one gets ensnared in empirical debates within the framework of the theory of the second best, there is very little chance of emerging alive. For what it's worth, my impression of the state of that debate is that Sanchirico has convincingly out-argued Kaplow and Shavell thus far.¹²⁶

ADAM: Imagine my shock as to which side you favor.

MAX: My fifth and final problem with the tax policy response to the indeterminacy of social welfare functions is its disregard of political constraints on public policy. Kaplow and Shavell simply assume that once we decide what distribution is best, implementing that solution through tax policy will be politically feasible. This is not necessarily true. Tax policy is notoriously subject to all sorts of political pressures and special interest groups. The wealthy may have both the will and the way to stave off redistributive taxes.¹²⁷ Of course, that is true in other policy areas as well. For a variety of reasons, however, it may be that redistributive policies are politically easier to achieve in non-tax policy areas. For instance, judges may be able to pursue distributive fairness policies when legislators cannot and may be able to employ their discretion to redistribute better in areas other than tax law. Moreover, action in some policy areas can affect the political balance of power and hence what is politically achievable in other areas. For instance, a strong antitrust policy may limit the size and power of large corporations and their managers, thereby making other sorts of political reforms more possible. Thus, a strong antitrust policy may be desirable even if it has negative efficiency effects in the immediate markets and industries to which it is applied.¹²⁸

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125. See Kaplow & Shavell, *Favor the Poor*, *supra* note 122, at 833.

126. See Sanchirico, *Deconstructing*, *supra* note 124, at 1071–80.

127. Kaplow and Shavell recognize this is a potential problem, and put it aside as beyond the scope of their article, which is fair enough. See Kaplow & Shavell, *Redistributing Income*, *supra* note 122, at 675 (recognizing that the political balance of power can cause a tax system to fall short of optimum redistributive taxation).

128. See Brett H. McDonnell & Daniel A. Farber, *Are Efficient Antitrust Rules Always Optimal?*, 48 ANTITRUST BULL. (forthcoming 2003) (manuscript at 4–6, on file with author).

At any rate, let us assume that economic analysis has given us an adequately clear prediction of the consequences of different policies, and that welfare analysis has provided an adequately clear answer as to the best policy given those effects. Hey, it could happen. But even then, there is a final hurdle before the whole analysis has proven its use. The analysis must actually be implemented as public policy; it must be politically viable. If it is significantly at odds with fairness norms, is this at all likely to happen? Given the strength of fairness norms, and the complication of welfare analysis, the welfare analyst is not likely to succeed politically.

ADAM: Again, Kaplow and Shavell anticipate your concern. They spend some time discussing the problems that governmental officials face when policy analysis conflicts with fairness norms. They acknowledge that sometimes policy makers will not be able to follow the welfare analysis. However, they think that often officials will either be able to adequately educate the citizenry or find other ways to enact the best policy.¹²⁹ Even if not, doesn't the analyst have a duty to publicly advocate the best policy, even if it is doomed to be ignored?

MAX: The lonely analyst crying out in the wilderness is all very romantic, but of little help in proving the usefulness of welfare policy analysis. As to the rest of your answer, I doubt that welfare analysis will be able to win out over fairness norms unless either the welfare analysis is not that different from the fairness norms, in which case not much has been gained, or the policy matter is so obscure and technical that the public doesn't really care. It will happen occasionally, but not very often.

Thus, welfare analysis has three very great hurdles to leap if it is to realize its benefits. Positive analysis must be definite enough to predict the consequences of different policies, both in terms of probability and magnitude of impact; normative analysis must give a way to choose among the alternatives given those consequences; and finally, the resulting policy recommendation must be politically feasible. Most of the time, any of these hurdles alone will be enough to make welfare analysis inconsequential. Together, they suggest that welfare analysis rarely will provide any tangible benefits.

ADAM: As I have suggested, I think one can disagree with your reasoning at every step of the way and wind up agreeing

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129. See FAIRNESS, *supra* note 1, at 396-402.

with Kaplow and Shavell that welfare analysis offers at least a modest prospect of improving policy and the promise of working better in the future if more academics start doing things the right way, via a welfare analysis. At any rate, as long as there is some possible benefit, what's the harm of engaging in welfare analysis?

MAX: That's the right question to ask, and I believe the cost is potentially considerable. Recall that Kaplow and Shavell admit, even emphasize, that fairness norms are usually helpful, and that a society is better off for having such norms.¹³⁰ The question is, will an increasingly strong role for economics in legal policy analysis undermine such norms? There is considerable research showing that training in economics tends to make people more selfish.¹³¹ Actually, it's a tricky chicken-egg question: Does economics makes people selfish, or do selfish people become economists? As best as we can tell, the answer is both. Of course, very sophisticated economists do, to some extent, realize the value of norms and altruism. However, less sophisticated economists do not, and even the more sophisticated ones have years of training in *homo economicus* engrained within them.

ADAM: Kaplow and Shavell anticipate this objection too. They answer by replying, first, that it remains unclear whether economics actually tends to make people more selfish and less cooperative.¹³² Second, they argue that even if it does, such a toll on the analyst is a small price to pay for the benefits from better analysis.¹³³

MAX: Those responses are underwhelming. As to the first point, yes, the statistical evidence is not definitive—it rarely is. But enough systematic evidence exists that anyone who claims to take such evidence seriously should be very concerned. Kaplow and Shavell are reduced to anecdotally citing individual famous economists who appear to behave in humanitarian ways—not very scientific of them.¹³⁴ As to the second point, the problem is not the effect on the analysts. Economists deserve what they get. The problem is their students. Some

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130. See *supra* note 105 and accompanying text.

131. See Robert H. Frank et al., *Does Studying Economics Inhibit Cooperation?*, 7 J. ECON. PERSP. 159 (1993); Gerald Marwell & Ruth E. Ames, *Economists Free Ride, Does Anyone Else?*, 15 J. PUB. ECON. 295, 306–07 (1981).

132. FAIRNESS, *supra* note 1, at 452 n.116.

133. *Id.*

134. See *id.*

studies have suggested a serious effect on undergraduate economics majors,¹³⁵ which is a popular major today, especially among future business leaders. One presumes the same is true for MBA students. Now Kaplow and Shavell want law professors to be immersed in economics. What would that mean for the education of future lawyers? Lawyers are an important part of the business and political elite—making them more selfish and less altruistic would be a disturbing and large cost to the spread of economic analysis in the law. Moreover, a selfish analyst can make for selfish analysis, undermining the whole project.

ADAM: Selfish, uncooperative lawyers—hasn't that barn door been wide open for far too long to be shut now?

MAX: And law and economics has been influential for decades now—there seems to be a correlation, though of course that doesn't prove causation.

ADAM: Well, making law students selfish doesn't strike me as a likely problem. By your own admission, in this kind of an argument it's doubtful that we will ever get clear evidence of the likely costs and benefits of legal welfare analysis.

MAX: Granted, but it should disturb Kaplow and Shavell that it is so hard to defend their entire endeavor as being cost justified.

ADAM: I'd like to point out one more argument by Kaplow and Shavell that I find persuasive. They repeatedly stress that their welfare-based approach takes an *ex ante* perspective on behavior. Most fairness theorists, however, approach the law from an *ex post* perspective.¹³⁶ For instance, in thinking about tort rules, fairness theorists often implicitly or explicitly assume that an accident has indeed occurred, and they focus on how the law should respond to such an accident. They ignore how legal rules affect the likelihood that an accident would occur in the first place.¹³⁷ Thus, welfare economics typically takes a more comprehensive stance, focusing on more of the issues that matter to society.

Kaplow and Shavell also suggest that the *ex post* character of fairness theories helps explain their popularity. In thinking about accidents, for example, the ordinary person will naturally focus on what has happened, not on what might have happened

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135. See Marwell & Ames, *supra* note 131, at 306–09.

136. See FAIRNESS, *supra* note 1, at 48–51, 437–43.

137. See *id.* at 147–48.

but didn't. While it may be natural, it is a standard type of cognitive error.¹³⁸ Analysts trying to take a rational, comprehensive look at what is best for society should avoid such cognitive errors.

MAX: That is a mildly useful point. I don't think it takes Kaplow and Shavell very far, however. First of all, I don't think that the most important fairness theorists really take an *ex post* point of view. Does that characterization really apply, for instance, to Rawls or Nozick? I don't think so. Rawls's original position is clearly an *ex ante* argument, while Nozick's distinction between procedural and substantive justice makes him quite insistently willing to accept situations whose results strike us as unfair if no rights were violated in reaching those results. Once again, Kaplow and Shavell take on their minor opponents but avoid the really important ones.

Second, it's not completely obvious to me that it's always wrong to focus on certain limited aspects of a problem, while ignoring others. Welfare economics may be comprehensive, but its scope is a major source of its glaring indeterminacy that we discussed a bit earlier.

ADAM: The fact that it's hard to get definite results from our analysis doesn't mean that we shouldn't try.¹³⁹ You're like the drunk who has lost his keys at night and searches under a street light because that's where he can see.

MAX: Under many circumstances, that strategy is probably the right one for the drunk to use.

ADAM: Another element in the book that I like is their insistence that the welfare economics approach is more general and varied than many legal scholars appreciate.¹⁴⁰ In the legal literature, law and economics has tended to be identified with the goal of "wealth maximization." For someone trained in economics, that is a very odd and limited understanding of how welfare economics works. In particular, it conveys the impression that a commitment to economic analysis entails a lack of concern for distributional issues, which is simply not true. Kaplow and Shavell perform a real service in setting the record straight.¹⁴¹

MAX: I agree that they make an important and useful

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138. *See id.* at 148.

139. *See id.* at 458.

140. *Id.* at 384.

141. *See id.* at 35-37.

point in distinguishing welfare economics from wealth maximization. However, they later obscure that point by employing numerical examples that simply assign monetary values for each outcome to every person and then summing up the values across persons—i.e., by analyzing using simple wealth maximization.¹⁴²

ADAM: But they note that wealth maximization, even though theoretically off base, is often helpful in simple, partial equilibrium models.¹⁴³

MAX: Yes, but that's the *only* kind of model Kaplow and Shavell ever provide in this book.

Moreover, they grant that distribution is important but then advocate ignoring distributional concerns for most legal questions because tax and transfer policies can fix any inequities.¹⁴⁴ Their desire to cling to that argument despite San-chirico's powerful critique suggests that distributional concerns aren't really that near and dear to their hearts.

ADAM: So, do you believe that Kaplow and Shavell are just wrong and that welfare economic analysis has little to add to the law? Do you think we are better off focusing on fairness rather than welfare?

MAX: No, I don't advocate following fairness theories to the exclusion of welfare analysis any more than I advocate following welfare analysis to the exclusion of fairness theories. Welfare economics has plenty of insights to add to legal scholarship. But so does fairness. For one thing, I think a legal academy filled with a mix of advocates, not all economists, will produce a relatively kinder, gentler breed of lawyers, limiting my critique of the economic approach. More importantly, I just don't get the appeal of focusing on welfare (whatever that is) to the exclusion of all other considerations.

At the end of our discussion I still don't think that Kaplow and Shavell have contributed any real argument in favor of their position. Beyond that, at some deeper psychological level I just don't feel the need to completely dominate the field of legal analysis, as do some economists and their fellow travelers. Richard Posner tried it twenty years ago with wealth maximization, as Kaplow and Shavell recognize.¹⁴⁵ Posner is trying to

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142. See, e.g., *id.* at 99–123.

143. See *id.* at 36–37.

144. See *supra* notes 121–22, 125 and accompanying text.

145. See FAIRNESS, *supra* note 1, at 35 & n.41.

get rid of legal philosophers with a different strategy nowadays,¹⁴⁶ which is probably why Posner contributed a gushy blurb to Kaplow and Shavell's book. Still, it is a little odd considering that his current attack on the futility of philosophical argument suggests that Kaplow and Shavell—who, after all, make an attempt at philosophical argument—are doomed to fail. Kaplow and Shavell want to root philosophers (who aren't welfare economists) out of the legal academy; so does Posner. The enemy of my enemy is my friend, I guess. I'm just not so caught up in this battle for scholarly turf. Economics is sometimes a useful tool, sometimes not. There are plenty of other sometimes-useful tools out there. Why categorically exclude any of them?

While I feel the intuitive appeal of the Pareto principle, I feel the intuitive appeal of a variety of competing fairness notions as well. I doubt very much that any one intellectual system can adequately reconcile those competing intuitions, and I don't see any great need to try to do so. Kaplow and Shavell are prestigious enough analysts that their book will continue to provoke a number of arguments against and for their position. Ultimately, though, I think the arguments they put forth are flimsy enough to make the more interesting long-run question about this book a psychological and sociological one: Why do economists entering the legal academy feel a periodic need to try to shut out their competitors, especially philosophers?

ADAM: You know, sometimes when I talk with you I feel the spirit of Critical Legal Studies reawakening, like some fell spirit buried deep in Moria. Skepticism about our ability to say anything definite about law, the impulse to psychoanalyze your opponents for hidden motives—is there a bit of the crit in you?

MAX: Let a thousand flowers bloom, to quote Mao and thereby confirm your suspicions. The crits did make some of these same points about law and economics early on—its indeterminacy, its burying of value judgments in neutral-seeming language about welfare, its imperialistic tendencies.¹⁴⁷ After a decade or two of decline in the crits and continued ascendance of the law and economics type, we could use some rebalancing.

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146. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999).

147. See MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 114–50 (1987); ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 12–14 (1986); Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).

But I say that only in the name of balance—if Leff and Unger wrote a similar book trying to claim the entire legal field for their own approach, I'd use law and economics arguments, among others, to take them down a peg or two. For now, though, it's the economists who are overreaching. And for the record, I'm not a crit; I'm a pragmatist.

ADAM: Whatever *that* means; you're at Minnesota, so it comes as no surprise. I still feel that Kaplow and Shavell at least pose an important question for non-welfarist theories: How can you justify sometimes making everyone worse off? Maybe in the end they have no real logical argument beyond that, but I think the question is still an important and damaging one. They have shifted the terms of the debate in their favor.

MAX: So underneath all their rhetoric about science and logic lies only rhetoric? I can agree with that. But once people realize this, and that the entirety of their long-sustained so-called argument is nothing more than repeating one rhetorical question over and over (and over) again, won't that rhetoric lose much of its force? So I hope, at any rate.

ADAM: Well, it's getting late, and I must be going. As always, it has been a pleasure talking with you. I hope we can continue the conversation in the near future.

MAX: As long as economists keep on producing work like this, I'm sure we will have plenty to talk about.