

---

---

# WHY WELFARE DEPENDS ON FAIRNESS: A REPLY TO KAPLOW AND SHAVELL

MICHAEL B. DORFF\*

## INTRODUCTION

A message to deontologists: put down your pencils, shut down your laptops. There is no further need for your services. Step out from behind the veil of ignorance and recognize the truth, that welfare reigns supreme and fairness is relevant only as an idiosyncratic taste.

So argue Louis Kaplow and Steven Shavell, two prominent Harvard legal economists, in their latest joint endeavor, *Fairness Versus Welfare*.<sup>1</sup> The debate between consequentialists and deontologists dates back at least to Jeremy Bentham,<sup>2</sup> but Kaplow and Shavell believe they have finally developed an argument to put the debate to rest, with the consequentialists, of course, as the victors. Their argument directly challenges—and attempts to invalidate—an enormous percentage of legal scholarship. Fairness advocates will no doubt be drowning law review editors in passionate defenses of deontology. Even as a consequentialist, I find myself

---

\* Assistant Professor of Law, Rutgers Law School, Camden. A.B., 1992, Harvard College, C.L.G.S.; J.D., 1996, Harvard Law School, *magna cum laude*. I am deeply indebted to Perry Dane, Elliot Dorff, Richard Epstein, Kimberly Ferzan, Mark Geistfeld, Phil Harvey, Russell Korobkin, Michael Livingston, Dennis Patterson, Nate Persily, Eric Posner, Edward Rock, Steven Shavell, David Silver, Allan Stein, and the members of the Rutgers Junior Faculty Colloquium for their insightful comments and suggestions. I also wish to thank Holly Robinson for her able research assistance. Any remaining errors are, of course, entirely my own.

1. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 971 (2001). Since this writing, *Fairness Versus Welfare* has been published as a book. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002). All citations in this Article will be to the *Harvard Law Review* article.

2. See JOHN STUART MILL, ON BENTHAM AND COLERIDGE 111–12 (Harper & Bros. 1950) (originally published as separate essays in 1838 (Bentham) and 1840 (Coleridge)) (discussing deontological attacks on Bentham, among others, during the mid-nineteenth century).

unpersuaded. At the end of the day, I believe moral theory determines welfare economics' policy recommendations.

I will summarize Kaplow and Shavell's argument more completely below, but in brief, they contend that policies based on fairness principles will sometimes promote fairness at the expense of people's welfare, making everyone worse-off.<sup>3</sup> Although this argument is, as they concede, tautological,<sup>4</sup> they contend that the trade-off between fairness and welfare is underemphasized.<sup>5</sup> By analyzing a series of detailed examples from different areas of the law and demonstrating the true costs of fairness in each, Kaplow and Shavell hope to dramatize the costs of policies based on fairness and so terminate their appeal.<sup>6</sup> If society is expected to bear these costs for the sake of fairness, then fairness advocates must advance some compelling rationale for making everyone worse-off.<sup>7</sup> Kaplow and Shavell repeatedly tell us they have surveyed the relevant literature in search of such a compelling rationale, but to no avail.<sup>8</sup>

What makes Kaplow and Shavell's argument different from and potentially more powerful than those that have previously been advanced against deontology is their sweepingly broad definition of welfare. Eschewing the traditional law and economics motif of simple wealth

---

3. See Kaplow & Shavell, *supra* note 1, at 971 (stating that the authors' first argument is that advancing notions of fairness reduces individuals' well-being).

4. *Id.*

5. *Id.* (pointing out that "the conclusion that pursuing notions of fairness is necessarily at the expense of individuals' well-being is not usually emphasized, and often is not even explicitly acknowledged, by analysts who employ notions of fairness to evaluate legal policy").

6. "By presenting the reader with a range of important legal contexts, in each of which individuals' well-being is shown to be reduced if the relevant fairness principles are given evaluative importance, we hope that the problematic implications of fairness-based legal policy analysis will come to be better understood." *Id.*

7. See *id.* at 972 (outlining the second part of the authors' argument, that no sound rationales exist that justify pursuing fairness over individual well-being).

8. For example, they state, "[W]e discover very little basis for the use of notions of fairness as independent evaluative principles," *id.* at 972,

Unless one's basic moral view disregards the well-being of all individuals, there must be something of substantial importance that is promoted by the pursuit of a notion of fairness for it to warrant overriding the well-being of everyone . . . [W]e find it very difficult to identify what that could be. A reason for this difficulty, we believe, is that there cannot be anyone to whom one is being fair when every human object of one's efforts to be fair is made worse off.]

*id.* at 1058 (footnote reference omitted), "On reflection it should not be surprising that there seems to be no good reason to pursue these notions of fairness at the expense of individuals' well-being," *id.* at 1142, "[W]e are unable to identify any good reason for insisting on what are deemed to be fair procedures, at the expense of all individuals' well-being," *id.* at 1197, and "When we examine the literature on fair punishment, we do not find any analysis that addresses the difficulties we have just described [with choosing fairness over welfare]," *id.* at 1256.

maximization, Kaplow and Shavell define welfare as encompassing anything and everything that might affect a person's well-being:

The welfare economic conception of individuals' well-being is a comprehensive one. It recognizes not only individuals' levels of material comfort, but also their degree of aesthetic fulfillment, their feelings for others, and anything else that they might value, however intangible. . . . Welfare economics thus accommodates all factors that are relevant to individuals' well-being and to its distribution.<sup>9</sup>

Thus, Kaplow and Shavell sidestep one of the most powerful critiques of the economic analysis of law—that wealth is too narrow a measure of human happiness<sup>10</sup>—by taking account of *anything* that enhances or detracts from a person's well-being.<sup>11</sup>

Kaplow and Shavell make an innovative and persuasive argument. The difficulty of putting forth something novel<sup>12</sup> in a centuries-old debate should not be overlooked. Inevitably, like any foray into solving one of the Great Debates, however, their argument has a serious—and I would argue fatal—flaw, even from a consequentialist's perspective.

In order to determine which public policy will maximize social welfare, Kaplow and Shavell need a method of tallying up individual welfare functions into a unified social welfare function. That is, they need to figure out whose welfare counts when it comes to determining social policy, and for how much. As they readily concede, there are many, perhaps infinitely many, possible social welfare functions.<sup>13</sup> A social welfare function might count everyone's welfare equally, might count only adults' welfare, only that of brown-eyed children, or only that welfare that is produced on alternate Tuesdays.

---

9. *Id.* at 968.

10. *See id.* at 968 n.35 (stating that skepticism about the concept of well-being sometimes reflects the view that well-being is construed too narrowly).

11. *See supra* text accompanying note 9 (quoting Kaplow and Shavell's expansive definition of well-being).

12. One might argue, however, that the heart of their argument—that fairness advocates are sacrificing welfare—is not new at all, but one that has long been recognized. As Michael Sandel has written:

On [the deontological] view, justice is not merely one value among others, to be weighed and considered as the occasion arises, but the highest of all social virtues, the one that must be met before others can make their claims. If the happiness of the world could be advanced by unjust means alone, not happiness but justice would properly prevail. And when justice issues in certain individual rights, even the general welfare cannot override them.

MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 2 (2d ed. 1998).

13. *See Kaplow & Shavell, supra* note 1, at 987–88 (stating that many methods of aggregation are possible).

Here is the important problem with their argument: *the choice of a social welfare function inevitably involves the adoption of a fairness analysis*. Whether the choice is a social welfare function that weighs everyone's welfare equally, or one that counts some people's welfare more than others', it is impossible to avoid endorsing some fairness-based view.<sup>14</sup> Kaplow and Shavell concede this point as well,<sup>15</sup> but they seem to miss entirely its relevance for their project. Rather than eliminate fairness criteria from public policy analysis, Kaplow and Shavell simply sweep it under the rug where it is less likely to be noticed. The same fairness analysis they decry throughout their argument must still take place; it is only moved further back in the process to the formulation of the social welfare function.

In Part I of this Article, I set forth Kaplow and Shavell's thesis in greater detail, explaining why they think they have finally won the war with the deontologists. In Part II, I discuss some examples of different possible social welfare functions and apply them to a few of Kaplow and Shavell's policy examples to demonstrate that their policy recommendations depend on the adoption of wealth maximization (with the attendant philosophical underpinnings) as the social welfare function. Social welfare functions based on different moral views yield different policy recommendations. Finally, in Part III, I assess the state of the battle, concluding that wealth maximization analysis provides us with important information, but cannot displace fairness theories.

### I. KAPLOW AND SHAVELL'S THESIS

Kaplow and Shavell are something of a "dynamic duo" in the law and economics movement. Having teamed up to battle evil (or at least public policy misconceptions) successfully in the past,<sup>16</sup> they have apparently

---

14. Mark Geistfeld has recognized this point in the tort law context: [T]he economic analysis of tort law can only help determine the forms of tort liability most likely to further the appropriate purposes of the tort system. Those purposes cannot be derived by economic analysis, but instead depend on moral justification. Hence the economic analysis of tort law is nothing more than a positive analysis that complements, rather than competes with, the appropriate moral theory of tort law.

Mark Geistfeld, *Economics, Moral Philosophy, and the Positive Analysis of Tort Law*, in *PHILOSOPHY AND THE LAW OF TORTS* 267 (Gerald J. Postema ed., 2001).

15. See Kaplow & Shavell, *supra* note 1, at 987 (recognizing that "value judgments are involved in aggregating different individuals' well-being into a single measure of social welfare").

16. See, e.g., Louis Kaplow & Steven Shavell, *Accuracy in the Assessment of Damages*, 39 *J.L. & ECON.* 191 (1996); Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 *J.L. & ECON.* 1 (1994); Louis Kaplow & Steven Shavell, *The Conflict Between Notions of Fairness and the Pareto Principle*, 1 *AM. L. & ECON. REV.* 63 (1999); Louis Kaplow & Steven Shavell, *Do Liability Rules Facilitate Bargaining? A Reply to Ayres and Talley*, 105 *YALE L.J.* 221 (1995); Louis Kaplow

decided to tackle the movement's arch-nemesis, the fairness advocate, most commonly personified in *Fairness Versus Welfare* as John Rawls, Immanuel Kant, or Charles Fried.<sup>17</sup>

The struggle for public policy supremacy between the consequentialists and the deontologists has raged at least since the early nineteenth century.<sup>18</sup> Consequentialists (or teleologists) believe that public policy choices should be made by examining the likely outcome of such choices.<sup>19</sup> One policy should be preferred over a second if the first will result in a better outcome. Their focus, then, is on society's overall welfare, however achieved, measured or defined.<sup>20</sup>

Deontologists, on the other hand, believe potential policy choices must be run through a gauntlet of moral duties, or principles, which cannot be violated. Some deontologists see one or more of these rules as absolute, while others seek to balance some principles against others.<sup>21</sup> In either version, deontologists use their principles to make the point that some actions are simply wrong, regardless of their consequences, and are therefore forbidden.<sup>22</sup> Although deontologists' rules could be based on any value or set of values, not just fairness, Kaplow and Shavell label all

---

& Steven Shavell, *Notions of Fairness Versus the Pareto Principle: On the Role of Logical Consistency*, 110 YALE L.J. 237 (2000); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996), 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); Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

17. See, e.g., Kaplow & Shavell, *supra* note 1, at 988, 1002 n.82, 1015 n.105, 1104 n.322, 1106 n.328, 1107 n.334, 1150 n.444, 1228–31, 1263 n.737.

18. See *supra* note 2 and accompanying text (pointing out a nineteenth-century discussion of the conflict).

19. See Philip Pettit, *Consequentialism*, in A COMPANION TO ETHICS 230, 231 (Peter Singer ed., 1991) ("Consequentialists see the relation between values and agents as an instrumental one: agents are required to produce whatever actions have the property of promoting a designated value, even actions that fail intuitively to honour it.")

20. In addition to Kaplow and Shavell, other consequentialists include Jeremy Bentham, John Stuart Mill, and Richard Posner. See, e.g., JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION (Hafner Press 1948) (1789); JOHN STUART MILL, UTILITARIANISM (Roger Crisp ed., Oxford University Press 1998) (1861); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (5th ed. 1998).

21. For an example of a deontologist who believes such principles must be weighed against one another, see W.D. ROSS, THE RIGHT AND THE GOOD 19–22 (Hackett Publishing Co. 1988) (1930) (arguing for seven "prima facie" values that must be weighed against each other: fidelity, reparation, gratitude, justice, beneficence, self-improvement, and nonmaleficence).

22. Nancy (Ann) Davis, *Contemporary Deontology*, in A COMPANION TO ETHICS 205, 205 (Peter Singer ed., 1991).

deontologists, or more precisely, all nonconsequentialists, as fairness advocates.<sup>23</sup>

The battle between consequentialists and deontologists has ramifications far beyond the halls of academia. The criteria by which policy proposals are evaluated have an enormous impact on which policies become law. Suppose, for example, that a town zoning board is considering changing the zoning of a strip of land bordering the downtown area. Historically, that part of town had been heavily industrial, and still retained many active factories. Recently, however, the downtown area has experienced a resurgence as a center for shopping and dining. Downtown has quickly run out of space for new stores and restaurants, but entrepreneurs are reluctant to expand into the industrial area because they fear that customers will not venture near the smoky, odiferous factories. The zoning board is now considering rezoning the industrial area as commercial/residential only and forcing the factories to relocate farther away from the downtown area.

Consequentialist board members would weigh the costs of such a change against the benefits to determine whether the change should be made. They would balance the jobs and products created by the factories against the resulting pollution and the jobs and other benefits that would be generated by an expanded downtown shopping district. There might also be other factors that went into the calculation, but they would all involve the welfare of the community.<sup>24</sup> In the end, consequentialists would vote for whichever policy was determined to maximize the community's welfare. They would not be concerned with a violation of the factory owners' rights—indeed, an extreme consequentialist would not even recognize that category of rights—except to the extent such a violation influenced the owners' future willingness to open new factories or the existence of those rights was otherwise socially useful.

---

23. Examples of deontologists include Immanuel Kant, John Rawls, Charles Fried, and W.D. Ross. See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE* (1981); IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (Lewis White Beck trans., The Bobbs-Merrill Co., Inc. 1959) (1785); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); ROSS, *supra* note 21.

24. Kaplow and Shavell bracket out the important question of whose utility counts in a social welfare function, that of only a local community, an entire country, all of humanity, or some broader category, stating:

[A] complete account of social welfare would address questions about membership in the group of individuals whose utilities are to be aggregated—whether it includes all individuals in a nation, or in the world, or in some other group; whether it includes only the present generation or also future ones; and whether it includes only humans or, for example, all sentient beings. . . . These topics, like the proper distribution of income, are beyond the scope of our inquiry.

Kaplow & Shavell, *supra* note 1, at 987 n.46.

Deontologist board members would instead examine whether the change would violate some fundamental principle. They might be concerned, for example, about the property rights of the factory owners, perhaps arguing that changing the zoning of the industrial area is akin to stealing the factory owners' property. Since stealing is wrong, deontologists would have to oppose the rezoning effort, regardless of the resulting benefit to the town. A strict deontologist would not consider the consequences of the failure to rezone the land regardless of the magnitude of such consequences. Many deontologists, however, take the position that truly disastrous consequences, such as the destruction of a city or a nation, may be considered, even if they might frame their decision not as a matter of consequences but as one principle (e.g., life) preempting another (e.g., justice).<sup>25</sup>

Kaplow and Shavell place themselves firmly within the consequentialist camp. They take the consequentialist position to its logical extreme, contending that welfare should be not only the dominant concern, but the *sole* concern of legal policymakers.<sup>26</sup> They argue that any alternative position—any position that places any weight whatsoever on fairness concerns—will sometimes result in policies that decrease social welfare, making society worse-off.

But what is “welfare”? Is welfare defined as the predominance of pleasure over pain, as Jeremy Bentham advocated?<sup>27</sup> Or should welfare instead be defined as the maximization of society's wealth, a view often associated with the law and economics movement?<sup>28</sup> Kaplow and Shavell reject both these conceptions in favor of a broad notion of welfare that includes anything and everything that might affect a person's well-being:

---

25. See, e.g., Davis, *supra* note 22, at 215 (noting that, in spite of their absolute assertions, “deontologists do not think that we are justified in refusing to violate deontological constraints when the consequences of our refusal would be dire”).

26. See Kaplow & Shavell, *supra* note 1, at 966 (stating as their thesis the proposition “that the assessment of legal policies should depend exclusively on their effects on individuals' welfare”).

27. “Bentham derived the general principle of utility which ‘approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question,’ happiness being understood as the predominance of pleasure over pain.” 3 THE ENCYCLOPEDIA OF PHILOSOPHY 96 (Paul Edwards ed., Reprint ed. 1972) (citation omitted).

28. Note that Richard Posner, often credited as the founder of the law and economics movement, defined welfare much more broadly stating:

Normative economics holds that an action is to be judged by its effect in promoting the social welfare, a term often defined so broadly as to be synonymous with the utilitarian concept of happiness, except that ordinarily the satisfactions of nonhuman beings are not included in the concept of social welfare.

RICHARD POSNER, THE ECONOMICS OF JUSTICE 49 (1981).

The notion of well-being used in welfare economics is comprehensive in nature. It incorporates in a positive way everything that an individual might value—goods and services that the individual can consume, social and environmental amenities, personally held notions of fulfillment, sympathetic feelings for others, and so forth. Similarly, an individual's well-being reflects in a negative way harms to his or her person and property, costs and inconveniences, and anything else that the individual might find distasteful. Well-being is not restricted to hedonistic and materialistic enjoyment or to any other named class of pleasures and pains. The only limit on what is included in well-being is to be found in the minds of individuals themselves, not in the minds of analysts.<sup>29</sup>

Two aspects of this definition's inclusive nature should be highlighted. First, Kaplow and Shavell's definition of welfare includes what they term a "taste for a notion of fairness."<sup>30</sup> Kaplow and Shavell argue that a taste for fairness is fundamentally no different from any other taste, whether for Colonial houses, cheeseburgers, or red wine. Just as tastes for these other, material goods affect an individual's welfare and therefore should be taken into account by legal policymakers, so do more abstract tastes for values such as fairness.<sup>31</sup>

The second aspect of Kaplow and Shavell's inclusive definition of welfare that should be highlighted is their incorporation of distributive concerns.<sup>32</sup> There are three senses in which Kaplow and Shavell address distributive concerns in their definition of welfare. First, they note that distribution affects social utility because some individuals will value a particular good or service more than others.<sup>33</sup> Distributing the good or service to one of these higher-valuing individuals will improve social welfare more than distributing the identical good or service to someone who values it less. In particular, they contend that redistributing income

---

29. Kaplow & Shavell, *supra* note 1, at 980 (footnote reference omitted).

30. *Id.* at 982 (noting that "the possibility that individuals have a taste for a notion of fairness, just as they may have a taste for art, nature, or fine wine" is particularly relevant to their discussion).

31. *Id.* Although including a taste for fairness in the calculation of individual welfare seems consistent with Kaplow and Shavell's larger thesis, it is striking that they choose fairness as the value to highlight, and not some other abstract taste such as charity, love, or, for that matter, unfairness. Presumably tastes for all of these values would also count in determining individual welfare. Highlighting a taste for fairness seems suspiciously like the creation of an escape hatch, so that if a critic confronts the authors with some particularly compelling conflict between welfare and fairness, Kaplow and Shavell can always fall back on the position that the fair outcome should triumph because of people's strong taste for fairness. Fortunately, in their text they largely avoid this maneuver and it is hoped that they will continue to do so in the ongoing defense of their thesis.

32. *See id.* at 990 (asserting that "basic concerns about the overall distribution of income are encompassed by the welfare economic approach").

33. *See id.* at 990–91.

from the wealthy to the economically disadvantaged will often raise social welfare because the poor will value the extra income more than the rich.<sup>34</sup> Their rationale is that the marginal utility of money, like that of other goods, declines as the quantity possessed increases.

Second, Kaplow and Shavell argue that the distribution of income may affect social welfare because of individuals' taste for caring for the poor.<sup>35</sup> For example, a middle-class individual may be distressed by the knowledge that some people do not have enough to eat.<sup>36</sup> Redistributing income in the form of food assistance may then increase the welfare even of those who do not receive such assistance because they will benefit from the knowledge that their neighbors are not starving. Conversely, the same middle-class person may suffer a decline in her well-being when she enviously observes a wealthy person driving a Mercedes. Redistributing income so that no one can afford a fancy car may result in an increase in social welfare if the increase in the welfare of the poor and middle class stemming from the termination of the cause of their envy outweighs the distress of the wealthy at the loss of their luxury cars.<sup>37</sup>

Finally, Kaplow and Shavell hold that the social welfare function may increase directly when income is distributed more equably.<sup>38</sup> That is, the social welfare function may value a more equal distribution independently of either marginal utility or individuals' taste for charity, granting extra "welfare points" when income is more equally distributed. One method of achieving this result that Kaplow and Shavell condone is counting the welfare of poorer individuals more heavily than that of the wealthy:

[M]ore weight might be placed on the well-being of less-well-off individuals, in which case social welfare would tend to be higher if income were redistributed from the better-off to the worse-off (independently of whether the marginal utility of income for the worse-off were greater than that for the better-off).<sup>39</sup>

---

34. *See id.* at 991.

35. *See id.*

36. *See id.* at 991 n.57 (arguing that the distribution of income may matter to social welfare if the well-being of the wealthy depends on the plight of the poor).

37. *See id.* (arguing that the distribution of income may affect social welfare when the poor envy the rich).

38. *See id.* at 988 ("[T]he well-being of worse-off individuals might be given additional weight, as under the approach associated with John Rawls, wherein social welfare corresponds to the utility of the worst-off individuals."); *id.* at 991 ("[T]he distribution of income may matter to social welfare because it affects the distribution of well-being, and, under the welfare economic approach, social welfare may depend directly on how equally well-being is distributed among individuals.").

39. *Id.*

At first glance, this is an extraordinary statement, little in keeping with the “basic notion of equal concern for all individuals” that Kaplow and Shavell advocate elsewhere in their essay.<sup>40</sup> As I argue below, the same principle that permits social welfare functions to disproportionately count the welfare of the poor must also permit ones that put a thumb on the scale in favor of other groups, such as the wealthy or those that manage to earn their incomes without government assistance.<sup>41</sup> Whatever position Kaplow and Shavell adopt on the permissible set of social welfare functions, however, they cannot avoid endorsing some notion of fairness.<sup>42</sup>

Now that we have clarified the notion that Kaplow and Shavell champion, what is it exactly that they are attempting to vilify? What, in a word, do they mean by “fairness”?

Most readers likely understand the term “fairness” to encompass notions of distributive justice, morality, and perhaps retributive justice. They likely have in mind scholars such as Kant, Rawls, and Fried, who believe in moral principles, in rules of behavior that cannot generally be trumped by a consideration of the consequences.<sup>43</sup> In this, Kaplow and Shavell do not disappoint us. They define “fairness” as any theory that

---

40. For example, they state that “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.” *Id.* at 985–86.

41. *See infra* Part II.A.1 (contending that Kaplow and Shavell’s inclusion of distributional concerns beyond declining marginal utility analysis opens the door to social welfare functions that privilege the welfare of other groups besides the disadvantaged).

42. *See infra* Part II.A.1 (arguing that it is impossible to escape the need to apply some fairness ideology when choosing a social welfare function).

43. Kant states his refusal to reason from consequences as follows:

[T]he moral worth of an action does not lie in the effect which is expected from it or in any principle of action which has to borrow its motive from this expected effect . . . .

. . . .  
[E]verything empirical is not only wholly unworthy to be an ingredient in the principle of morality but is even highly prejudicial to the purity of moral practices themselves. . . . We cannot too much or too often warn against the lax or even base manner of thought which seeks principles among empirical motives and laws, for human reason in its weariness is glad to rest on this pillow. In a dream of sweet illusions (in which it embraces not Juno but a cloud), it substitutes for morality a bastard patched up from limbs of very different parentage, which looks like anything one wishes to see in it, but not like virtue to anyone who has ever beheld her in her true form.

KANT, *supra* note 23, at 17, 44. Similarly Rawls states, “It may be expedient but it is not just that some should have less in order that others may prosper.” RAWLS, *supra* note 23, at 15. *See also id.* at 31 (arguing that the right should be prior to the good, and that interests requiring the violation of justice have no value). Finally, Fried argues:

There exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectations in others. By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then to break it.

FRIED, *supra* note 23, at 17.

does not rely exclusively on welfare as a normative criterion for selecting legal policies.<sup>44</sup> This definition does indeed encompass much of readers' likely intuitive sense of "fairness," including the existence of rules that trump all consequential concerns out of a desire for justice or the pursuit of some other principle of morality. The only concept commonly associated with fairness that their definition does not include is distributive equality—i.e., that goods and services be distributed equally. Kaplow and Shavell exclude this notion from "fairness" by including it in the definition of welfare.<sup>45</sup>

Once Kaplow and Shavell have defined "fairness" as any philosophy that does not exclusively rely on social welfare for its rules of decision, an important step towards proving their thesis becomes relatively straightforward. This step is the statement that applying determinative fairness criteria will, at least in some instances, result in a decrease in social welfare. Kaplow and Shavell have, in fact, defined their terms—welfare and fairness—so as to make this point inevitable, essentially, as they effectively concede, a tautology.<sup>46</sup> If "fairness" consists of any philosophy that ignores welfare, then it seems virtually inevitable that applying determinative fairness criteria will, at least in some instances, decrease social welfare.

Kaplow and Shavell go on to make an even stronger point. Not only will fairness criteria decrease social welfare as a whole, but in some cases, the use of such criteria will actually make *everyone* worse-off.<sup>47</sup> A policy that makes everyone worse-off violates the Pareto principle, the notion that policies that make everyone better-off should always be adopted.<sup>48</sup> In

---

44. See Kaplow & Shavell, *supra* note 1, at 1000 ("Notions of fairness have the property that evaluations relying on them are not based exclusively—and sometimes are not dependent at all—on how legal policies affect individuals' well-being.") (emphasis omitted).

45. See *id.* at 990–92 (arguing for a notion of welfare that incorporates distributive concerns in several important respects).

46. The tautology is encapsulated as follows:

Our first argument, that advancing notions of fairness reduces individuals' well-being, is in fact tautological on a general level. By definition, welfare economic analysis is concerned with individuals' well-being, whereas fairness-based analysis (to the extent that it differs from welfare economic analysis) is concerned with adherence to certain stipulated principles that do not depend on individuals' well-being. Thus, promoting notions of fairness may well involve a reduction in individuals' well-being.

...  
[I]t is true that it is virtually a tautology to assert that fairness-based evaluation entails some sort of reduction in individuals' well-being, for notions of fairness are principles of evaluation that give weight to factors unrelated to individuals' well-being.

*Id.* at 971, 1071.

47. See *id.* at 1012.

48. See *id.* at 1015 (defining the Pareto principle as holding "that one should always favor a policy under which everyone is better off").

particular, in what the authors term “symmetric contexts,” in which all individuals are identically situated, Kaplow and Shavell argue that it is always the case that everyone will be worse-off whenever fairness criteria lead to the selection of a social policy different from the recommendation of welfare economics.<sup>49</sup>

The authors see this point as almost self-evidently determinative of the debate. What rational person, after all, could favor a policy that made everyone worse-off? The fact that applying fairness criteria will sometimes make everyone worse-off should then be sufficient to persuade legal policymakers not to employ fairness criteria.<sup>50</sup> At the very least, this argument should successfully shift the burden to fairness advocates to explain why any value should be advanced at the expense of social welfare.<sup>51</sup>

This Pareto argument is on its face so persuasive that it deserves a brief detour here in response. I have two points.<sup>52</sup> First, as Kaplow and Shavell acknowledge, there is general agreement that the Pareto principle is

---

49. *Id.* at 1012.

50. *Id.* at 1015.

51. Specifically, the authors state that they “believe that analysts who accord independent weight to notions of fairness bear a substantial burden of explanation. They must provide the reasons why a society should willingly make its members—possibly all of them—worse off in order to advance a particular conception of fairness.” *Id.* at 973. They also argue that since legal policymakers presumably care about people’s well-being, and since fairness-based policies may reduce people’s well-being, it becomes necessary to search for a rationale for adopting fairness criteria. They conclude, “We find that little explicit justification for notions of fairness—even those developed by prominent writers over the years—has in fact been offered.” *Id.* at 1017–18.

52. Howard Chang has argued for a third response. Believing that it is theoretically possible to design a fairness theory that does not conflict with the Pareto principle, he states, “A more plausible fairness theory would qualify the scope of fairness principles so as not to conflict with the Pareto principle. In fact, the Pareto principle itself could be part of a complete theory of fairness.” Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 *YALE L.J.* 173, 208 (2000). Chang proposes a fairness theory that includes the Pareto principle as a trumping criteria, taking precedence over fairness concerns. *Id.* For example, a fairness theory might allow rights to be waivable:

We might, for example, conceive of a fairness theory as endowing individuals with alienable rights that they may invoke to protect their interests from unfair interference by others. If presented with a situation in which it would be in their interests to waive this right, however, then they may do so . . . .

*Id.* at 209. Chang points out that such a fairness theory would not conflict with the Pareto principle because in cases in which everyone, including the rights holder, would be better-off if the right were relinquished, the rights holder would do so. *See id.* Kaplow and Shavell have in essence responded that such a theory is not truly a “fairness theory” at all, as they have defined the term, since it will never conflict with the recommendation of welfare economics. *See* Louis Kaplow & Steven Shavell, *Notions of Fairness Versus the Pareto Principle: On the Role of Logical Consistency*, 110 *YALE L.J.* 237, 246 (2000) (stating that “if [Chang’s] modified principle satisfied our consistency assumptions, we know from our proof that it would not retain any substantial fairness content”). I believe their response is persuasive.

largely irrelevant in policymaking because it is almost never true that a change in policy will make everyone better-off.<sup>53</sup> The authors respond that the paucity of real world examples is irrelevant; it is sufficient to show that adopting fairness criteria *could* result, even if only theoretically, in a contradiction of the Pareto principle.<sup>54</sup> This response is unlikely to satisfy many policymakers, who are bound to be more concerned with real world applications than with theoretical contradictions. Moreover, in the context of the fairness versus welfare debate, it is difficult to imagine a situation in which the Pareto principle could *ever* apply. As Amartya Sen has pointed out, when welfare economics advocates a different policy from some fairness theory, sufficiently strong adherents of the fairness theory will *always* be made worse-off by the policy's adoption.<sup>55</sup> The material benefits the fairness adherents receive under the efficient policy cannot compensate them for the moral deficit created.

The second problem with the Pareto argument is that it is vulnerable to the same critique I have of Kaplow and Shavell's thesis generally. The Pareto argument depends on the ability of welfare economics to produce a policy recommendation that is different from that of fairness notions.<sup>56</sup> But as I argue throughout the paper below, the recommendations produced by welfare economics are entirely dependent on fairness notions. Any fairness notion can be recast as a social welfare function so that both welfare economics and the fairness notion would produce the identical social policy recommendation. That is, the social welfare function can be defined in such a way that it will tell us that people are better-off when the fairness recommendation is followed. It can do this by deciding that certain welfare—that which results from violations of the fairness principle—does not count. Such a function still depends only on the utilities of individuals and not on the fairness of outcomes, at least as I understand that requirement. In sum, it is impossible to state meaningfully that welfare

---

53. Kaplow & Shavell, *supra* note 1, at 1015.

54. They note that, "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." *Id.*

55. Chang describes Sen's position:

Sen notes that as long as "at least one person respects the rights of others," such that this person would always prefer the libertarian outcome "and wants that preference to count" in "deciding what is socially better," then libertarian rights will never conflict with the Pareto principle, because the libertarian's preference will always prevent an illiberal outcome from being Pareto superior to the libertarian outcome.

Chang, *supra* note 52, at 207 (quoting Amartya Sen, *Liberty, Unanimity and Rights*, 43 *ECONOMICA* 217, 236 (1976)).

56. See Kaplow & Shavell, *supra* note 1, at 1012 n.102 (assuming, in the proof of the Pareto argument, that "rule X is deemed better under welfare economics but rule Y is deemed better under a notion of fairness").

economics recommends a different policy from fairness because economics' policy recommendation *depends* on fairness criteria.

Without the Pareto argument, we are left with Kaplow and Shavell's contention that obeying fairness criteria in choosing social policy will sometimes make people as a whole worse-off, a flaw absent from policy choices guided by welfare economics. This argument is remarkably parallel to Kant's argument against utilitarianism (primarily against John Stuart Mill but equally applicable to Kaplow and Shavell's thesis). Kant argued that utilitarianism was flawed because it created inadequate safeguards for individual rights.<sup>57</sup> There were bound to be some instances in which social welfare hindered rather than preserved justice.<sup>58</sup> That is, Kant argued that the value that should trump all others—autonomy—could be preserved only by a system that self-consciously pursued autonomy at the expense of other values, such as welfare. Conversely, Kaplow and Shavell argue that the value they feel should trump all others—welfare—can be preserved only by a system that self-consciously pursues welfare at the expense of other values, such as autonomy. Both arguments raise the question: Why should this particular value trump all others?<sup>59</sup>

Kant's response was that privileging welfare over autonomy would result in injustice, leading to some people's happiness being secured by coercing others to comply with their wishes.<sup>60</sup> In addition, Kant argued that autonomy should trump all other values because with autonomy, people can choose for themselves what conception of the good they embrace.<sup>61</sup> Kant also thought that the only absolutely good thing is a good individual will.<sup>62</sup> That is, his conception of humanity defines the distinctly

---

57. Michael Sandel has restated Kant's argument: "Utilitarianism is unreliable in that no merely empirical foundation, utilitarian or otherwise, can secure absolutely the primacy of justice and the sanctity of individual rights." SANDEL, *supra* note 12, at 4.

58. *See id.*

59. Mill, in fact, criticized Kant for this very point. *See id.* at 5 (describing Mill's response that happiness should trump justice).

60. *See id.* Sandel characterizes Kant's position, stating:

Kant's answer would be that even exceptions in the name of human happiness must be rejected, for the failure to affirm absolutely the primacy of justice leads to unfairness and coercion. Even if the desire for happiness were universally shared, it could not serve as basis for the moral law. Persons would still differ in their conceptions of what happiness consists in, and to install any particular conception as regulative would impose on some the conceptions of others, and so deny at least to some the freedom to advance their own conceptions. It would create a society where some were coerced by the values of others, rather than one where the needs of each harmonized with the ends of all.

*Id.*

61. *See id.* at 5–6.

62. KANT, *supra* note 23, at 9.

human as the ability to exercise autonomous will,<sup>63</sup> while utilitarians see human beings as individuals with needs that must be satisfied. Hence, for utilitarians, what is useful is good. Kant argued for a morality that concerned itself with subjects, not objects, whose purpose was to ensure that people were able to choose the ends they desired and not to have what those ends should be dictated by others.<sup>64</sup>

Kaplow and Shavell's response, in contrast, is not to assert why welfare should be chosen as the ultimate value,<sup>65</sup> but rather to attack fairness as the product of conditioned "social norms." They contend that fairness theorists have been attracted to fairness models because fairness theories correspond to conditioned social norms.<sup>66</sup> These social norms evolved as approximations of welfare analysis in different (often simpler) social situations from those the law generally addresses—situations having different penalties for violations, different administrative costs, and different amounts of information available to enforce them.<sup>67</sup> Thus, because social norms are at best approximations, policymakers should not use them as a substitute for actual welfare analysis.<sup>68</sup> Social norms are relevant and important<sup>69</sup>—both because weakening social norms may cause bad behavior in other areas<sup>70</sup> and because norms constitute tastes, which are a relevant consideration under welfare analysis<sup>71</sup>—but norms should

---

63. *See id.* at 45 ("The will is thought of as a faculty of determining itself to action in accordance with the conception of certain laws. Such a faculty can be found only in rational beings.").

64. Sandel states Kant's position as, "what matters above all is not the ends we choose but our capacity to choose them. And this capacity, being prior to any particular end it may affirm, resides in the subject." SANDEL, *supra* note 12, at 6–7.

65. Instead the authors state:

Our contention that the rationales that seem to underlie notions of fairness do not justify treating these notions as independent evaluative principles is not, of course, one that can be established through logical deduction, for logic alone cannot tell us what our first principles of evaluation should be. Nevertheless, we believe that our specific discussions in Parts III–VI show that the deficiencies just described are indeed present and that, upon reflection, notions of fairness are difficult to defend.

Kaplow & Shavell, *supra* note 1, at 1019–20.

66. *Id.* at 973. *See also id.* at 1021–38 (arguing that the intuitive appeal of fairness theories stems from social norms that have developed to assist us in contexts quite different from those faced by legal policymakers).

67. *Id.* at 1032–33.

68. *See id.*

69. For an interesting discussion of the role of social norms in legal policymaking, see ERIC POSNER, LAW AND SOCIAL NORMS (2000).

70. Kaplow & Shavell, *supra* note 1, at 1023.

71. For example:

[I]f individuals have internalized a social norm that is related to a notion of fairness, they may have a taste for fairness, in the sense that they may feel better off or worse off depending on whether their conception of fairness is reflected in legal rules or in the actual operation of the legal system. . . . Now, any factor that influences individuals' well-being is relevant under

not themselves be determinative of policy.<sup>72</sup> Instead, policymakers should rely on direct welfare analysis.<sup>73</sup>

While I find it unfortunate that Kaplow and Shavell fail to advance a concrete rationale for adopting welfare as the ultimate value, the intricacies of the philosophical debate are beyond the scope of this article. My primary concern with *Fairness Versus Welfare* is that the authors fail in their purpose: they do not purge policy analysis of fairness criteria. Instead, even in their own analyses, they merely hide the fairness question in the design of the social welfare function. They fail because the task they set for themselves is impossible: Policy analysis must *inevitably* be grounded on some conception of “fairness,” as Kaplow and Shavell define the term.

In the next section, I will analyze the rules Kaplow and Shavell establish for social welfare functions and explain why *any* social welfare function necessarily encompasses a fairness judgment. I will then describe a set of four social welfare functions. For heuristic purposes, three of these functions will loosely reflect principles associated with fairness theorists (John Rawls, Immanuel Kant, and Robert Paul Wolff). It is not my intent to claim that the philosophers discussed would ever participate in a welfare economics evaluation of public policy, nor do I argue that they would endorse the particular functions I describe. Instead, my purpose is to demonstrate that social welfare functions may incorporate fairness principles.

Although I argue that each of these functions falls within Kaplow and Shavell’s prescribed limits for defining social welfare functions, the more important point is that any restriction on such definitions must be defended using fairness criteria; welfare economics cannot on its own justify the

---

welfare economics, and a taste for fairness is no different in this respect from a taste for a tangible good or for anything else.

*Id.* at 974–95. *See also id.* at 1035 (noting that “individuals plausibly do have tastes for notions of fairness”).

72. In this regard, the authors state:

[W]e would expect that notions of fairness, which correspond to social norms, will sometimes serve as helpful proxy tools for identifying legal rules that raise individuals’ well-being, but we would also predict that there often will be an important divergence between rules that promote fairness and those that advance well-being. When there is a divergence, analysts should follow welfare economics rather than fairness-based analysis. That the notions of fairness are rooted in social norms does not in itself imply that the notions have independent importance as evaluative principles; indeed, an understanding of social norms suggests the opposite.

*Id.* at 1035.

73. *Id.*

---

---

criteria for measuring social welfare.<sup>74</sup> I will apply each of these social welfare functions to one of the concrete policy examples Kaplow and Shavell analyze and explain why the choice of the social welfare function—and with it, an associated fairness criterion—determines the outcome of the economic analysis. Because a fairness theory is required to defend the selection of a social welfare function, and the choice of a social welfare function will determine welfare economics' policy recommendations, fairness theory is ultimately determinative of legal policy. The attempt to eliminate fairness theory from public policy debate is therefore doomed to failure. I will conclude with a few thoughts about where the consequentialism/deontology debate might go next.

## II. THE EFFECT OF ALTERNATIVE SOCIAL WELFARE FUNCTIONS

### A. SOME POSSIBLE ALTERNATIVES

#### 1. Designing a Social Welfare Function

Under welfare economics, in order to evaluate a policy option, it is first necessary to select a measure of social welfare, some function that will aggregate individual well-being into the societal equivalent. Individual welfare itself is not determinative of the choice of social welfare function. The selection of a social welfare function may well affect individual welfare because it will determine how social welfare is measured, thereby influencing policy choices that in turn affect individual welfare. But in order to evaluate the effect of choosing a particular social welfare function on society as a whole, as opposed to the effect on a particular individual, we first need a method of aggregating individual welfare into social welfare. In other words, before we can use the tools of welfare economics to assist us in selecting a social welfare function, we must first select a social welfare function.

Welfare economics, then, cannot assist us in selecting a social welfare function. Attempts to do so collapse into a vicious circle. Instead, we must turn to some other methodology, some other system of thought, to guide us in our selection. Choosing a social welfare function involves deciding how we should count the welfare of different individuals in compiling the community's total. Leaving aside the problematic question of making

---

74. See Geistfeld, *supra* note 14, at 267 (asserting that the goals of the tort law system “cannot be derived by economic analysis, but instead depend on moral justification”).

interpersonal utility comparisons,<sup>75</sup> we must somehow determine when (or whether) to count everyone's welfare equally, when to privilege the welfare of some over that of others, and when to refuse to count some welfare altogether. These are all fundamentally questions about values or ethics, so the discussion about which social welfare function to adopt will inevitably involve the issues at the heart of moral and political philosophy. More importantly for the current discussion, since welfare economics cannot help us in choosing a social welfare function, the discussion will not turn on, and in some cases may not even involve, individual welfare. As such, the social welfare function debate will be a debate about fairness, under Kaplow and Shavell's definition, a debate that is "not based exclusively—and sometimes [is] not dependent at all—on how legal policies affect individuals' well-being."<sup>76</sup>

Kaplow and Shavell might reply that none of this matters. After all, they themselves concede that welfare economics rests on pillars of value judgments.<sup>77</sup> They point to at least three value judgments critical to welfare economics: that social welfare is a function of individual welfare, that social welfare increases as the welfare of individuals increases, and that factors other than well-being do not count.<sup>78</sup> They also readily concede that value judgments are necessary in the selection of a social welfare function.<sup>79</sup> Why, then, do I draw so much attention to this point? Surely as long as the social welfare function selected obeys Kaplow and Shavell's definitional guidelines, they might say, welfare economics will function properly. Why does the nature of the selection debate matter?

The selection debate matters because, as I argue below,<sup>80</sup> the choice of a social welfare function *determines* welfare economics' policy recommendations. If selecting a different social welfare function changes the resulting substantive policy analysis, and if the choice of a social welfare function hinges on fairness theories, then it follows that even under welfare economics, policy recommendations depend on fairness theories.

---

75. For a discussion of some of these difficulties and some potential solutions, see Kaplow & Shavell, *supra* note 1, at 988 n.49 (citing sources that discuss this issue).

76. *Id.* at 1000.

77. *Id.* at 986–88 (admitting that in a number of ways, "the approach of welfare economics involves value judgments").

78. *See id.* at 986 (noting that "value judgments underlie the assumptions that social welfare depends on individuals' well-being, that this dependence is positive, and that factors unrelated to individuals' well-being are irrelevant").

79. *Id.* at 987 (specifically stating that a "method of aggregation is of necessity an element of welfare economics, and value judgments are involved in aggregating different individuals' well-being into a single measure of social welfare").

80. *See infra* Part II.B.

If this line of argument holds true, Kaplow and Shavell's thesis—that “the assessment of legal policies should depend exclusively on their effects on individuals' welfare”<sup>81</sup>—must be false.

Let me repeat: *Regardless of how devoutly one believes in examining likely consequences when making policy choices, it is impossible to escape the need to apply some fairness ideology when choosing a social welfare function. This function in turn will determine the policy outcomes recommended by economic analysis.* Kaplow and Shavell appear to concede this point, though they use the term “value judgments” instead of fairness.<sup>82</sup> Again, though, they apparently fail to recognize the fatal significance of this fact for their project.

Moreover, Kaplow and Shavell themselves apparently permit social welfare functions to incorporate fairness principles, thereby enabling fairness theories to determine social policy recommendations. Although Kaplow and Shavell allow for a variety of social welfare functions, they do provide a few limitations. They begin by stating that “social welfare is postulated to be an increasing function of individuals' well-being and to depend on no other factors.”<sup>83</sup> They go on to state categorically 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.”<sup>84</sup>

At first glance, these limitations appear to prohibit any social welfare function that either (1) takes into account any factor other than well-being or (2) fails to count all individuals' welfare equally. If this initial reading were correct, Kaplow and Shavell would in effect be limiting their social welfare functions to some version of welfare maximization that closely approximates the traditional wealth maximization formula used by utilitarians.<sup>85</sup> That is, policymakers would perform a simple summation of everyone's expected welfare under each of a range of policy choices to determine which of those policies to adopt as law. Under traditional wealth

---

81. Kaplow & Shavell, *supra* note 1, at 966 (stating their thesis).

82. See quotation cited *supra* note 79.

83. Kaplow & Shavell, *supra* note 1, at 985 (stating the assumptions on which welfare economics is founded).

84. *Id.* at 985–86 (describing the symmetric requirement).

85. See *id.* at 987–88 (recognizing that “under the utilitarian approach, social welfare is taken to be the sum of individuals' utilities”).

maximization, policymakers are exhorted to perform a similar calculus, only with wealth instead of welfare.<sup>86</sup>

But Kaplow and Shavell do not want to constrain the set of possible social welfare functions this tightly. If they did, their argument would remain vulnerable to those critics who argue that welfare analysis does not take distributive concerns into effect—what I will label the “distributive critique.”<sup>87</sup> Instead, without acknowledging the apparent contradiction with their earlier statement, Kaplow and Shavell state that it is permissible for a social welfare function to give additional weight to worse-off individuals, referencing John Rawls.<sup>88</sup> By including such functions, they do in fact successfully duck the distributive critique.

It is important to distinguish the distributional concerns that are met by social welfare functions that give additional weight to worse-off individuals from the more conventional methods of including distributional concerns in economic analyses. In particular, economics has long proffered the notion of the declining marginal value of goods, most notably in the context of money.<sup>89</sup> Kaplow and Shavell also make this point.<sup>90</sup> To

---

86. See NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM* 13 (1997) (stating that wealth maximization is an operative organizing concept of the law and economics movement).

87. See Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 *CORNELL L. REV.* 1003 (2001) (attacking the traditional notion that redistribution concerns should be met solely through government transfers, and not by the selection of legal rules); Chris William Sanchirico, *Taxes Versus Legal Rules As Instruments for Equity: A More Equitable View*, 29 *J. LEGAL STUD.* 797 (2000). See also MERCURO & MEDEMA, *supra* note 86, at 80 (describing the New Haven School of Law and Economics as those who maintain that market failures should be corrected by concern for both allocative and distributional impacts); SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* 6 (1992) (noting that New Haven theorists “recognize that the existing distribution of property rights [and hence wealth] is highly contingent and lacks strong normative justification.”); Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle That Safety Matters More Than Money*, 76 *N.Y.U. L. REV.* 114, 136–43 (2001) (arguing that welfare economics can defensibly ignore distributive concerns only if the government can redistribute income among households, but that there are important limits to the government’s ability to effect such transfers, especially in the tort context). *But see* 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) (responding to Sanchirico, *Taxes Versus Legal Rules As Instruments for Equity: A More Equitable View*, *supra*).

88. See Kaplow & Shavell, *supra* note 1, at 988.

89. See RICHARD G. LIPSEY, PETER O. STEINER & DOUGLAS D. PURVIS, *ECONOMICS* 130 (8th ed. 1987) (“The utility any household derives from successive units of a particular commodity diminishes as total consumption of the commodity increases while the consumption of all other commodities remains constant.”); Kaplow & Shavell, *supra* note 1, at 991 n.55 (citing authorities making use of the concept of declining marginal utility).

90. They state:

[T]he distribution of income will matter to social welfare because a dollar of income often will raise the utility of some individuals more than that of others. Notably, redistributing

express this notion simply, someone who has a lot of something values having a bit more considerably less than someone who has none of it.

This type of distributional effect, stemming from the decreasing marginal utility of goods and services, has long been recognized and analyzed by economists. Economics can also easily accommodate the notion that some people may have a taste for equal distribution.<sup>91</sup> Marginal utility analysis, however, even when combined with an allowance for redistributive tastes, is insufficient to answer the distributional critique, that is, the critique that welfare economics pays insufficient attention to the need for a more equal distribution of goods and services. Even if the social welfare function reflects the intensity—and not just the ordering—of preferences,<sup>92</sup> the effect of marginal utility may be too weak to overcome other factors that weigh against redistribution. For example, it may be that wealthy people tend also to be exceptionally greedy, undercutting the effect of declining marginal utility, while poor people tend to have few material desires. Or it may be that redistribution erodes incentives to produce, reducing the amount of goods and services available to be distributed and making society as a whole worse-off.<sup>93</sup> Economic analysis may advocate against redistribution, then, even when fairness advocates call for it because of the unjust initial distribution of resources.

Kaplow and Shavell therefore want to move beyond the traditional economic arguments for redistribution and allow a more equal distribution

---

income from the rich to the poor will tend to raise social welfare, assuming that the marginal utility of income is greater for the poor than for the rich.

Kaplow & Shavell, *supra* note 1, at 990–91.

91. As Kaplow and Shavell observe:

[T]he distribution of income may matter to social welfare because some individuals' well-being may depend directly on the distribution of income, as when individuals feel sympathy toward those who are less fortunate. We also note that, in accord with the foregoing, there is a substantial body of work by economists on matters concerning income distribution.

*Id.* at 991–92 (footnote reference omitted).

92. Utility is an ordinal function that ranks an individual's preferences. While it is possible to determine whether a given change in policy improves two individuals' welfare by examining whether each of them ranks the resulting outcome more highly than the preexisting situation, interpersonal comparisons of utility are not strictly possible. Whenever a change in legal rule would make some people better-off but others worse-off, it is necessary to make such interpersonal comparisons to determine whether the policy is helpful overall. As Kaplow and Shavell point out, various methods have therefore been suggested to get around the ordinality problem. *See id.* at 985 n.42. *See also* RAWLS, *supra* note 23, at 90–91 (arguing that at the present time, there appears to be no satisfactory solution to the ordinality problem, but refusing to rule out the possibility that one might be found eventually).

93. Rawls appears to suggest this possibility when he argues that wealth inequalities may be just if they result in making everyone better-off than they would be under an equal distribution. *See* RAWLS, *supra* note 23, at 62.

to become a value in and of itself in the social welfare function.<sup>94</sup> They state:

[S]ocial welfare may depend directly on how equally well-being is distributed among individuals. For example, as previously noted, more weight might be placed on the well-being of less-well-off individuals, in which case social welfare would tend to be higher if income were redistributed from the better-off to the worse-off (independently of whether the marginal utility of income for the worse-off were greater than that for the better off).<sup>95</sup>

By opening the door to redistribution as an independent value, however, Kaplow and Shavell allow *any* reason for counting some people's welfare more than others' to become a legitimate aggregating principle.<sup>96</sup> If, as they say, more weight may be placed on the well-being of some individuals because they are less well-off, then more weight might also be placed on the well-being of some individuals because they behaved justly, acted without government assistance, or were favored for some other reason.<sup>97</sup>

Such a social welfare function does not contradict Kaplow and Shavell's condition that the function be symmetric.<sup>98</sup> The symmetric

---

94. See Kaplow & Shavell, *supra* note 1, at 991 (describing the ways redistribution may affect welfare).

95. *Id.* See also *id.* at 988 (asserting that "the well-being of worse-off individuals might be given additional weight, as under the approach associated with John Rawls, wherein social welfare corresponds to the utility of the worst-off individuals").

96. Kaplow and Shavell may also be clouding the coherence of their definition of welfare, the "good" (as opposed to the "right," in the philosophical sense) in their theory, by including distribution. As Rawls states:

[I]f the distribution of goods is also counted as a good, perhaps a higher order one, and the theory directs us to produce the most good (including the good of distribution among others), we no longer have a teleological view in the classical sense. The problem of distribution falls under the concept of right as one intuitively understands it, and so the theory lacks an independent definition of the good. The clarity and simplicity of classical teleological theories derives largely from the fact that they factor our moral judgments into two classes, the one being characterized separately while the other is then connected with it by a maximizing principle.

RAWLS, *supra* note 23, at 25.

97. In fact, in an earlier publication, Kaplow and Shavell essentially acknowledged this point when stating:

Indeed, we do not formally limit the distributive principles that may be employed (the favored distribution could be utilitarian or egalitarian, or one could give more to Joe because he is tall and less to Jill because her preferences are objectionable), although, of course, the spirit of some of our arguments and others that could be adduced would narrow the range of plausible distributive principles substantially.

Kaplow & Shavell, *supra* note 52, at 237 n.2.

98. See Kaplow & Shavell, *supra* note 1, at 985-86 (stating that there is an underlying supposition "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").

requirement means only that the social welfare function does not count the welfare of some specific individual more highly than that of others.<sup>99</sup> The symmetric requirement does not bar social welfare functions from privileging the welfare of some *class* of individuals. Kaplow and Shavell expressly permit social welfare functions to take into account any factor that affects welfare, including income, ability, opportunity, and need, when determining how to aggregate individuals' well-being.<sup>100</sup> Factors that do not directly impact welfare may also be included so long as they apply to classes and not to named individuals, since Kaplow and Shavell also expressly permit social welfare functions to privilege the welfare of the class of less-well-off individuals above and beyond any effect on individual welfare.<sup>101</sup>

Kaplow and Shavell do state that social welfare functions must ignore factors that are not directly related to individuals' well-being.<sup>102</sup> They also state, however, that social welfare functions may account for the distribution of welfare, over and above how that distribution affects individual well-being.<sup>103</sup> Distribution of welfare apart from how that

---

99. Kaplow and Shavell specify:

With respect to the social welfare function . . . the *condition of equal concern* (or, equivalently, equal treatment) is the stipulation that the value of *W* does not depend on which individual has which utility level. This assumption rules out a function that favors a specific individual at the expense of others.

*Id.* at 986 n.43.

100. *Id.*

101. Particularly, they state:

[T]he distribution of income may matter to social welfare because it affects the distribution of well-being, and, under the welfare economic approach, social welfare may depend directly on how equally well-being is distributed among individuals. For example, as previously noted, more weight might be placed on the well-being of less-well-off individuals, in which case social welfare would tend to be higher if income were redistributed from the better off to the worse off (independently of whether the marginal utility of income for the worse off were greater than that for the better off).

*Id.* at 991.

102. They assert that:

[V]alue judgments underlie the assumptions that social welfare depends on individuals' well-being, that this dependence is positive, and that factors unrelated to individuals' well-being are irrelevant. In other words, to adopt welfare economics is to adopt the moral position that one should be concerned, positively and exclusively, with individuals' well-being.

*Id.* at 986.

103. In this regard, Kaplow and Shavell state:

[U]nder the welfare economic approach, social welfare may depend directly on how equally well-being is distributed among individuals. For example, . . . more weight might be placed on the well-being of less-well-off individuals, in which case social welfare would tend to be higher if income were redistributed from the better off to the worse off (*independently of whether the marginal utility of income for the worse off were greater than that for the better off*).

. . . .  
That is, under such [a redistributive] social welfare function, it is possible for social welfare to be higher when two individuals' levels of well-being are more nearly equal, even if the sum

distribution affects well-being, as with higher marginal utilities, is unavoidably a factor independent of individuals' well-being, yet Kaplow and Shavell permit such a factor in social welfare functions.

To see why this is true, imagine that Fran is a poor dairy farmer, and that Adam is a wealthy urban attorney. Fran owns and lives on a dairy farm, has plenty of fresh milk, and thus values an additional bottle at only \$1. Adam, who lives in the city, rarely has the opportunity to buy fresh milk and values an additional bottle at \$5. The difference in Fran's and Adam's marginal utility from an additional bottle of fresh milk comes from the concept of declining marginal utility.

Suppose that legal policymakers are considering a law that will have the effect of granting either Fran or Adam an additional bottle of fresh milk. A strictly utilitarian welfare function would advocate giving the milk to Adam, who values the next bottle of milk much more highly than does Fran, and since total social utility would therefore increase more if the bottle were given to Adam. What I will call a redistributive welfare function, however, of the type expressly permitted by Kaplow and Shavell, might value Fran's additional utility more highly than Adam's, strictly because Fran has less total utility (represented by wealth in my simplified example) than does Adam. The resulting decision to allocate the additional bottle of milk to Fran has nothing to do with the extent of the change in either Fran's or Adam's individual well-being.

By conceding that worse-off individuals' well-being may be privileged, Kaplow and Shavell are effectively approving social welfare functions of this type: "In a conflict between X and Y, count X's welfare more heavily if and only if X is worse off than Y or X and Y are equally well off." The extreme form of such a function would not count the better off individual's well-being at all, resulting in a function of this form: "In a conflict between X and Y, count X's welfare if and only if X is worse off than Y or X and Y are equally well off." Such a social welfare function imposes a condition on counting certain individuals' well-being in the social aggregate. The resulting social welfare function does not depend strictly on the change in individuals' well-being caused by a change in policy. Instead, the social welfare function measures the value of a change in policy in large part by extraneous factors, in this case, the preexisting wealth of the affected parties.

---

total of their well-being is the same. In contrast, under the utilitarian social welfare function, only the total utility matters, not the distribution of utility.

*Id.* at 991 & n.56 (emphasis added).

Kaplow and Shavell might respond that such a function still depends entirely on individuals' well-being, since the condition imposed is a function of preexisting *welfare*. But such an argument would constitute mere sophistry. The point of welfare economics, as Kaplow and Shavell themselves state, is to "guide society in its evaluation of legal policy."<sup>104</sup> Welfare economics, then, is concerned with change and its effects. The goal of welfare economics is to steer policymakers towards formulating legal rules that will increase individual well-being. A social welfare function that advises policymakers to discard a policy that would increase individuals' well-being in favor of one that would instead increase the equality of distribution of well-being is not concerned solely with individuals' welfare in any meaningful sense. Instead, such a function reflects a philosophical view that equality in distribution is a positive good, even if imposing a more equal society made everyone worse off. Regardless of what one thinks of such a philosophy's substantive merits, it is impossible to escape the fact that it is, by Kaplow and Shavell's own definition, a *fairness* viewpoint, one whose evaluations "are not based exclusively . . . on how legal policies affect individuals' well-being."<sup>105</sup>

To illustrate this point, imagine that our hypothetical farmer (Fran) and attorney (Adam) live in a Coasean universe in which transactions are costless.<sup>106</sup> If the policymakers, following the recommendations of a redistributive social welfare function, choose to grant the extra bottle of fresh milk to Fran, Adam will then purchase her right to that bottle for some amount between \$1 (the value she places on the bottle) and \$5 (his valuation), depending on their relative bargaining abilities. In other words, the parties themselves believe that they are better off with the bottle in Adam's hands. Can there be any doubt, then, that a social welfare function that is based on preexisting welfare or wealth is a function of something other than individual well-being?<sup>107</sup>

---

104. See *id.* at 967 (setting forth the text's thesis).

105. See *id.* at 1000 (defining fairness theories).

106. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (arguing that in a world without transaction costs, the initial distribution of entitlements would not matter because the parties would trade to achieve the efficient allocation of goods and services).

107. Kaplow and Shavell attempt to reconcile this conflict in a footnote, but the text of the footnote seems to highlight rather than eliminate the difficulty. They state:

Throughout this Article, we refer to welfare economics as employing measures of social welfare that depend only on individuals' well-being. What we mean by this expression is that, once a social welfare function is chosen (that is, once a judgment about aggregation is made), any two policies can be compared using only information about how each policy affects individuals' well-being. We note that there is some potential for confusion about our statement that social welfare depends only on well-being because of the very fact that one needs a method of aggregating information about individuals' well-being in order to make an overall assessment. In this sense, the evaluations under welfare economics do not depend

The end result of this analysis must be, I believe, that my characterization of Kaplow and Shavell's guidelines for permissible social welfare functions is correct. That is, social welfare functions fulfill Kaplow and Shavell's requirements if they (1) increase as a function of individuals' well-being and (2) do not privilege the welfare of specific individuals,<sup>108</sup> even if they do not always count everyone's well-being equally. Functions in the form "count X's welfare if and only if Z condition is met" are permissible so long as Z does not consist of a condition involving named individuals.

As I will argue more fully below,<sup>109</sup> permitting such functions fatally undercuts Kaplow and Shavell's thesis that policymakers should not consider fairness when forming legal policy. Policymakers have no choice but to consider fairness, as Kaplow and Shavell have defined the term (that is, as any mode of analysis whose recommendation is determined by some factor other than individual welfare<sup>110</sup>) in formulating the social welfare function, and the selection of the social welfare function will often determine the resulting substantive policy recommendation.

The authors might respond by formulating a narrower set of guidelines that exclude any considerations, distributive or otherwise, other than individual well-being. Such a shift would expose their argument to the powerful criticisms of the law and economics movement concerning the movement's alleged failure to consider the importance of distribution, criticisms they had circumvented by setting broader guidelines. In addition, they would then be left only with relatively minor variations of

---

purely on the data (facts) about individuals' well-being (as is familiar from the point that one cannot get an "ought" from an "is"). Our contrast with notions of fairness, however, concerns the data themselves. Under a notion of fairness, some information other than that about each individuals' well-being is given weight in a judgment about policy choice; that is, it is possible for two policies to result in identical levels of well-being for each individual yet for the judgment to differ. Under welfare economics, by contrast, the only information about a policy that is relevant is information about how it affects each individual's well-being.

Kaplow & Shavell, *supra* note 1, at 988 n.50 (internal citation omitted).

But of course, redistributive social welfare functions of the type Kaplow and Shavell expressly permit *do* give weight to information other than that about each individual's well-being in a judgment about policy choice; such functions consider those individuals' preexisting well-being as well. As explained in the immediately preceding paragraphs, consideration of anything other than marginal well-being reflects substantive policy goals separate and apart from increasing individual well-being.

108. See *supra* Part II.A.1.

109. See *infra* Part II.B (arguing that Kaplow and Shavell's substantive policy results fundamentally depend on the social welfare function selected).

110. See Kaplow & Shavell, *supra* note 1, at 1000 (defining fairness notions as "hav[ing] the property that evaluations relying on them are not based exclusively—and sometimes are not dependent at all—on how legal policies affect individuals' well-being") (emphasis omitted).

---

---

the traditional law and economics framework as permissible social welfare functions, a result I suspect they would find unsatisfactory.

Moreover, as explained earlier in this section, excluding other considerations from the social welfare function is, in itself, a decision about fairness. As Kaplow and Shavell appear to acknowledge, even the traditional law and economics social welfare model—counting each individual’s well-being equally—reflects particular values that can neither be supported nor refuted by welfare economics.<sup>111</sup> The debate over which values the social welfare function should reflect cannot be resolved by recourse to individual well-being or welfare economics. That debate must be resolved by philosophical, moral and/or religious systems of thought wholly external to welfare economics, precisely the same modes of analysis that Kaplow and Shavell seek to exclude from policymaking decisions. The result of their analysis, however, is merely to shift the focus of the fairness debate from concrete policy outcomes to a point earlier in the discussion: the method of determining whose welfare should count and for how much in the social welfare function. Far from being eliminated, the fairness debate remains determinative of substantive policy outcomes, as I will argue below.<sup>112</sup>

In the next few sections, I will posit some examples of social welfare functions and explain why they meet Kaplow and Shavell’s conditions, even though some of them incorporate notions associated with fairness theories. The purpose of these sections is to demonstrate the internal weakness in Kaplow and Shavell’s argument that stems from their attempt to incorporate distribution concerns. Because Kaplow and Shavell permit social welfare functions that embody fairness theories, their framework collapses in on itself, in the end permitting fairness theories to determine legal policy.

## 2. Wealth Maximization

The first example of a social welfare function I will discuss is standard wealth maximization. I will adopt Kaplow and Shavell’s definition: “maximizing the total dollar value of, or willingness to pay for, social resources.”<sup>113</sup> That is, under wealth maximization, social welfare is defined as the sum total of the value of all goods and services available, as

---

111. *See id.* at 986–88 (acknowledging that value judgments underlie welfare economics).

112. *See infra* Part II.B (arguing that the substantive policy analysis is dependent on the nature of the social welfare function being applied).

113. Kaplow & Shavell, *supra* note 1, at 995 (defining wealth maximization).

measured by people's willingness to pay for them. This social welfare function is strongly associated with Richard Posner's early writings.<sup>114</sup>

Interestingly, Kaplow and Shavell argue that this is not a qualifying social welfare function at all, despite its popularity with legal economists. First, they point out that to calculate wealth, one must have a set of prices, and there is no set of inherent prices to use.<sup>115</sup> Second, they claim that wealth, even broadly defined, is not synonymous with welfare, because wealth is not defined in terms of people's well-being.<sup>116</sup> Their argument is somewhat opaque. If prices are defined by what people are willing to pay, then the measure of what all people are willing to pay for the state of being that would be produced by a particular legal rule seems a reflection of the well-being produced by that rule. To take a highly simplified example, imagine a world in which there were only two goods—cake and ice cream. The world's wealth would then be determined by how much cake and ice cream it produced. Under wealth maximization, the world's welfare would be measured by the amount of cake, multiplied by the price of cake, plus the amount of ice cream, multiplied by the price of ice cream.

Kaplow and Shavell's complaint, then, seems to be that in actuality there are other, intangible factors that affect people's well-being that are not being taken into account. These might include leisure time or a taste for justice, to take only two examples. But these are also goods, though intangible ones. In a somewhat more diverse world that included these goods in addition to cake and ice cream, the value of these goods would be measured in the same way as that of cake or ice cream. Leisure for example, may be measured by the amount of wages people demand to give up their leisure time in exchange for work. Similarly, a taste for justice might be measured by the amount of taxes people are willing to pay for a more just government.

Kaplow and Shavell may be referencing a deeper criticism, however, based on the arbitrariness of the initial distribution of goods and services. It is the initial distribution of assets that determines people's ability to pay for the goods and services they want, so the initial distribution may have a large impact on prices. A person without resources may desire a twelve-bedroom house more than any other potential purchaser, but if she lacks the money to pay for it, her desire will not bid up the price. Although it may

---

114. *See id.* at 995–96 & n.68 (stating that Posner advanced wealth maximization as a goal some twenty years ago, but now acknowledges the impossibility of making economics a source of moral guidance).

115. *Id.* at 996.

116. *Id.* at 997.

be possible for this person to borrow money for the purchase price, a person without resources or significant income will find it very difficult to find a willing lender. Moreover, borrowing adds costs in the form of interest, reducing the net price our materially deprived but covetous buyer will be willing to pay.

As philosophers such as John Rawls have pointed out, the initial distribution of resources is entirely arbitrary.<sup>117</sup> Some people are born into wealthy families, receive excellent educations, and have the social and business connections to ensure them of ample career opportunities. Others are born into poor families or without families, attend inadequate schools in crime-ridden neighborhoods, and have social or business connections only with people who have no more resources than they. While it may be possible for someone born into a family without material resources to overcome these handicaps through extraordinary talent and hard work, there can be no doubt of the tremendous advantage conferred by fortunate birth. Moreover, talent and the capacity for hard work may themselves be the product of one's birth situation, including both genetics and environment. Since none of us has the luxury of choosing our family, this initial distribution is both economically and morally arbitrary, yet it may have a large impact on the social welfare calculus through its effect on prices.<sup>118</sup>

Nevertheless, there are moral and economic arguments in favor of employing some form of wealth maximization as the social welfare function. John Rawls has argued that inequality may be justified when it improves the situation of those who are worst off.<sup>119</sup> More practically, since the real world has an initial unjust distribution of goods, services, and abilities, wealth maximization may be a helpful social welfare function because it enables us to determine how to produce more goods and services to reallocate. Wealth maximization measures the utility of possible future states of affairs by people's willingness to pay for them, given their current ability to pay. Since people are willing to pay more for an outcome under

---

117. Rawls states:

The existing distribution of income and wealth, say, is the cumulative effect of prior distributions of natural assets—that is, natural talents and abilities—as these have been developed or left unrealized, and their use favored or disfavored over time by social circumstances and such chance contingencies as accident and good fortune. Intuitively, the most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view.

RAWLS, *supra* note 23, at 72.

118. *See id.* (describing Rawls' belief that the initial distribution of talents and other resources is morally arbitrary).

119. *Id.* at 78.

which they are better off, wealth maximization is in a very real sense a direct measure of welfare.

It is an imperfect measure, granted, in that it may overstate the interests of the wealthy. The wealthy have more resources with which to pay for goods and services, and so may have a disproportionate impact on prices. This impact may be analogized to a system in which the wealthy receive many votes per person, while poor people receive only one vote each. The social welfare measurement under the wealth maximization theory depends on prices, and prices are the product of competitive bidding. Because the wealthy have more resources, they can offer a price that more adequately reflects the intensity of their desire for a particular good or service. Poor people, on the other hand, will have greater difficulty mustering the resources to match their desires, so their desires may not be reflected as well in market prices. The wealth maximization social welfare function, then, will also disproportionately reflect the desires of the wealthy.

This problem may easily be overstated. The wealthy are relatively few in number,<sup>120</sup> so the market price for most goods and services should be determined predominantly by the much larger number of middle- and working-class earners.<sup>121</sup> The prices for luxury goods may be set almost entirely by the wealthy, but luxury goods are a relatively small component of the economy.<sup>122</sup> In reality, then, employing wealth maximization as the social welfare function may better be analogized to a system in which everyone gets one vote for national and state-wide elections, but in elections for town council positions in wealthy suburbs, votes are allocated in proportion to wealth. Such a system would give the wealthy some

120. Although it is difficult to reach a consensus on the definition of "wealthy," the U.S. Census Bureau reported that in 1999 only 12.3% of U.S. households earned \$100,000 or more. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, MONEY INCOME IN THE UNITED STATES 1999, at B-3 tbl.B-2 (2000), available at <http://www.census.gov/prod/2000pubs/p60-209.pdf>.

121. While it is again difficult to agree on definitions for terms such as "middle class" or "working class," the Census Bureau released the following income distribution for 1999:

Under \$9,999	\$10,000 to \$14,999	\$15,000 to \$34,999	\$35,000 to \$49,999	\$50,000 to \$74,999	\$75,000 to \$99,999	\$100,000 and over
9.2%	7.3%	26.8%	15.8%	18.4%	10.3%	12.3%

See *id.*

122. The definition of "luxury goods" is of course debatable, but it may be helpful to note that out of a total of some \$5.85 trillion spent in the U.S. in 1998, only \$90.6 billion (1.5%) was spent on new autos, \$367.9 billion (6.3%) on new clothes, accessories and jewelry and \$92.6 billion (1.6%) on computer goods and audio/video appliances. Only some subset of even these categories likely qualified as true luxury goods. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, at 457 (2000).

additional say in government, but this effect is likely to be pronounced only in matters that disproportionately affect the wealthy.

Regardless of the relative merits of wealth maximization,<sup>123</sup> it seems clear that Kaplow and Shavell believe it does *not* qualify as a social welfare function under their guidelines because wealth is not defined in terms of individuals' well-being.<sup>124</sup> Despite this belief, as I argue more fully in Part II.B, wealth maximization is the social welfare function that Kaplow and Shavell effectively employ when applying their theory to specific examples.<sup>125</sup>

### 3. Redistribution

The second example of a social welfare function I will apply is a redistribution function. In any calculation of the welfare of a social group, this function will count only the welfare of the member who is worst off. The identity of this member, of course, will shift over time, as the members' relative welfare changes. If a given policy will not affect the welfare of the member who is worst-off, then the function will count only the welfare of the member who is next worst off. The redistribution function will continue to move up the line of the social group members until it finds the least-well-off person who will be affected by the change in question. It is that person, and only that person, whose welfare will be counted by the function.

This redistributive social welfare function is inspired by the work of John Rawls.<sup>126</sup> Rawls contends that inequalities in wealth or income are just only if they lead to the advancement of the situation of the most disadvantaged.<sup>127</sup> In contrast to the utilitarian position, Rawls believes that

---

123. See discussion *infra* Part III.

124. See Kaplow & Shavell, *supra* note 1, at 997.

125. Kaplow and Shavell do state that wealth maximization may provide a useful framework for analyzing policy questions as a simplified approximation of welfare economics:

[I]t may be analytically useful to study models in which social welfare equals some simple wealth-like aggregate. In addition, maximization of wealth (defined, perhaps, with respect to current prices) may in fact reasonably approximate maximization of social welfare in many contexts. Thus, under welfare economics, although wealth is not in itself deemed to be valuable, analysis that assesses policies based on their aggregate impact on wealth will often prove useful.

*Id.* (footnote reference omitted).

126. See RAWLS, *supra* note 23, at 78 (arguing that inequality in distribution can be justified if it benefits those who are worst-off).

127. Rawls states this in a variety of forms:

Assuming the framework of institutions required by equal liberty and fair equality of opportunity, the higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society.

it is an insufficient justification to claim that the gains to the “winners” from some proposed inequality will greatly outweigh the costs to the “losers.”<sup>128</sup> Such logic can be employed only if the proposal will benefit those who are already in the most disadvantaged position. If a change in policy will not affect the worst-off, then Rawls applies the “lexical difference principle,” declaring that the policy is just only if it will improve the position of the next worst-off.<sup>129</sup> This rule continues to be applied until the policymaker finds the least-well-off individual who is affected by the change.<sup>130</sup>

I do not by any means claim that Rawls would endorse the specifics of the redistributive social welfare function as here defined.<sup>131</sup> To the contrary, Rawls might well prefer some sort of efficiency analysis in many substantive areas on the theory that such an analysis would improve the lot of the disadvantaged as a whole. For example, in a car accident between a poor but negligent driver and a relatively wealthy pedestrian, Rawls might advocate imposing liability on the driver in order to deter negligent driving even though the result would be to increase the wealth disparity between the individuals actually involved in the accident.

---

The intuitive idea is that the social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate.

*Id.* at 75.

We simply maximize the expectations of the least favored position subject to the required constraints. As long as doing this is an improvement for everyone, as we assume it is, the estimated gains from the situation of hypothetical equality are irrelevant, if not largely impossible to ascertain anyway.

*Id.* at 80. “Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.” *Id.* at 83. *See also id.* at 14–15 (asserting that “social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society”); *id.* at 62 (permitting “certain inequalities of wealth and organizational powers [that] would make everyone better off than in this hypothetical starting situation” of equal distribution); *id.* at 64 (“[T]he second principle insists that each person benefit from permissible inequalities in the basic structure. This means that it must be reasonable for each relevant representative man defined by this structure, when he views it as a going concern, to prefer his prospects with the inequality to his prospects without it.”).

128. *See id.* 64–65.

129. Rawls states:

[I]n a basic structure with *n* relevant representatives, first maximize the welfare of the worst off representative man; second, for equal welfare of the worst-off representative, maximize the welfare of the second worst-off representative man, and so on until the last case which is, for equal welfare of all the preceding *n*–1 representatives, maximize the welfare of the best-off representative man. We may think of this as the lexical difference principle.

*Id.* at 83.

130. *Id.*

131. Nor do I claim that Rawls would engage in welfare economic analysis at all. As stated in Part I, I employ social welfare functions that incorporate some version of a fairness ideology for heuristic purposes only, not to criticize the theorists discussed.

Rawls appears to see himself as a deontologist in the Kantian tradition.<sup>132</sup> He criticizes utilitarianism, arguing that behind the “veil of ignorance,” where people are stripped of all relevant characteristics such as class, wealth, and ability,<sup>133</sup> utilitarianism would not be chosen.<sup>134</sup> Utilitarianism is flawed, he contends, in part because it fails to distinguish between the quality of the desires when measuring the value of their satisfaction; a desire to discriminate, for example, is given the same weight as more benevolent desires.<sup>135</sup> In addition, he holds that, contrary to the utilitarian position, the deprivation of one person’s liberty cannot be exchanged for an offsetting benefit.<sup>136</sup> He concludes that “there is no reason to think that just institutions will maximize the good.”<sup>137</sup>

Nevertheless, there are strong consequentialist strains in Rawls’ writing. For example, Rawls writes, “[A]ll ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy.”<sup>138</sup> For this reason, I suspect Kaplow and Shavell would characterize Rawls’ theory as a “mixed form of evaluation,” a type they include in their criticism of fairness theories

---

132. See RAWLS, *supra* note 23, at 252–53 (pointing out the parallels between Kant’s view that “a person is acting autonomously when the principles of his action are chosen by him as the most adequate possible expression of his nature as a free and equal rational being” and Rawls’ own veil of ignorance formulation, and between Kant’s categorical imperatives and Rawls’ principles of justice).

133. See *id.* at 12. Rawls states:

Among the essential features of this [original] situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance.

*Id.*

134. Rawls asserts:

There is no reason to suppose that the principles which should regulate an association of men is simply an extension of the principle of choice for one man. On the contrary: if we assume that the correct regulative principle for anything depends on the nature of that thing, and that the plurality of distinct persons with separate systems of ends is an essential feature of human societies, we should not expect the principles of social choice to be utilitarian.

*Id.* at 28–29.

135. See *id.* at 30–31.

136. See *id.* at 61, 64–65.

137. See *id.* at 30 (defining the good as the “satisfaction of rational desire”).

138. *Id.* at 30 (distinguishing between defining deontological views as nonteleological, the definition Rawls advocates, and as views that characterize the rightness of policies independently from their consequences). Rawls further states:

We cannot, in general, assess a conception of justice by its distributive role alone, however useful this role may be in identifying the concept of justice. We must take into account its wider connections; for even though justice has a certain priority, being the most important virtue of institutions, it is still true that, other things equal, one conception of justice is preferable to another when its broader consequences are more desirable.

*Id.* at 6. He also notes that, “Ideally the rules should be set up so that men are led by their predominant interests to act in ways which further socially desirable ends.” *Id.* at 57.

whenever such theories lead to a result different from strict welfare analysis.<sup>139</sup>

Even though Rawls' theory is subject to Kaplow and Shavell's criticism, there can be little doubt that the redistributive social welfare function falls within their guidelines for permissible social welfare functions. As explained above, Kaplow and Shavell impose only the following limits on social welfare functions: (1) they must increase as a function of individuals' well-being and (2) they must not privilege the welfare of specified individuals.<sup>140</sup>

The redistributive function meets both these requirements. As to the first, the function will increase only as a result of a change in individuals' well-being. There are no other factors that are capable of increasing the function other than well-being. The function will not increase, for example, if there is more justice, love, or peace in the world, except as such a transformation directly affects the well-being of individuals. And as to the second, the redistributive function does not privilege the welfare of specific, identified individuals. Kaplow and Shavell's second prohibition does not bar functions from counting the welfare of some class of individuals more than that of others.<sup>141</sup> It only prevents functions from naming *specific* individuals.<sup>142</sup> A function that weighed the welfare of Bill Gates less than that of others would thus be prohibited, but a function that discounted the welfare of the wealthy would not.

In case there were some doubt about the redistribution function's qualification, Kaplow and Shavell specifically state that such a function would be permissible:

[T]he distribution of income may matter to social welfare because it affects the distribution of well-being, and, under the welfare economic approach, social welfare may depend directly on how equally well-being is distributed among individuals. For example, as previously noted, more weight might be placed on the well-being of less-well-off

---

139. See Kaplow & Shavell, *supra* note 1, at 969–70.

140. See *infra* Part II.A.1.

141. See Kaplow & Shavell, *supra* note 1, at 991 (holding that a social welfare function may place more weight on the welfare of individuals who are worse off).

142. They describe the requirement as follows:

With respect to the social welfare function . . . the condition of equal concern (or equivalently, equal treatment) is the stipulation that the value of [the social welfare function] does not depend on which individual has which utility level. This assumption rules out a function that favors a specific individual at the expense of others . . . This equality requirement does not, however, rule out attention to differences in income, ability, opportunity, need, and the like, as all these factors affect well-being and thus the level of utility.

*Id.* at 986 n.43.

individuals, in which case social welfare would tend to be higher if income were redistributed from the better off to the worse off (independently of whether the marginal utility of income for the worse off were greater than that for the better off).<sup>143</sup>

This passage clarifies Kaplow and Shavell's understanding of their two guidelines for social welfare functions as permitting differential weighing of individual welfare so long as the privileged individuals are selected by a category somehow related to welfare, and not simply by name. The passage also specifically approves social welfare functions such as the redistribution function that privilege the welfare of those who are less-well-off.

#### 4. Deontology

The third example of a social welfare function I will apply is a deontological function. Inspired by the work of Immanuel Kant, this function counts only welfare that is acquired without violating a deontological principle such as one of Kant's categorical imperatives.<sup>144</sup> For the purpose of simplicity in illustration, and to avoid elaborate discussions concerning the correct interpretation of Kant's work, the deontological social welfare function will take the following as its three fundamental principles:

- (1) Do not steal;
- (2) Do not break a promise; and
- (3) Do not cause harm to others.

---

143. *Id.* at 991. Kaplow and Shavell go on to explain in a footnote:

That is, under such a social welfare function, it is possible for social welfare to be higher when two individuals' levels of well-being are more nearly equal, even if the sum total of their well-being is the same. In contrast, under the utilitarian social welfare function, only the total utility matters, not the distribution of utility . . . . There is a debate about whether and to what extent social welfare should be taken to depend on the distribution of individuals' well-being . . . but this is a debate within the framework of welfare economics. That is, the debate is about how social welfare depends on individuals' well-being, not whether it should. However the debate is resolved, note that social welfare depends only on individuals' well-being; information on aspects of a situation other than their effects on well-being is irrelevant in assessing social welfare.

*Id.* at 991 n.56 (internal citations omitted).

144. See KANT, *supra* note 23, at 31 ("The categorical imperative would be one which presented an action as of itself objectively necessary, without regard to any other end."). See also 3 THE ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 27, at 95 (explaining Kant's notion of the categorical imperative).

I will elaborate on the interpretation of these principles as necessary as I apply them below.<sup>145</sup>

Kant, of course, is a deontologist, and his work represents the very target for Kaplow and Shavell. Kant is a fairness theorist, arguing that legal policymakers should avoid violating certain ethical principles even if the result makes society worse off.<sup>146</sup> Kaplow and Shavell want to banish such thinking from the minds of policymakers, contending that societal welfare should be policymakers' only goal.<sup>147</sup>

Nevertheless, despite the fact that Kant's views are anathema to Kaplow and Shavell, the deontological social welfare function fulfills Kaplow and Shavell's minimalist requirements, at least as I have construed them. To recap, I interpret Kaplow and Shavell as requiring only that social welfare functions (1) increase as a function of individuals' well-being and (2) do not privilege the welfare of specific individuals.<sup>148</sup>

The deontological social welfare function fulfills these two criteria. The function increases with individuals' well-being; the better off individuals are, the higher the value of the function. Under the function's rules, some individuals' welfare—that which results from violations of one or more of the three fundamental ethical principles—will not be counted, but it is individual welfare and individual welfare alone that can increase the function's value. In addition, the function does not privilege the welfare of specific individuals. Welfare resulting from violations of a

---

145. See *infra* Part II.B (applying the alternative social welfare functions to one of Kaplow and Shavell's policy examples).

146. See KANT, *supra* note 23, at 17. See also SANDEL, *supra* note 12, at 2 (observing that deontological theorists, such as Kant, accept that "[i]f the happiness of the world could be advanced by unjust means alone, not happiness but justice would probably prevail"). Kant states this position as follows: "[T]he moral worth of an action does not lie in the effect which is expected from it or in any principle of action which has to borrow its motive from this expected effect." KANT, *supra* note 23, at 20. He further states:

[E]verything empirical is not only wholly unworthy to be an ingredient in the principle of morality but is even highly prejudicial to the purity of moral practices themselves. . . . We cannot too much or too often warn against the lax or even base manner of thought which seeks principles among empirical motives and laws, for human reason in its weariness is glad to rest on this pillow. In a dream of sweet illusions (in which it embraces not Juno but a cloud), it substitutes for morality a bastard patched up from limbs of very different parentage, which looks like anything one wishes to see in it, but not like virtue to anyone who has ever beheld her in her true form.

*Id.* at 44.

147. As they clearly assert: "The thesis of this Article is that the assessment of legal policies should depend exclusively on their effects on individuals' welfare. In particular, in the evaluation of legal policies, no independent weight should be accorded to conceptions of fairness, such as corrective justice and desert in punishment."

Kaplow & Shavell, *supra* note 1, at 966.

148. See *infra* Part II.A.1.

fundamental ethical principle will not be counted, but this is true no matter the identity of the violator. The second requirement is therefore also fulfilled by the deontological function. As explained above,<sup>149</sup> a function of the form “count X’s welfare if and only if Z condition is met” is permissible so long as Z does not consist of a condition involving named individuals. A deontological function, in which Z consists of the condition that X’s well-being is not the result of X’s violation of a fundamental principle, falls within the guidelines.<sup>150</sup>

## 5. Anarchy

The final example of a social welfare function I will apply is an anarchic function. The anarchic function reflects the views of those who believe that the state has no right to rule and is inspired by Robert Paul Wolff.<sup>151</sup> In accord with this belief, the anarchic function will count individual welfare only when that welfare has been secured without the compulsory power of the state. Although it is unclear whether Wolff would support such a function,<sup>152</sup> refusing to count welfare that is the

149. See *infra* Part II.A.1.

150. Howard Chang has referred to attempts to discount welfare resulting from certain disapproved activities or motivations as “preference laundering” and has argued that such attempts fall outside the bounds of welfare economics, at least under Sen’s use of the term. See Chang, *supra* note 52, at 183–95.

Regardless of whether Chang is correct about Sen’s definition, there can be little doubt that this type of social welfare function falls within Kaplow and Shavell’s guidelines, as Chang appears to have recognized subsequently:

In their reply, Kaplow and Shavell suggest for the first time that their notion of welfarism would allow rankings to depend on more information than just individual utility levels. First, they assert that rankings under their framework could depend on information about individuals, so that social choices ‘could give more to Joe because he is tall and less to Jill because her preferences are objectionable.’

Howard F. Chang, *The Possibility of a Fair Paretian*, 110 YALE L.J. 251, 253 (2000) (quoting Kaplow & Shavell, *supra* note 52, at 237 n.2).

151. See generally ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* (paperback ed. 1976) (arguing that the right of the state to rule is fundamentally incompatible with individual autonomy).

152. Wolff’s argument in *In Defense of Anarchism* is confined to the philosophical position that the right of the state to rule is fundamentally incompatible with individual autonomy. He does not discuss the implications of this belief other than to say that citizens have no moral obligation to obey the state. See *id.* at 71 (explaining that embracing philosophical anarchism means “treat[ing] all governments as non-legitimate bodies whose commands must be judged and evaluated in each instance before they are obeyed”). Nevertheless, there are indications that he would sometimes advocate that an individual *choose* to obey the state, even when the particular command in question is against that individual’s interest. *Id.* at 18. Wolff argues:

[A]n anarchist may grant the necessity of *complying* with the law under certain circumstances or for the time being. He may even doubt that there is any real prospect of eliminating the state as a human institution. But he will never view the command of the state as *legitimate*, as having a binding moral force.

.....

product of state coercion seems a natural position for someone like Wolff who believes the state has no moral authority.

There can be no serious doubt that Wolff falls under Kaplow and Shavell's definition of a fairness theorist. Kaplow and Shavell define fairness theories as "having the property that evaluations relying on them are not based exclusively—and sometimes are not dependent at all—on how legal policies affect individuals' well-being."<sup>153</sup>

Wolff's theory that governments have no moral authority to command is based on a very strong notion of individual autonomy<sup>154</sup> and has nothing to do with the state's effect on individual welfare. Wolff argues that individuals have an unwavering duty to deliberate the morality of their actions.<sup>155</sup> This duty is not morally delegable to anyone else, although of course people can and do delegate this duty with some frequency.<sup>156</sup> For example, it is common to rely completely on a doctor in making medical decisions.<sup>157</sup> Nevertheless, individuals remain morally responsible for their

---

[A] community may agree unanimously on some principles of compulsory arbitration by which economic conflicts are to be settled. An individual who has voted for these principles may then find himself personally disadvantaged by their application in a particular case. Thinking the principles fair, and knowing that he voted for them, he will (hopefully) acknowledge his moral obligation to accept their operation even though he would dearly like not to be subject to them. He will recognize the principles as his own, just as any of us who has committed himself to a moral principle will, uncomfortably to be sure, recognize its binding force upon him even when it is inconvenient. More precisely, this individual will have a moral obligation to obey the commands of the mediation board or arbitration council, *whatever it decides*, because the principles which guide it issue from his own will. Thus the board will have authority over him (i.e., a right to be obeyed) while he retains his moral autonomy.

*Id.* at 18, 24–25. *But see id.* at 41–42 (noting that "[a] promise to abide by the will of the majority creates an obligation, *but it does so precisely by giving up one's autonomy*"). In any event, let me reiterate that my discussion of fairness theorists such as Rawls, Kant, and Wolff is for heuristic purposes only. I do not intend to suggest that any of them would engage in welfare economic analysis at all, much less select the social welfare functions I have defined.

153. Kaplow & Shavell, *supra* note 1, at 1000 (defining notions of fairness).

154. "The autonomous man, insofar as he is autonomous, is not subject to the will of another. He may do what another tells him, but not *because* he has been told to do it. He is therefore, in the political sense of the word, *free*." WOLFF, *supra* note 151, at 14.

If all men have a continuing obligation to achieve the highest degree of autonomy possible, then there would appear to be no state whose subjects have a moral obligation to obey its commands. Hence, the concept of a *de jure* legitimate state would appear to be vacuous, and philosophical anarchism would seem to be the only reasonable political belief for an enlightened man.

*Id.* at 19.

155. *See id.* at 12.

156. *See id.* at 14.

157. *See id.* at 15 (stating that a person committing oneself to the treatment regime prescribed by a doctor is an example of giving up independence of judgment with regard to a category of decisions).

decisions even when they have delegated the responsibility for making them to another.<sup>158</sup>

The defining mark of the state, according to Wolff, is the moral right to rule, the right to command and to be obeyed.<sup>159</sup> This moral right is fundamentally incompatible with individual autonomy.<sup>160</sup> An individual cannot give up the right to make decisions about one's own conduct to an outside agency without violating the moral duty of autonomy, the duty to make one's own moral decisions. As a result of this conflict, it is impossible for any state, no matter how it is organized, to obtain authority, the moral right to be obeyed.<sup>161</sup>

Even if the state unambiguously improves the welfare of humanity, it is nevertheless illegitimate.<sup>162</sup> An individual may choose to obey a particular dictate of the state for pragmatic reasons, but even patterns of obedience will not grant the state moral legitimacy, no matter how great a benefit such obedience confers on society.<sup>163</sup> Wolff's philosophy is premised on the moral duty of autonomy and is entirely independent of individual welfare. Wolff therefore falls clearly under Kaplow and Shavell's definition of a fairness theorist.

Despite qualifying as a fairness theory, the anarchist social welfare function falls within Kaplow and Shavell's guidelines for permissible social welfare functions. Social welfare functions fulfill Kaplow and Shavell's requirements if they (1) increase as a function of individuals' well-being and (2) do not privilege the welfare of specific individuals, even if they do not always count everyone's well-being all the time.<sup>164</sup> The anarchic function increases only as a result of an increase in individual welfare. As with the deontological function, some individual welfare will not affect the anarchic function one way or the other—in this case, welfare

---

158. According to Wolff, the point that one can decide to obey the commands of another without determining for oneself whether the command is a good one:

should not be confused with the false assertion that a man can give up responsibility for his actions. Evan [sic] after he has subjected himself to the will of another, an individual remains responsible for what he does. But by refusing to engage in moral deliberation, by accepting as final the commands of the others, he forfeits his autonomy.

*Id.* at 14.

159. *See id.* at 18 (stressing that "[t]he defining mark of the state is authority, the right to rule").

160. *Id.*

161. *See id.* at 19. Although Wolff in his main text argues that a unanimous democracy would resolve the conflict, *see id.* at 22–27, 69, he later concedes that a unanimous democracy is not a state in the relevant sense. *See id.* at 88.

162. *See id.* at 39–40.

163. *Id.* at 18.

164. *See supra* Part II.A.4 (arguing that not all individual well-being must count under Kaplow and Shavell's guidelines).

that is the result of state coercion. The anarchic function nevertheless qualifies under Kaplow and Shavell's rules. As explained above,<sup>165</sup> a function of the form, "count X's welfare if and only if Z condition is met" is permissible so long as Z does not consist of a condition involving named individuals. The anarchic function, in which Z consists of the condition that X's well-being not be the result of state coercion, falls within these guidelines.

In a footnote, Kaplow and Shavell argue that the symmetric requirement is broader than I have argued here. In particular, they contend that the symmetric requirement bars social welfare functions that employ certain libertarian principles:

We note that this value judgment about equal treatment . . . rules out not only schemes of evaluation that show favoritism toward particular individuals or groups, but also certain libertarian or entitlement-based principles, namely, those stipulating that it matters which individuals achieve particular levels of well-being. (As we explain in note 43, above, this equality requirement implies that social welfare is unaffected by switching the levels of well-being of two individuals.) The standard welfare economic framework is also inconsistent with many libertarian approaches because, although the latter are understood to require that particular rights be honored regardless of the consequences, under welfare economics only information about the effect of legal rules (including those that embody particular rights) on individuals' well-being may be considered in assessing those rules.<sup>166</sup>

It is unclear precisely to which libertarian principles Kaplow and Shavell are referring in this note. Although the anarchic function could perhaps be characterized as libertarian since it opposes government coercion, the function does not hold that it matters which individuals—in the sense of named individuals—achieve particular levels of well-being. Similarly, under the anarchic function social welfare is unaffected by switching the levels of well-being of two individuals. To the extent the note is arguing that social welfare functions may not attach conditions to counting individual welfare, the note is entirely inconsistent with Kaplow and Shavell's allowance of social welfare functions that discount the welfare of wealthy individuals.<sup>167</sup>

---

165. See *supra* Part II.A.1.

166. Kaplow & Shavell, *supra* note 1, at 987 n.45 (also explaining that libertarian rights justified on instrumental grounds count as welfare theories under their definition).

167. See *supra* Part II.A.1.

The note's second point is potentially more troubling to my argument if applied to social welfare functions because on its face it seems to rule out functions that privilege the welfare of particular classes of individuals. The note states that "under welfare economics only information about the effect of legal rules (including those that embody particular rights) on individuals' well-being may be considered in assessing those rules."<sup>168</sup> This language could be read to bar consideration of class membership (as a factor other than the effect of legal rules on individuals' well-being) when aggregating individuals' well-being. Under such a reading, the redistributive, deontological and anarchic social welfare functions would no longer qualify as proper aggregating functions. It appears, however, that the note is merely restating Kaplow and Shavell's definition of welfare theories, that they evaluate policies based on their effects, and not on whether they violate some fundamental principle. There is nothing in the note to suggest that Kaplow and Shavell are attempting to narrow the guidelines for social welfare functions. If the note is intended to narrow the guidelines, then the new guidelines exclude social welfare functions that privilege the welfare of less-well-off individuals, functions that Kaplow and Shavell expressly include.<sup>169</sup> As argued above, by allowing such redistributive social welfare functions, Kaplow and Shavell have opened the door to any social welfare function that attaches a condition to counting individual welfare, so long as that condition does not involve named individuals or groups.<sup>170</sup>

In any event, as I argue above,<sup>171</sup> even if Kaplow and Shavell excluded redistributive functions, along with any other social welfare functions that conditioned the counting of individual welfare, such a decision would in and of itself constitute a judgment about values, as Kaplow and Shavell concede.<sup>172</sup> Equality itself is a value judgment. Hiding the values debate by limiting permissible social welfare functions does not eliminate the need to have the debate. The principles of welfare economics cannot determine the outcome of such a debate; the value decisions involved must be justified by other, philosophical, arguments, the sort of arguments that Kaplow and Shavell would characterize as fairness

---

168. Kaplow & Shavell, *supra* note 1, at 987 n.45.

169. *See id.* at 991 (noting that "under the welfare economic approach, social welfare may depend directly on how equally well-being is distributed among individuals").

170. *See supra* Part II.A.1.

171. *See supra* Part II.A.1.

172. *See* Kaplow & Shavell, *supra* note 1, at 987 (recognizing that "[t]he choice of a method of aggregation involves the adoption of a view concerning matters of distribution").

ideologies because they do not hinge on individual welfare.<sup>173</sup> Because the outcome of this debate will, as argued more fully in the next section,<sup>174</sup> determine welfare economics' policy recommendations, Kaplow and Shavell have succeeded only in forcing policymakers to have the fairness debate in a somewhat different context. The authors have failed to weaken the critical importance of fairness theories.

#### B. APPLYING THE ALTERNATIVES TO THE TORT EXAMPLE

In the following sections, I demonstrate that the substantive policy outcome called for by welfare economics varies depending on the choice of social welfare function. I will analyze one of the legal policy issues discussed by Kaplow and Shavell—the tort example—and apply four different social welfare functions. Each social welfare function—which itself must reflect some fairness theory—produces different policy recommendations. Thus, I will show that welfare ultimately depends on fairness.

Kaplow and Shavell analyze a simplified tort policy issue in which individuals are both injurers and victims precisely one time each.<sup>175</sup> Unless the injurer takes a precaution, the injury in question will inflict harm of \$100 on the victim.<sup>176</sup> The cost of the precaution will sometimes be \$25 and sometimes \$150.<sup>177</sup> The authors consider three possible liability regimes: strict liability, negligence, and no liability.<sup>178</sup> Under strict liability, the injurer must pay for whatever harm is caused.<sup>179</sup> Under a negligence regime, the injurer must pay for the harm caused only if the extent of the harm is greater than the cost of the precaution.<sup>180</sup> Under the no liability rule, the injurer is never liable to the victim.<sup>181</sup> Kaplow and Shavell also assume that the negligence rule and the strict liability rule require that society bear some legal costs, which I will assume are \$5 and \$10 per incident, respectively.<sup>182</sup> Although Kaplow and Shavell go on to

---

173. *See id.* at 1000.

174. *See infra* Part II.B (applying different social welfare functions to a few policy problems posed by Kaplow and Shavell to demonstrate that the choice of the social welfare function often determines the policy recommendation).

175. *See* Kaplow & Shavell, *supra* note 1, at 1052–53.

176. *Id.* at 1053.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *See id.* at 1055 (explaining the authors' assumptions as to legal costs).

consider more complex iterations of this problem, this simple model should suffice for our purposes.

### 1. Kaplow and Shavell

Kaplow and Shavell argue that the choice of rule under welfare economics will depend on the cost of taking care and the relative legal costs associated with the negligence rule versus the strict liability rule.<sup>183</sup> Since Kaplow and Shavell assume for the purposes of simplicity that all accidents are reciprocal—that each person is an injurer and a victim exactly once—the best rule for everyone is the rule that minimizes total accident costs: the sum of the cost of the harm if suffered, the cost of prevention if borne, and any legal costs.<sup>184</sup> If the cost of taking care is low (\$25), then either the negligence rule or the strict liability rule is preferable, because either rule induces the injurer to take care and avoid the injury.<sup>185</sup> Faced with a choice between spending \$25 to take care and \$100 if they do not take care, injurers will take care and avoid the harm. Under a no liability rule, however, injurers would not take care, thereby imposing social costs of \$100. Since both the negligence rule and the strict liability rule induce efficient behavior, the most desirable rule is the one of these two that is cheaper for a court to apply.<sup>186</sup>

If the cost of taking care is high (\$150), however, then it is inefficient to take care and so the best rule is no liability. With a high cost of care, injurers do not take care regardless of the legal rule. The injury always occurs, inflicting harm of \$100. (Remember that each person is injurer and victim precisely once; there is no chance of a person causing or suffering from a second injury.) Under either a negligence or strict liability rule, though, legal costs are borne. The no liability rule is preferable because it avoids these costs.<sup>187</sup>

---

183. *See id.* at 1055–56 (explaining why any of the three rules could be best, depending on the cost of taking the precaution and the legal expenses associated with the rules).

184. *See id.* at 1054–55.

185. *See id.* at 1055 (arguing that if the costs of taking the precaution are low, then either the negligence or strict liability rule is preferable).

186. *See id.*

187. *See id.* at 1055–56 (contending that if the cost of taking the precaution is high, a no liability rule is superior).

The following chart summarizes the results of Kaplow and Shavell's analysis:

	<i>Negligence</i>	<i>Strict Liability</i>	<i>No Liability</i>
<i>Precaution is Cheap:</i>			
Cost to victim of harm caused:	\$0	\$0	\$100
Cost of Precaution Borne:	\$25	\$25	\$0
Legal Costs:	\$5	\$10	\$0
Per Capita Social Costs:	\$30*	\$35	\$100
<i>Precaution is Expensive:</i>			
Cost to victim of harm caused:	\$100	\$100	\$100
Cost of Precaution Borne:	\$0	\$0	\$0
Legal Costs:	\$5	\$10	\$0
Per Capita Social Costs:	\$105	\$110	\$100*

\* Rule yielding the lowest social costs.

## 2. Wealth Maximization

Despite the great lengths to which Kaplow and Shavell go in order to distinguish their more inclusive version of welfare economics from traditional wealth maximization,<sup>188</sup> their analysis of this policy problem reverts to the traditional form. Their analysis does not attempt to measure their expanded notion of welfare. Instead, they employ a price model, as though individual welfare were reducible to dollar figures.<sup>189</sup> Kaplow and Shavell do not discuss distribution concerns in this example, perhaps because they believe that assuming reciprocity eliminates any such possible concern.<sup>190</sup> It should be apparent, however, that distribution concerns may still appear in a reciprocal accident context. Although there is no distinction between the *class* of injurers and victims, there is no doubt a substantial distinction between some *individual* injurers and victims, and this distinction might well spawn distributive concerns. The fact that

188. See Kaplow & Shavell, *supra* note 1, at 996–97 (distinguishing their view of welfare from wealth maximization on grounds that wealth is not a well-defined concept with a natural set of prices and that wealth is not defined in terms of individuals' well-being).

189. See *id.* at 1052–56 (measuring welfare in dollars).

190. See *id.* at 1054 (stating that “in this perfectly reciprocal context, every individual will be identically affected by any legal rule, for each individual is once an injurer and once a victim”).

Wanda, who is wealthy, and Paula, who is poor, each take a turn in the role of injurer and victim may not eliminate the desire of a redistributivist to transfer some of Wanda's wealth to Paula by using tort law.<sup>191</sup>

Moreover, although they do not describe the social welfare function they are using, it seems clear that Kaplow and Shavell are applying traditional wealth maximization. In order to calculate which rule should be adopted, the authors simply add up the social welfare under each regime, measuring welfare in dollars and counting each member of society equally.<sup>192</sup> Although they do discuss distributive concerns in a later, nonreciprocal version of the tort example, distributive concerns make a concrete solution more elusive.<sup>193</sup> Even in the reciprocal context, the policy recommendation depends on a number of factors that affect per capita costs, including the desirability of inducing injurers to take the precaution and the magnitude of legal costs associated with each regime.<sup>194</sup> In the nonreciprocal context, analysts must balance the per capita cost factors, which will themselves often need to be weighed against one another, against possibly offsetting distribution concerns.<sup>195</sup> The end result will no doubt produce indeterminate results far more often than when distribution concerns—outside of those produced by decreasing marginal utility—are excluded.

### 3. Redistribution

Under Kaplow and Shavell's analysis (or under wealth maximization), the policy recommendation in the tort example depends on whether the cost

---

191. For an example of a legal rule that would effect such a redistribution, see *infra* Part II.B.1.

192. See Kaplow & Shavell, *supra* note 1, at 1054–56 (analyzing the relative advantages of each rule by adding up the dollar-valued welfare of society, counting each individual equally).

193. See *id.* at 1068–70 (arguing that in the nonreciprocal accident context, application of the welfare economic approach is more difficult because the weighted impact on the poorer class—generally assumed to be victims rather than injurers—must be balanced against other factors that make up per capita costs, so that it is possible, for example, for one rule to minimize per capita costs but for another regime to be better from a distributive standpoint).

194. Kaplow and Shavell state:

Let us now briefly explain why *any* of the three regimes could be the superior one. In essence, if the precaution is cheap (costs \$25) and is thus worth inducing, a rule of liability will be desirable if legal costs are not too large. Whether strict liability or the negligence rule will be better depends on which rule involves lower legal costs. If, however, the precaution costs \$150, individuals will be worse-off if they are induced to take care, and they will not in fact be led to do so under either strict liability or the negligence rule. Accordingly, a rule of no liability will be best because it produces the same outcome as the other liability rules with regard to behavior and harm, but no legal costs are borne.

*Id.* at 1055 (footnote references omitted).

195. See *id.* at 1069 (pointing out that “[i]n cases in which total costs are lower under one rule but the other is preferable on distributive grounds, either rule might turn out to be best, depending on the relative magnitudes of the two competing effects and how they are to be aggregated”).

of the precaution is low relative to the harm caused by the injury and on the relative legal costs associated with each regime.<sup>196</sup> Is this result the inevitable conclusion of welfare economics, or does it depend on the choice of a social welfare function? Do the policy recommendations differ under a redistributive social welfare function?

Recall that the redistributive social welfare function counts the welfare of only the least well off individual whose welfare is affected by the question at issue.<sup>197</sup> To determine welfare economics' policy recommendation under the redistributive social welfare function for the tort example, then, we must first discern the identity of the least well off individual in the example. Note that we are not seeking the *class* of people who are generally worse off. Such a class might or might not include the worst off individual. Instead, we are looking for the least well off individual even if that individual is a member of a class that is, overall, the best off. We might generally believe, for instance, that injurers are better off than victims, perhaps because better off individuals can afford to be more careless, or because they are more likely to own objects (such as automobiles or factories) that are likely to cause injuries to others, or simply by virtue of the fact that the victims have suffered from the injury. Even so, a particular injurer might be poorly off. In the car accident context, for example, the injurer might be an impoverished pedestrian who, lost in a haze of hunger and fatigue, wanders onto the highway and causes a multicar pileup.

Because we are concerned with the *particular* individual who is worst off, and not the *class* of such individuals, the reciprocity assumption does not have the same impact under the redistributive social welfare function as it did under wealth maximization. When we apply wealth maximization, reciprocity allows us to ignore distribution concerns, at least insofar as they involved classes of injurers and victims.<sup>198</sup> In contrast, under the redistributive social welfare function, because we are concerned with individuals and not with classes, reciprocity does not permit us to assume that the desirable solution is the one that minimizes per capita social costs. To the contrary, the choice of legal rule is independent of social costs. Instead, the selection of regime depends entirely on how each rule affects

---

196. See *id.* at 1054–56 (discussing which legal rule would be chosen by welfare economics).

197. See *supra* Part II.A.3 (defining the redistributive social welfare function).

198. See *supra* Part II.B.1 (stating that in the reciprocal accident context, the best rule for everyone is the rule that minimizes total accident costs: the sum of the cost of the harm if suffered, the cost of prevention if borne, and any legal costs, so long as we are concerned with classes of individuals).

the least-well-off individual. The rule selected must therefore be a function of the outcome for the worst-off individual.

The rule that maximizes social welfare as measured by the redistributive social welfare function is one that states that, in any given accident, if the victim is worse off than the injurer, the injurer must compensate the victim for the harm caused. If, on the other hand, the injurer is worse off than the victim, then the victim must remain uncompensated. This “poorer party wins” rule is not one of the three choices (strict liability, negligence, and no liability) that Kaplow and Shavell consider. Nevertheless, it is a rule courts are capable of applying to particular cases.

This rule causes people to take care only if they believe that they are reasonably likely to be the better-off individual in an accident. More specifically, an individual takes care when the extent of the harm caused, discounted by the probability that the person will be the better-off of the injurer-victim pair, is greater than the cost of the precaution. Note that under the redistributive welfare function we must speak in terms of the broad definition of welfare endorsed by Kaplow and Shavell, not a wealth definition that can be easily measured in money. Nevertheless, if for simplicity’s sake we apply the monetary measure used by Kaplow and Shavell in their example, a person takes the precaution when the precaution is cheap (\$25 rather than \$150) and when the probability that the person will be the better off individual is greater than 25%.<sup>199</sup>

As a result, assuming people can accurately assess the probability that they will be better-off than their victim, many people (the least-well-off 25%) will not take care. They will correctly decide that the expected gain from taking the precaution is less than the cost of the precaution because they are very likely to be worse off than their victim and therefore will not be required to pay for the harm caused. Many individuals—the victims of these 25%—will therefore suffer harm that would have been prevented under a wealth maximization regime. Nevertheless, the welfare of the least-well-off individual is improved under the redistributive function relative to the wealth maximization rule. The least-well-off individual will never have to compensate a victim for the harm caused, and will therefore

---

199. In this relatively simple version of the tort example, risk aversion is not a factor because each person has a certain chance of being the injurer and the victim one time each. See Kaplow & Shavell, *supra* note 1, at 1052 (describing an accident context in which injurers cause harm with certainty unless they act to prevent it and in which harm is perfectly reciprocal). I will therefore assume that individuals are risk neutral. If individuals were risk averse, the point at which people would choose to take the precaution would differ, but the substance of the analysis would remain the same.

---

never bear the expense of the precaution. The individual will, however, always be compensated for harm suffered from others when in the position of the accident victim. While under wealth maximization, the worst-off individual would expect to suffer no harm but would pay \$25 in accident prevention when the cost of prevention was low, under the redistributive function the individual can expect to suffer no uncompensated harm (perhaps no harm at all if the prospective injurer is one of the 75% who will take the precaution) and will not bear any prevention costs.

When the cost of taking the precaution is high (\$150), no one will take care regardless of how any individual's level of welfare compares to that of everyone else's. The high cost of taking care is greater than the expected benefit of taking care even for the individual who is best-off in society and who therefore will always pay for the harm she causes (\$100 in damages avoided by taking care versus \$150 of precaution expenditures). When the cost of care is high, some results are the same as those generated by wealth maximization: no one takes care and accidents always occur. The difference between the redistributive and wealth maximization functions when the cost of care is high are found only in the distribution of compensation payments. Wealth maximization advocates a rule of no liability, under which injurers never compensate their victims, and no one bears court costs.<sup>200</sup> In contrast, under the redistributive function, injurers who are better-off than their victims will have to pay compensation and everyone will bear court costs.

Under the redistributive social welfare function, then, both the recommended legal rule and the expected behavior of people under that rule are different from the corresponding results under wealth maximization. Under wealth maximization, when the cost of taking the precaution is low, the recommended rule is either strict liability or negligence, depending on legal costs, and all people are expected to take care.<sup>201</sup> Under the redistributive social welfare function, the recommended rule is to force the injurer to compensate the victim only if the injurer is better-off than the victim and only 75% of people are expected to take care. When the costs of care are high, the wealth maximization function advocates a no liability rule, while the redistributive function argues for a consistent rule regardless of the cost of care—namely, that the injurer compensates the victim when the victim is worse-off than the injurer.

---

200. See *supra* Part II.B.1 (describing the results of Kaplow and Shavell's analysis of the tort example when precautions are expensive).

201. See *supra* Part II.B.1 (describing Kaplow and Shavell's analysis of the simple tort example, which is identical to a wealth maximization analysis).

---

---

Under either function, when the costs of care are high, no one takes the precaution, and accidents always occur.

#### 4. Deontology

The deontological function also yields a different policy recommendation from Kaplow and Shavell's wealth maximization analysis. The deontological function, as I have defined it above for our purposes, counts individual welfare only if that welfare does not result from the violation of three fundamental rules: do not steal, do not break a promise, and do not cause harm to others.<sup>202</sup> Assume further that the rule against causing harm to others does not distinguish between intentional harm and accidental harm. The injurer has therefore violated a fundamental rule even if she would not be considered negligent—even if, that is, the cost of the precaution is high—and so injurers' welfare does not count in the social welfare total. Because the welfare of injurers never counts, the deontological social welfare function advocates a strict liability regime. Victims' well-being is enhanced if injurers must always compensate their victims. This compensation is "costless" to society because the decrease in individual welfare is a result of a violation of the fundamental rule against harming others and therefore will not count. The "efficient" rule under the deontological social welfare function, then, is strict liability, regardless of the cost of taking the precaution.<sup>203</sup>

Under this rule, individuals can be expected to take the precaution only when the expected cost of the precaution is less than the expected liability. Injurers will take the precaution and avoid accidents when the cost of the precaution is low (\$25) but not when it is high (\$150). When the cost of the precautionary measure is low, accidents will not occur because all injurers will take care. When the cost of the precautionary measure is high, accidents will occur, injurers will compensate their victims, and society will bear court costs. This result is nearly identical to the outcome under the wealth maximization function when costs are low, but different from the wealth maximization outcome when the costs of taking precautions are high. When costs are low, the wealth maximization function advocates either a negligence or a strict liability rule, and under either rule all injurers will bear the precaution costs and no accidents will

---

202. See *supra* Part II.A.4 (defining the deontological function).

203. Although this is a deontological social welfare function, we are still applying welfare economics, not deontology. Once we have calculated the social welfare resulting from different legal rules (using the deontological function), we choose the rule that results in the most social welfare, even if that rule violates some deontological principle.

occur.<sup>204</sup> The deontological function calls for a strict liability rule, and the result is also that all injurers will take care and no accidents will occur. When the cost of taking precautions is high, Kaplow and Shavell's analysis advises policymakers to adopt a no liability rule. Injurers will never take care, but the parties will never bear court costs.<sup>205</sup> The deontological function, on the other hand, advises a strict liability rule. Injurers will still not take care but will be forced to compensate their victims. Because victims will sue to receive compensation, the parties will incur court costs.

## 5. Anarchy

Just as with the previous alternative social welfare functions, the anarchic social welfare function recommends different legal rules from Kaplow and Shavell's analysis. The anarchic function counts only individual welfare that is not the product of government coercion.<sup>206</sup> Compensation payments the state forces injurers to pay victims therefore are not included in the calculation of total social welfare. As a result, under the anarchic social welfare function, the recommended legal regime will be no liability, regardless of whether taking precautions is cheap or costly. Once an injury takes place, any state-compelled compensation payments will be excluded from the social welfare calculation. Any such payments would reduce social welfare overall because the payments made by injurers would reduce social welfare by the amount of the payment, but the compensation received by victims would not increase it. In contrast, under wealth maximization, the actual payments represent a wash to the social welfare function. The loss to the injurer is exactly matched by the gain to the victim.<sup>207</sup> As far as the anarchic social welfare function is concerned, state-compelled compensation payments are like pouring money into a black hole; the money is spent without any measurable return. The legal costs associated with overseeing and compelling the payments also result in a pure loss to the system.

Under this rule, injurers will never take care because the expected cost of taking care (either \$25 or \$150) will always exceed the injurer's

---

204. See *supra* Part II.B.1 (describing the results for the tort example under Kaplow and Shavell's analysis when the cost of taking the precaution is low).

205. See *supra* Part II.B.1.

206. See *supra* Part II.A.5.

207. See Kaplow & Shavell, *supra* note 1, at 1054–55 (pointing out that “[a]ny amount of damages that [an individual] will pay as an injurer he will receive as a victim, so that actual damages payments do not directly affect individuals’ well-being, although they do so indirectly by influencing behavior”).

expected liability if there is an accident (\$0). In the absence of precautions, accidents will always occur, but no one will ever bear legal costs.

This result is quite different both in prescription and resulting expected behavior from Kaplow and Shavell's wealth maximization analysis. Recall that Kaplow and Shavell's recommendation depends on the cost of taking precautions: if the cost is low, they recommend either a negligence or strict liability regime, depending on the associated legal costs; if the cost of taking the precaution is high, they recommend a no liability regime.<sup>208</sup> Kaplow and Shavell argue that injurers will take care when the cost of care is low, but not when the cost of care is high. When we apply an anarchic social welfare function, however, welfare economics produces quite different results. Instead of sometimes recommending either a negligence or strict liability regime, welfare economics now advises that policymakers adopt a no liability regime, regardless of the cost of taking precautions. And instead of producing a world in which injurers do sometimes take care, at least when the cost of care is low, welfare economics under an anarchic function produces a world in which injurers never take care, regardless of how cheap the precautions are.

### C. CONCLUSION

Kaplow and Shavell argue that legal policymakers should ignore fairness criteria in favor of welfare because applying fairness criteria may result in policies that make people worse-off. In order to measure whether society as a whole, as opposed to some particular individual, is worse-off, however, we must first determine how to measure and count each individual's well-being in the social welfare calculus. The choice of this social welfare function cannot be determined by appeal to welfare economics. Instead, some fairness criteria must be used.

As I have just demonstrated with one of Kaplow and Shavell's policy examples, the selection of which social welfare function to employ determines welfare economics' substantive recommendations.<sup>209</sup> If

---

208. See *supra* Part II.B.1 (describing Kaplow and Shavell's analysis of the tort example).

209. Although I have applied the alternative social welfare functions to examples in only one of the substantive policy areas examined by Kaplow and Shavell, the same results would obtain if I discussed examples from the others. That is, the alternative social welfare functions would frequently produce different policy recommendations from Kaplow and Shavell's. For example, in their discussion of procedure, Kaplow and Shavell argue that civil suits should sometimes be subsidized. See Kaplow & Shavell, *supra* note 1, at 1173 (analyzing different possible outcomes based on the cost of care and the cost of suit). An anarchic social welfare function, however, would never recommend subsidizing civil lawsuits. Similarly, in their discussion of law enforcement, the authors advocate setting expected punishments equal to the expected value of the crime to criminals. See *id.* at 1250–52

---

fairness criteria decide which social welfare function to employ, and the social welfare function determines policy outcomes, then fairness criteria determine policy outcomes, even when we apply welfare economics.

### III. WHERE DO WE GO FROM HERE?

Kaplow and Shavell appear to have failed in their attempt to prove that legal authorities can and should exclusively consider welfare when determining policy. What does this failure mean for law and economics or economic welfare models generally? Does the inverse of Kaplow and Shavell's thesis hold true? Should we abandon economics in favor of fairness theories?

Clearly not. Economics alone is insufficient as a sole basis for determining policy, but it remains useful. Applying the wealth maximization social welfare model version of welfare economics gives us a very important piece of information: What legal regime would result in the greatest aggregate social wealth? Even under a narrow, materialistic definition of wealth, maximizing social wealth is an important policy goal. The extent of our wealth measures our ability to provide food, shelter, security, and leisure. In a very real sense, wealth equates to life. It is far too easy to dismiss concerns about maximizing wealth as gross materialism and to lose sight of the often direct translation between material goods and life.<sup>210</sup>

At the same time, I am not advocating, as Kaplow and Shavell do, that wealth maximization replace all other forms of policy analysis. Wealth maximization should be the *first* step in determining social policy. Welfare economics can supply critical information about the likely consequences on aggregate wealth of a proposed legal regime. Economics can also supply some insight into how changes in the legal rules will affect the distribution of wealth. But it is important to recognize that economic analysis is only the first step. We must then proceed to the debate about fairness, justice, mercy, theology, religion, and any and all other values or systems of belief.

---

(arguing that if the expected punishment is set equal to the benefit derived from the crime, no crimes will be committed). But a redistributive social welfare function would advocate exempting the worst-off individual from punishment in order to maximize that individual's well-being.

210. Here I am not referring only to the easy examples such as food or medical care. Owning a car may enable a worker to commute to work in fifteen minutes instead of riding a bicycle for an hour. That extra ninety minutes per day round trip adds up to 375 hours per year or over two weeks per year of extra time. For over fifty years of work, that amounts to an extra *two years* of life. Granting everyone in the United States an extra two years of life would equate to nearly *7.5 million lifetimes*. There is too little appreciation of how lives are at stake in virtually every decision about the allocation of material resources.

It is this values debate that tells us what sacrifices are desirable or permissible in order to improve or extend the lives of others or structure our world in a way that seems moral, right, and true to us. The values debate takes place always within the context of the information provided by welfare economics. The consequences of decisions are vital to determining their morality, but the consequences by themselves have no meaning independent of some moral framework.

