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## CAN LAW AND ECONOMICS BE BOTH PRACTICAL AND PRINCIPLED?

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'Be it my will that my justice be ruled by my mercy.' That is a prayer which we all need to utter at times when the demon of formalism tempts the intellect with the lure of scientific order.<sup>1</sup>

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### IV. CONCLUSION

The law and economics<sup>2</sup> movement today is in a vigorous ferment. In recent years, law and economics scholars have started to explore both the psychological and philosophical foundations of their discipline

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2. In this Article, "law and economics" means normative law and economics. Normative law and economics "recommend[s] changes that might improve" the legal system, while positive law and economics simply "explains[s] the legal system as it is" by charting its economic effects. A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS xiv (2d ed. 1989).

with a new seriousness.<sup>3</sup> Correspondingly, their proposals for reforming the legal system have begun to change. There is a sense afoot that adjusting the legal system to serve economic goals is more complicated than was previously appreciated and may require significant political or institutional changes. Some scholars respond to this development by scaling back their ambitions; they offer limited defenses of the current uses of economic techniques by government actors such as regulatory agencies. Others, however, still hope to extend the domain of economics into the common law. These more ambitious scholars are increasingly forced to consider policies of paternalism.

Consider the following proposals, all discussed by economically minded scholars within the past four years:

- An economist, reacting to experimental data showing that citizens (especially racial minorities) refuse to obey efficient rules for setting punitive damages in tort, concludes that this data supports proposals to entrust punitive damages to judges or to eliminate them entirely in some cases.<sup>4</sup>
- A prominent, moderate legal theorist mulls the idea of removing the tort system from the hands of citizens by transferring judicial and legislative power to unelected bureaucrats, reasoning that such bureaucrats could be trusted to further the economic goal of optimal deterrence “whatever ordinary people think.”<sup>5</sup>
- A psychologist, reacting to evidence of a popular distaste for utilitarianism, encourages parents to buy their children world-simulating computer games to overcome mental barriers to consequentialist thinking and encourages elementary schoolteachers to alter their curricula in order to teach pupils the moral precepts of utilitarianism.<sup>6</sup>
- Two Harvard law professors reason that “political actors” like judges, in response to “citizens’ limited capacities” to comprehend economic analysis, may need to hide the true bases of their decisions by couching their public statements in a “lan-

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3. The current debate about foundations has produced book-length contributions. See COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC AND PHILOSOPHICAL PERSPECTIVES (Matthew D. Adler & Eric A. Posner eds., 2001) [hereinafter COST-BENEFIT ANALYSIS]; Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001); BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000).

4. See W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313, 342-44 (2001); see also *infra* Parts II.D.1, II.D.3.

5. See Cass R. Sunstein, David Schkade & Daniel Kahneman, *Do People Want Optimal Deterrence?* 29 J. LEGAL STUD. 237, 250 (2000); see also *infra* Part II.D.2.

6. See JONATHAN BARON, *JUDGMENT MISGUIDED: INTUITION AND ERROR IN PUBLIC DECISION MAKING* 201 (1998); see also *infra* Parts II.D.4, III.C.

guage of fairness."<sup>7</sup>

These proposals reflect an important tension that affects law and economics today. The tension occurs as analysts try to reconcile the techniques of economics with an improving understanding of how people behave and of what they want from their legal system. The purpose of this Article is to describe this tension; to point out recent psychological evidence that sharpens it; and then to consider some prospects for resolving the tension, whether by paternalism or by other means.

In Part I, we identify a source of the tension—the current efforts to supply a plausible moral foundation for law and economics. After explaining the basic concepts used in economic analysis, we examine past attempts to provide a principled justification for using economics to reform the legal system. We suggest that these attempts largely failed, so that legal economists have generally proceeded without a well-articulated moral basis. Recently, however, scholars have begun serious efforts to pay off this overdue debt. In accord with several recent authors, we conclude that a good justification of law and economics must pass a two-part test; it must be both morally principled and feasible to apply in practice.

In Part II, we seek to add something to the debate by presenting empirical evidence that this test may be harder to meet than scholars have recognized. We outline psychological research suggesting that normal citizens may have *law-related preferences*—preferences about the content and fairness of their legal system. While law-related preferences are tough to measure in traditional market terms, we think the evidence for them is too strong to be simply ignored by economists, especially since they are likely to influence the behavior of jurors, litigants, and voters. Most intriguingly, the studies suggest that in certain cases people prefer that legal decisions not be made on an economic basis.

In Part III, we offer predictions about the further development of law and economics in light of the discipline's growing theoretical sophistication and the evidence of law-related preferences. The most compelling options are: (1) various forms of paternalism, whether by excluding citizens from participation in the legal system or by discounting some types of individual preferences from consideration in choosing policies, and (2) a limited implementation of economic techniques, applying them strongly in some areas of the law and not others. We also discuss ways in which paternalistic approaches may be counterproductive. We conclude by giving our answer to the question that both titles

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7. See Kaplow & Shavell, *supra* note 3, at 1319.

and motivates the Article.

### I. PRINCIPLED AND PRACTICAL COMMITMENTS IN LAW AND ECONOMICS

Most lawyers and law students are familiar with some of the policy recommendations made by different legal economists. Different scholars have argued that strict product liability should be replaced with a negligence rule;<sup>8</sup> that, to the contrary, product manufacturers should be subjected to a more pro-plaintiff standard of "enterprise liability;"<sup>9</sup> that the punishment for a given crime should be made stiffer as the likelihood decreases that violators will be caught;<sup>10</sup> and that corporate managers should sometimes be permitted to engage in insider trading of their own corporation's stock.<sup>11</sup>

Scholars commonly justify these changes in the law on the grounds that they would increase "social wealth" or "social welfare." But these are technical concepts borrowed from the discipline of economics. There has rarely been explicit discussion of how this jargon relates to appealing moral foundations. For example, do legal rules that increase "social wealth" thereby promote interests that Americans value? Conversely, when analysts do lay out their moral assumptions, it is often unclear how a judge or bureaucrat who is sympathetic to economic aims can put them into practice. How can a legal decision-maker with limited resources confidently maximize "social welfare" on a case-by-case basis?

Our aim in this part is to suggest what good answers to these questions should be like. As one touchstone, we will use the recent work of Louis Kaplow and Steven Shavell. Their important new article, *Fairness Versus Welfare*, defends a vision of law and economics that is founded on the moral assumptions of welfare economics, a field whose insights, Kaplow and Shavell claim, have not been fully incorporated into previous scholarship.<sup>12</sup> Kaplow and Shavell argue that economists should take account of all individual preferences about the legal system

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8. See GARY T. SCHWARTZ, *THE VITALITY OF NEGLIGENCE AND THE ETHICS OF STRICT LIABILITY* (1981).

9. See Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case For Enterprise Liability*, 91 MICH. L. REV. 683, 787 (1993).

10. See George J. Stigler, *The Optimum Enforcement of Law*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 55, 56 (Gary S. Becker et al. eds., 1974) (arguing that significant increases in sanctions would lead to greater deterrence).

11. See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 253-75 (1991) (offering economic critique of the restrictions on insider trading imposed by federal securities laws).

12. See Kaplow & Shavell, *supra* note 3, at 967-76.

and its objects, regardless of the content of those preferences.<sup>13</sup> Like a taste for "art, nature, or fine wine," Kaplow and Shavell argue, moral beliefs about the legal system should influence the policy choices made by legal analysts and decision-makers.<sup>14</sup> Our second touchstone is recent work by Matthew Adler and Eric Posner. Adler and Posner have, to date, made the most sophisticated attempt to connect common economic techniques to plausible moral principles.<sup>15</sup>

In Part I.A, we introduce a conceptual framework that distinguishes the moral component of a position in law and economics from the procedures that must be used to implement it. In Part I.B, we discuss the different moral principles that have been put forward as possible justifications for law and economics reform. This discussion concludes by presenting the leading moral positions in contention today: Kaplow's and Shavell's view that preferences should be satisfied regardless of their content, and the view of other analysts that only some preferences are morally relevant.

Next, in Part I.C, we explain the economic procedure of cost-benefit analysis, which has been the default technique used by scholars to choose among competing legal rules. We then describe the ways that recent scholarship in behavioral psychology has undermined many of the assumptions of traditional cost-benefit analysis. In Part I.D, we survey (and criticize) current attempts to develop improved procedures that incorporate better information about individual well-being than traditional cost-benefit analysis. Finally, Part I.E sets out problems that can arise when the moral positions favored by current analysts are combined with practical positions committed to using information besides market prices to measure preferences.

### A. *Moral and Practical Normative Questions*

#### 1. *Identifying the Commitments That Underlie a Position in Law and Economics*

Normative economic analysis presupposes a norm. However, the norms employed in economic analysis need not necessarily coincide with the moral norms endorsed by a correct philosophical theory. One may reasonably seek to identify and implement legal practices that maximize a certain attribute without treating that attribute as an ade-

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13. *Id.*

14. *Id.*

15. See Matthew D. Adler & Eric A. Posner, *Implementing Cost-Benefit Analysis When Preferences Are Distorted* [hereinafter *Implementing Cost-Benefit*], in *COST-BENEFIT ANALYSIS*, *supra* note 3, at 269-309; see also Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 *YALE L.J.* 165 (1999) [hereinafter *Rethinking Cost-Benefit*].

quate philosophical criterion of the value of social arrangements. Thus, one might pursue a legal system that maximizes a particular attribute (call it a subgoal) because the subgoal seems to be a good proxy, a "second best" alternative, for one's real, ultimate norm (call it the goal). Or it may be best to shoot for the subgoal in practice if either the goal is difficult to measure directly, or if the goal is more politically controversial than the subgoal. Or a scholar may choose to present a model or formal analysis in terms of a subgoal simply because it is easier to understand than an analysis in terms of the goal. Finally, a particular subgoal might be a good proxy for a number of different goals, so that people with different fundamental beliefs could still agree on the value of analysis that promotes that subgoal.

Recent law and economics scholarship is conscious of these distinctions. Professors Adler and Posner justify choosing regulations using the economic technique of cost-benefit analysis on the ground that cost-benefit analysis is a "decision procedure" that "says nothing at all [directly] about the moral worth of the project," but tends to promote morally good principles on the whole.<sup>16</sup> Lewis Kornhauser concurs that "it is inappropriate to consider cost-benefit analysis as a moral criterion;" instead, its moral apologists must "consider how cost-benefit analysis functions within [a] wider institutional framework" of government action.<sup>17</sup> It need not be "justifiable in isolation."<sup>18</sup> Kaplow and Shavell, who address normative issues at a more abstract level, claim that analysis of policies based on their effects on the norm of wealth can be morally valuable, even though "wealth is not in itself deemed to be valuable."<sup>19</sup>

A consistent terminology for these distinctions may be helpful. We will therefore propose a pair of terms that can be used to keep track of the different aspects of a legal economist's normative commitments. A complete proposal to reform the legal system on economic grounds would answer two questions. First, what substantive ethical or moral criteria should ultimately be used to evaluate the success or failure of the legal system? We will call this the *moral question*. Second, what type of economic decision procedure should be used in practice to identify legal rules that satisfy the relevant moral criteria? We will call this the *practical question*.

Though separable, the two questions are obviously connected. The analyst cannot answer the practical question—cannot choose a method,

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16. *Rethinking Cost-Benefit*, *supra* note 15, at 194-95.

17. Lewis A. Kornhauser, *On Justifying Cost-Benefit Analysis*, in *COST-BENEFIT ANALYSIS*, *supra* note 3, at 217.

18. *Id.* at 218.

19. Kaplow & Shavell, *supra* note 3, at 997.

a decision procedure—without having some idea of what ultimate criteria the chosen procedure ought to serve. Conversely, a moral goal that the analyst cannot connect to some sort of implementing procedure in the real world would be a doubtful guide for legal reform.

A legal analyst could select and defend a variety of *moral* principles. She might maintain that the legal system should foster efficiency or equality; fairness, wealth, or individual well-being; piety or revolution. The range of available answers to the moral question, we suppose, is chiefly constrained by the analyst's moral intuitions and those of the community.<sup>20</sup>

An analyst answers the *practical* question by deciding to use a particular decision procedure (or type of procedure) to pick and choose between different policies, such as competing legal rules. Notice that this choice itself involves the adoption of a standard—economic analysis, by its nature, must compare the relative quantities of some attribute present in different outcomes, so different decision procedures are characterized in part by the different data they emphasize.<sup>21</sup> Various candidates for this attribute include the satisfaction of preferences measured by willingness to pay as inferred from market transactions,<sup>22</sup> the satisfaction of preferences revealed in choice-making behavior generally,<sup>23</sup> and perhaps even psychological experiences of pleasure, if only they could be measured directly.<sup>24</sup> The attribute that guides the decision procedure may be treated as a mere subgoal, a proxy for the moral good, or it may be treated as a goal. For example, while choosing legal rules that maximize the satisfaction of preferences backed by willingness to pay might be sought for its own sake (the moral position

20. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 15 (5th ed. 1998) (“[T]he economist [cannot] tell us whether . . . consumer satisfaction should be the dominant value of society.”); HAL R. VARIAN, *INTERMEDIATE MICROECONOMICS* 529 (2d ed. 1990); cf. Kaplow & Shavell, *supra* note 3, at 986 (acknowledging that “to adopt welfare economics is to adopt the moral position that one should be concerned, positively and exclusively, with individuals’ well-being”).

21. See Tyler Cowen, *What a Non-Paretian Welfare Economics Would Have to Look Like*, in *ECONOMICS AND HERMENEUTICS* 285, 286 (D. Lavoie ed. 1991), reprinted in *ECONOMIC WELFARE* (Tyler Cowen ed. 2000) (noting that welfare economic theory “is concerned with the ranking of outcomes and must therefore focus upon the maximization of some attribute or set of attributes”); AJIT K. DASGUPTA & D.W. PEARCE, *COST-BENEFIT ANALYSIS: THEORY AND PRACTICE* 21 (1972) (“The decision-maker . . . is assumed to have an *objective function*, an entity which he aims to maximize. This objective function may be profits, or income, or net social benefits defined in a way so as to incorporate things other than income.”).

22. See, e.g., Richard Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); see also Richard Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J.L. ETHICS & PUB. POL’Y 85 (1985) (offering a qualified defense of applying the wealth-maximization norm in policy choices).

23. See *infra* notes 160-193 and accompanying text.

24. See, e.g., JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 34, 38 (1982) (arguing for reform of penal statutes to promote the norm of maximizing experienced pleasure and minimizing pain).

of wealth maximization), it might also be sought as a proxy for increasing everyone's well-being.

The above, we said, is a sketch of a *complete* position. However, much work in law and economics presents policy conclusions without giving fully-fledged answers to the moral and practical questions. For example, A. Mitchell Polinsky's popular primer *An Introduction to Law and Economics* presents economic models of legal rules in a simple, non-algebraic form that measures "all benefits and costs . . . in terms of a common denominator—dollars."<sup>25</sup> Polinsky then trades off these hypothetical dollar-denominated costs and benefits to determine the rule that maximizes the amount of net gains to society. He "emphasize[s] that this assumption [that costs are monetized] is made for expositional simplicity."<sup>26</sup> Thus Polinsky's primer presents a set of models that correspond most naturally to a particular answer to the *practical question* (the decision procedure of cost-benefit analysis, discussed at length below, which measures preferences by implication from market prices), but Polinsky takes no position on whether cost-benefit analysis is the best practical approach to choosing legal rules.

Similarly, Polinsky addresses certain problems that may arise when a policymaker seeks to trade off the goals of efficiency and equity in the legal system.<sup>27</sup> But the primer does not try to resolve the question whether a concern for equity is morally required, nor does it suggest which distributions of income should be regarded as equitable.<sup>28</sup> Polinsky refrains from selecting a moral aspiration, except to assert that efficiency is one value about which decision-makers should care.

Polinsky's primer, with its open-ended approach to moral and practical questions, is a fairly typical academic discussion of normative law and economics. In particular, the contributions of professional economists to legal policy analysis tend to be incomplete in order to emphasize their generality. These analysts model different legal contexts and point out mathematical relationships that hold true among the different costs and benefits involved, regardless of how those costs and benefits are measured. The aim is to develop insights that are applicable regardless of the moral and practical commitments held by decision-makers.<sup>29</sup>

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25. POLINSKY, *supra* note 2, at 10.

26. *Id.*

27. *See id.* at 7-10, 119-27 (defining "equity" as an attribute of the distribution of income in society, and recommending that equitable goals be accomplished through legislative tax and transfer programs, rather than through the design of legal rules).

28. *See id.*

29. *See, e.g.*, A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 295-96 (1987) (inviting "readers [to] modify the [normative] conclusions reached here in light of the values they . . . attach to principles of fairness," but expressing no opinion about whether such modification would be normatively desirable or undesirable). Obviously,

Incompleteness in defense of generality is often no vice.

But if law and economics is to create benefits through reform, then somebody must apply economic models to concrete situations. They must measure, compare, and make a decision. Even if proxies and estimates are used to gauge costs and benefits for the community as a whole, there is a concrete question whether any given proxy is sufficiently accurate for a particular society at a particular time. Perhaps the job of concrete economic analysis will not fall to the judiciary. Perhaps judges should be asked simply to apply statutory legal rules that the legislature has previously found to be justified on economic grounds. Nevertheless, this option simply means that the *legislature* must decide what the relevant costs are, how to weigh them, and whether a given legal rule will produce benefits if enacted in a particular state at a particular time. The freedom to adopt agnostic positions is not complete. Models presented in economic analysis are irrelevant unless it is conceivable that they could be applied, with some accuracy, by relevant actors like courts, legislatures, or government agencies in practical situations of policy choice. And conversely, the fact that models can be implemented is irrelevant unless we believe that their implementation would promote the principles that decision-makers perceive as important.

## 2. *Criticism of the Ideal of Completeness*

How much completeness, then, is necessary? That is, how much constraint does the requirement to be both principled and practical impose on law and economics? Cass Sunstein has argued influentially that common law judging is pervaded with “incompletely theorized agreements” about general principles, on one hand, and about the correct outcomes of individual cases, on the other.<sup>30</sup> In Sunstein’s view, the use of incomplete agreements is often indispensable as a matter of political reality.<sup>31</sup> For example, Sunstein suggests that political actors who share an agreement on a general principle (such as the wrongfulness of racial discrimination), but differ on its application to particular facts (such as affirmative action), can still see themselves as holding important things in common despite painful disagreements about individual outcomes.<sup>32</sup> Similarly, the ability of actors, such as appellate judges, to agree on specific outcomes in particular cases, but not on the large abstract principles that justify them, enables the legal system to resolve disputes

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Kaplow and Shavell’s *Fairness Versus Welfare*, *supra* note 3, exhibits no such agnosticism.

30. CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 35-61 (1996).

31. *Id.*

32. *Id.* at 35-36.

while minimizing political conflict.<sup>33</sup>

Recently, Sunstein has tried to extend this reasoning to law and economics. In his view, it may be justified in some cases to use economic decision procedures such as cost-benefit analysis to choose government regulations, despite the lack of a moral consensus on the desirability of the procedure.<sup>34</sup> Thus, he argues, "it should be possible for diverse people to agree on presumptive floors and ceilings [of monetary costs] for regulatory expenditures," even if those people doubt "that all questions of regulatory policy should be resolved by asking how much people are willing to pay for various social goods."<sup>35</sup>

Sunstein's contentions have merit. However, Sunstein also admits that the possibility of incomplete agreement has its limits.<sup>36</sup> In our view, there are several reasons that we should hesitate to accept highly incomplete justifications for legal reforms based on law and economics.

First, Sunstein defends a very open-ended style of decision-making that he calls "cost-benefit analysis."<sup>37</sup> As he notes, it differs from the more rigid form of "cost-benefit analysis" that is commonly taught—standard cost-benefit analysis does resolve policy questions by asking how much people are willing to pay.<sup>38</sup>

But to the extent that the procedure used for policy choice is highly malleable and flexible, it also becomes less distinctive and less of a guide. If our methods of economic analysis are allowed to become very loose-textured in order to secure incomplete consensus, there is a danger that law and economics will simply reduce to a rhetoric for carrying on policy discussions.

On the other hand, suppose we are considering an economic decision procedure that *is* fairly determinate, setting boundaries as to what data will be measured and how they will be compared. In that case, we may be hesitant to accept an incomplete justification because the future implications of accepting the procedure will be great. Sunstein is convincing when he discusses the value of incomplete agreements in securing consensus on abstract principles of justice, on one hand, and outcomes in particular legal cases, on the other.<sup>39</sup> But one can accept a vague principle without being bound to any particular future application of it, and one can accept the result in one case without being bound to

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33. See *id.* at 39, 41 (stating that incompletely theorized agreements about outcomes "help make law possible; they even help make life possible").

34. Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, in *COST-BENEFIT ANALYSIS*, *supra* note 3, at 223, 256.

35. *Id.* at 256.

36. *Id.*

37. *Id.*

38. See *infra* discussion Part I.C.1.

39. See *supra* note 33 and accompanying text.

the same result in a slightly different case. However, to the extent the procedure for an economic decision is determinate enough to be useful, it will presumably leave future outcomes much less open to maneuvering than either of Sunstein's examples. Political actors should therefore be leery about adopting such procedures without inspecting their moral credentials.

Finally, Sunstein's notion of incompletely theorized agreement is most persuasive when applied to a situation in which one group of citizens supports an economic procedure because it has been plausibly justified in terms of moral norm *A*, which they accept; while another group rejects moral norm *A*, but supports the procedure because it has been plausibly justified in terms of moral norm *B*, which the second group accepts. This presumes that *some* plausible moral arguments are forthcoming. In a situation where *no* plausible moral case had been made for a given procedure, an incompletely theorized agreement that the procedure is valuable should be much less likely, and perhaps less admirable.

These considerations suggest that a position with a fair amount of theoretical "completeness" on the moral and practical levels is still desirable in law and economics. The following parts of this Article consider some of the intellectual resources currently available to theorists who want to meet that goal. We begin with the moral question.

## *B. Past and Present Moral Positions in Law and Economics*

### *1. Wealth Maximization and its Critics*

Before the current ferment, legal economists last gave the moral question serious attention during a period of scholarly debate between 1979 and 1981.<sup>40</sup> The high-water mark in that debate was the 1980 *Hofstra Law Review* symposium on *Efficiency as a Legal Concern*.<sup>41</sup> That symposium's all-star participants included Guido Calabresi, Richard Posner, Ronald Dworkin, Duncan Kennedy, and Frank Michelman, among others.

The Hofstra symposium focused on a thesis that Richard Posner had first expressed in an article published the previous year.<sup>42</sup> Posner argued that "the economic norm [of] 'wealth maximization' provides a

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40. See Kaplow & Shavell, *supra* note 3, at 996 (describing Richard Posner's work from 1979 to 1981 as "the most sustained attempt by a legal scholar to defend a normative law and economics approach").

41. Symposium, *Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

42. Posner, *Utilitarianism, Economics, and Legal Theory*, *supra* note 22, at 103; *cf. id.* at 111 (summarizing claim that "the economic approach is less 'rejectable' than utilitarianism or Kantianism").

firmer basis for a normative theory of law than does utilitarianism" or autonomy-based ethical theories (which Posner termed "Kantianism").<sup>43</sup> He attempted to provide a principled *ethical* argument for wealth maximization; he was not simply arguing that wealth-maximizing procedures were proxies for a separate moral end.

Posner's argument had two prongs. First, he argued that "wealth maximization, especially in the common law setting, derives support from [a] principle of consent that can also be regarded as underlying the . . . quite different approach of Pareto ethics."<sup>44</sup> Posner's consent argument drew on the notion of "*ex ante* compensation," which still enjoys some currency among welfare economists. Posner reasoned that, while *individual* outcomes of policy choices that maximized wealth alone could be viewed as unacceptable to the losers, the outcomes would still be worthy of hypothetical consent if the individual could expect to enjoy net benefits from a series of such choices.<sup>45</sup> In the long run, if he would expect to "win" at least as much as he would "lose" from choices under such a criterion, then the criterion could be treated as enjoying unanimous (hypothetical) consent.<sup>46</sup> Posner compared the hypothetical consent that he thought legitimated applying the wealth maximization norm to society to the consent (to a risk of losing) that a purchaser of a lottery ticket gives by choosing to make that purchase.<sup>47</sup>

At the same time, Posner argued that wealth maximization avoided the more extreme or "fanatical" implications that would follow from basing the legal system on a purely consent-based, "Kantian" substantive norm.<sup>48</sup> Because wealth maximization "assign[s] substantial weight to preferences," it was said to resemble utilitarianism in connecting ethical worth to the production of human happiness.<sup>49</sup> But by counting preferences only to the extent that they were registered (or could be registered) in *voluntary* transactions, wealth maximization also avoided some of the unattractive implications of theoretical utilitarianism.<sup>50</sup>

Professors Ronald Dworkin and Jules Coleman trenchantly criticized Posner's ethical arguments for wealth maximization in their contributions to the Hofstra symposium.<sup>51</sup> Dworkin's critique of the wealth

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43. *Id.*

44. Richard Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 488 (1980).

45. *Id.* at 491-92.

46. *Id.* at 492-93 & n.15.

47. *Id.* at 492.

48. *Id.* at 491-97.

49. Posner, *supra* note 44.

50. *See id.* at 497 (describing wealth maximization as "constrained utilitarianism," but as involving a constraint that "is not ad hoc but is supplied by the principle of consent," whose purpose is to "minimize coercion").

51. *Efficiency as a Legal Concern*, *supra* note 41.

norm was also developed in the contemporaneous article *Is Wealth a Value?*<sup>52</sup>

Dworkin rejected both what he called the "immodest version" of Posner's normative thesis (the claim that increasing wealth should be the *exclusive* criterion of ethical value), and its "modest version" (the claim that increasing wealth was one component of ethical value).<sup>53</sup> Dworkin focused attention on the hypothetical example of a simple, involuntary transfer of a good from one individual, *A*, to another individual, *B*, whose willingness to pay for that good, measured in dollars, is somewhat greater than *A*'s. Dworkin's point was that such a transaction, once it is analytically stripped of all non-wealth-related ethical characteristics (such as consent between the parties, or a net increase in personal happiness), is ethically inert—"no gain at all."<sup>54</sup> A wealth gain, considered strictly as such, is simply irrelevant to any ethical criterion worth valuing. Dworkin suggested that whatever intuitive plausibility the wealth maximization norm enjoyed was derived from the fact that wealth-maximizing transfers are sometimes correlated with increases in personal happiness or well-being.<sup>55</sup> The impulse underlying the wealth norm was a half-glimpsed utilitarianism.

Dworkin reached a similar conclusion in his Hofstra symposium piece, which focused on Posner's consent-based argument for wealth maximization.<sup>56</sup> First, Dworkin argued that the only type of consent that could be invoked to justify the wealth norm was hypothetical, or "counterfactual" consent.<sup>57</sup> But because such counterfactual consent was not *actual* consent, Dworkin stressed, it was "itself irrelevant to political justification."<sup>58</sup> Since legal rules help to fix entitlements, the adoption of a new rule frequently shifts wealth from some persons to others. Thus, in a typical situation of policy choice between different legal rules, many of the affected individuals would reasonably conclude that they will be losers from the adoption of a particular legal rule, and not just in the short term, but consistently so.<sup>59</sup> Actual consent to a given rule will typically not be forthcoming from a fraction of the population—perhaps from a majority. Dworkin's point was simply that one cannot justify a principle or procedure on the grounds that it is the

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52. Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980).

53. *Id.* at 201.

54. *Id.*

55. *Id.* at 200.

56. Ronald Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563 (1980).

57. *Id.* at 574-75.

58. *Id.* at 575.

59. Consider oligopolists faced with a proposed strengthening of the prohibitions of the Sherman Act, or polluters faced with a proposed lowering of the legal standard of proof needed to establish that their polluting activities are enjoined nuisances.

product of free choice, if the principle is not, in fact, chosen.<sup>60</sup> He concluded that "Posner's appeal to autonomy . . . is wholly spurious."<sup>61</sup>

Furthermore, Dworkin continued, to the extent Posner suggested that the losers from a wealth-maximizing rule *should* be viewed as consenting to the rule, he could only support *that* claim on the grounds that the net social gains from such rules would outweigh social losses.<sup>62</sup> In short, analysis of "consent" justifications for wealth maximization left one in the same place as did considering the wealth norm on its own merits. What Posner offered was "not an improved version of a Rawlsian argument, but a utilitarian argument only."<sup>63</sup>

What was the upshot of the 1979-1981 debate over first principles? In hindsight, it appears that the foundational position presented by Posner was significantly discredited. After 1980, it was increasingly difficult to defend wealth maximization as an answer to the moral question.<sup>64</sup>

Within a few years of the 1980 exchange, Judge Posner himself began to describe his allegiance to the wealth maximization norm in increasingly instrumental terms. By the time his 1985 essay *Wealth Maximization Revisited* was published, Posner had reached a revised position.<sup>65</sup> Posner acknowledged that he was "slightly more sympathetic" than he had previously been to criticisms of wealth maximization as an ethical principle.<sup>66</sup> He also acknowledged that it was "not a demonstrably or a universally correct ethic."<sup>67</sup> Indeed, he devoted part of his essay to discussing "the instrumental character of wealth maximization."<sup>68</sup> There, he explicitly linked the appeal of wealth maximiza-

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60. Dworkin, *supra* note 56, at 574-79.

61. *Id.* at 575.

62. *Id.*

63. *Id.* at 579. Jules Coleman's essay for the Hofstra symposium presented similar arguments against the principled use of wealth maximization. See Jules Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 521-23 (1980). Coleman argued, first, that compensation (whether *ex post* or *ex ante*, in the form of risk discounting) is not equivalent to consent, and that "knowledge of a risk does not always amount to either explicit or implicit waiver of a right or . . . an assumption of risk." *Id.* at 536-37 n.45. Moreover, Coleman argued, Posner could not provide persuasive grounds to believe that economically rational individuals under uncertainty would choose to pursue wealth-maximizing institutions and legal rules with anything like the degree of unanimity required to give such 'hypothetical consent' legitimacy. *Id.* at 539-40.

64. See, e.g., Kaplow & Shavell, *supra* note 3; Lewis Kornhauser, *On Justifying Cost-Benefit Analysis*, in COST-BENEFIT ANALYSIS, *supra* note 3, at 201, 217 n.41 (discussing "Richard Posner's proposal in the late seventies that common-law judges ought to maximize wealth," which "in effect proposed a cost-benefit criterion for judicial decision and . . . attempted to justify [it] . . . on general moral grounds," and concluding that Posner's attempted "justification largely failed").

65. Posner, *Wealth Maximization Revisited*, *supra* note 22.

66. *Id.* at 85.

67. *Id.* at 90.

68. *Id.* at 95-100.

tion to its instrumental tendency to produce happiness:

It is curious, but true, that to aim directly at maximizing happiness [through redistribution] . . . is self-defeating because it results in a poor and unhappy society. Wealth maximization is a more effective instrument for attaining the goals of utilitarianism than utilitarianism itself. Stated otherwise, wealth maximization is the correct rule of decision in a system of rule utilitarianism.<sup>69</sup>

Thus, Posner's position since the mid-1980s on the normative questions has not been sharply different from a "liberal" position such as that found in the early works of Guido Calabresi. Both Posner and the "early Calabresi" held that cost-benefit analysis of legal rules has instrumental value (i.e., it is a decent answer to the practical question), and that principles such as autonomy and fairness can also come into play, functioning as a sort of *ad hoc* veto on the results of cost-benefit analysis that can be used to align those results more closely with moral criteria.<sup>70</sup> Works like *Economic Analysis of Law*<sup>71</sup> and *The Costs of Accidents*<sup>72</sup> thus differ not in their basic moral and practical orientations, but in the details of their conclusions about the economic effects of particular legal rules, and their intuitions about how frequently moral or ethical concerns should trump the results of cost-benefit analysis.

Today Posner describes his moral position as corresponding to "the kind of vague utilitarianism, or 'soft core' classical liberalism, that one associates with John Stuart Mill."<sup>73</sup> Posner's utilitarianism is qualified by concessions to individual liberty in cases where strict utilitarian or other consequentialist reasoning would produce what Posner views as repugnant conclusions.<sup>74</sup>

Posner's sustained attention to philosophical foundations (and the absence thereof) has been the exception. Scholarship in law and economics after 1980 typically did not devote much energy to investigating moral foundations. There remained a wide scope for arguments that using cost-benefit analysis to choose legal practices was instrumentally related to maximizing individual utility, or promoting autonomy, or

69. *Id.* at 98. Posner also argued that wealth maximization tended instrumentally to promote norms of autonomy that he assumed were a component of ethical value. Posner, *Wealth Maximization Revisited*, *supra* note 22, at 99-102.

70. Compare POSNER, *supra* note 20, at 13-15, 238, 284-287, with GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 291 (1970) ("None of my criticisms of the fault system, based as they are on its failure to reduce accident costs adequately, would be decisive if the fault system found substantial support in our notions of justice.").

71. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998).

72. GUIDO CALABRESI, *THE COST OF ACCIDENTS* (1970).

73. RICHARD POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* xii (1999).

74. See POSNER, *supra* note 20.

whatever other norms were deemed to constitute a satisfactory answer to the moral question. But there were few attempts to justify law and economics in a rigorous way at its moral source.

That is changing. In recent years, authors have become more conscious of the moral and practical questions, and of the need for arguments to connect them. They present foundational moral principles that economic procedures are supposed to serve, and they give arguments defending their chosen principles over alternatives. All of the recent authors agree that a crucial moral criterion for analyzing legal policies is *individual well-being*.<sup>75</sup> But they propose differing conceptions of well-being. Kaplow and Shavell, whose approach we will describe as “comprehensive,” believe that the moral goal of well-being reduces simply to giving people (as a whole) what they actually prefer. Other authors, whose approach we will describe as “restricted,” think that the content of well-being is more circumscribed: some kinds of preferences that people hold should not be allowed to influence our conception of a good legal system.

## 2. *Well-Being: A Comprehensive Approach*

The legal system envisioned by *Fairness Versus Welfare*, based exclusively on well-being, will undoubtedly be one of the most widely discussed of the new foundational arguments. Indeed, Kaplow and Shavell’s article is arguably the most extensive presentation of a principled moral position that the law and economics tradition has ever offered. The broad outlines of their position are clear: “[L]egal rules should be selected entirely with respect to their effects [on human welfare, which is to say] on the well-being of individuals in society.”<sup>76</sup> Decision-makers should not give any independent weight to “notions of fairness” such as retributive justice, individual liberty rights, or the view that keeping promises is intrinsically good; those values “are not based exclusively . . . on how legal policies affect individuals’ well-being.”<sup>77</sup> In short, their answer to the moral question is that the legal system should take its moral direction entirely from what “economists refer to as welfare economics.”<sup>78</sup>

Kaplow and Shavell expressly agree with the chief point of the post-1980 consensus—that wealth maximization is not a satisfactory answer

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75. See, e.g., Kaplow & Shavell, *supra* note 3; see also *Rethinking Cost-Benefit*, *supra* note 15; *Implementing Cost-Benefit*, *supra* note 15 (articulating implications of their earlier work); Howard Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L.J. 173 (2000).

76. Kaplow & Shavell, *supra* note 3, at 967.

77. *Id.* at 1000.

78. *Id.* at 968.

to the moral question.<sup>79</sup> The two authors reject wealth as an “appropriate social goal,” noting that “wealth is not defined in terms of individuals’ well-being.”<sup>80</sup> They assert that a moral answer must consider the *distribution* of income while defining well-being, which wealth maximization does not do.<sup>81</sup>

The most distinctive aspect of Kaplow and Shavell’s moral position is its commitment to utilitarianism based on unrestricted preferences. As they define it, welfare is founded upon the notion of individual preferences: “[T]he primitive element for analysis of an individual’s well-being is that individual’s ordering of possible outcomes.”<sup>82</sup> Outcomes are placed in a numerical order that reflects whether “one outcome is preferred to another.”<sup>83</sup> Kaplow and Shavell adopt a generally inclusive attitude toward preferences, but hesitate to accept preferences that are difficult to measure by standard methods, or seem to diverge from the welfare implications of the rest of the preference-holder’s preferences.<sup>84</sup> The authors state that “[t]he notion of well-being used in welfare economics is comprehensive in nature. It incorporates in a positive way everything that an individual might value,” including goods, services, social realities, principles, feelings, and more.<sup>85</sup> They refuse to exclude any classes of preference from the definition of well-being because of objections to the *content* of those preferences.<sup>86</sup> Instead, “[u]nder a welfare economic analysis, any actual preference is given weight because it reflects an individual’s actual well-being.”<sup>87</sup> In particular, Kaplow and Shavell refuse to exclude classes of preferences such as “other-regarding” preferences or malevolent preferences.<sup>88</sup> They note that to draw distinctions between good and bad preferences implies that it is proper to apply criteria that go beyond the satisfaction of actually held preferences.<sup>89</sup> Kaplow and Shavell’s rejection of the use of independent notions of fairness also implies rejecting the validity of such criteria.<sup>90</sup>

79. See *supra* notes 40-72 and accompanying text.

80. See Kaplow & Shavell, *supra* note 3, at 997.

81. See *id.* at 989-92.

82. *Id.* at 979 n.33.

83. *Id.*

84. *Id.* at 1339-50 (discussing objectionable preferences).

85. Kaplow & Shavell, *supra* note 3, at 980. Indeed, Kaplow and Shavell stress that “[t]he 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.” *Id.*

86. See *id.* at 1346.

87. *Id.*

88. See *id.* at 1339-43 (discussing malevolent preferences); Kaplow & Shavell, *supra* note 3, at 1343-46 (discussing other-regarding preferences); *id.* at 1346 (concluding that “there is no a priori basis under welfare economics for ignoring certain preferences”).

89. See *id.* at 1340.

90. *Id.* (“[S]uch an approach is troubling . . . because the moral force and appeal of welfare economics lies in promoting the actual well-being of people, not in advancing some hypothetical notion of satisfaction that is distinct from that of the individuals who are the object of our con-

The wide sweep of Kaplow and Shavell's acceptance of preferences, regardless of their content, is exemplified in their treatment of "tastes for fairness." The authors stress that if "individuals have tastes for legal rules that comport with some personally held notions of fairness," then such preferences will be taken into account in the welfare calculus, in proportion to their strength, just like any other preferences.<sup>91</sup> This concession is important. The studies that we will detail in Part II are probative of preferences about the legal system that are similar to the "tastes for fairness" considered by Kaplow and Shavell. We will suggest that Kaplow and Shavell's commitment to respect tastes for fairness must extend to the tastes about the legal system that we will describe.

### 3. *Well-Being: Restricted Views*

#### a. *Matthew Adler and Eric Posner*

In recent works, Matthew Adler and Eric Posner have presented an unusually full philosophical defense of using the procedure of cost-benefit analysis to choose between competing government regulations.<sup>92</sup> They begin by noting that previous economic literature has not provided a firm moral foundation for the cost-benefit procedure.<sup>93</sup> They argue that the application of cost-benefit analysis by agencies can be justified in terms of "a [moral] criterion with an impressive philosophical pedigree: *overall well-being*."<sup>94</sup>

Adler and Posner acknowledge that the traditional welfare economic view of well-being, which equates well-being to the satisfaction of preferences, reflects an important truth about well-being.<sup>95</sup> Well-being, they agree, must be in part a reflection of individual choice and desire.<sup>96</sup> But unlike Kaplow and Shavell, Adler and Posner adopt a "restricted-desire-based theory" of well-being: they argue that not *all* preferences

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cern.").

91. *Id.* at 1350.

92. *Rethinking Cost-Benefit*, *supra* note 15; see also *Implementing Cost-Benefit*, *supra* note 15 (providing another articulation of the theory). The different forms of cost-benefit analysis are discussed *infra* at notes 114-120, 144-155 and the accompanying text.

93. See *Rethinking Cost-Benefit*, *supra* note 15, at 167 ("The reputation of cost-benefit analysis . . . among American academics has never been as poor as it is today . . . . Many law professors, economists, and philosophers believe that [cost-benefit analysis] does not produce morally relevant information and should not be used in project evaluation.").

94. *Id.* at 195. Adler and Posner do not regard well-being as the only moral criterion relative to policy analysis, but they regard it as "morally relevant" to a significant number of policy decisions. See *id.* at 194-95.

95. *Id.* at 199.

96. See *id.* at 200.

have the quality that satisfying them increases the holder's well-being.<sup>97</sup> In particular, Adler and Posner are inclined to exclude "disinterested or morally motivated preferences" from the notion of well-being.<sup>98</sup> They argue that the moral force of the project of promoting individual well-being is reduced if "well-being" includes desires for choices and events that individuals do *not* regard as an improvement in their own situation, but feel compelled to favor for other reasons, such as moral reasons.<sup>99</sup>

*b. Howard Chang*

In the course of a recent scholarly exchange with Kaplow and Shavell, Howard Chang has presented philosophical arguments for basing the analysis of law on a "liberal theory of social welfare."<sup>100</sup> Thus, Chang's work also tackles the moral question. He sketches a particular theory of social welfare, but unlike Adler and Posner, he does not explore the practical question by linking his favored theory with an economic decision procedure that would best implement it.<sup>101</sup>

Chang rejects a moral position that identifies well-being with the satisfactions of whatever preferences individuals happen to hold. Instead, he believes that a sound moral position should exclude "external preferences"—preferences which do not have to do with an individual's own enjoyment of goods or entitlements, but instead have to do with "the assignment of goods and opportunities to others."<sup>102</sup> In Chang's view (following the philosophy of Ronald Dworkin), external preferences should be excluded from the moral goal because they "deny the equal concern and respect that utilitarianism owes all individuals."<sup>103</sup> For example, Chang accepts Dworkin's argument that an individual's preference that one racial group receive better treatment than another should be excluded from the measurement of well-being.<sup>104</sup> The intuition behind this view is that it is incompatible with the moral principle of equal regard for individuals to allow one citizen's prejudiced preferences about the fortunes of another citizen to influence the state's pol-

97. *Rethinking Cost-Benefit*, *supra* note 15, at 202.

98. *See Implementing Cost-Benefit*, *supra* note 15, at 276.

99. *See Rethinking Cost-Benefit*, *supra* note 15, at 199-200 ("The standard economic theory [of well-being] is wrong . . . because [an individual] might prefer the project to the status quo for all manner of reasons, including but not limited to her welfare.").

100. Chang, *supra* note 75. *But see* Louis Kaplow & Steven Shavell, *Notions of Fairness Versus the Pareto Principle: On the Role of Logical Consistency*, 110 *YALE L.J.* 237 (2000) (responding to Chang's arguments); *but cf.* Howard F. Chang, *The Possibility of a Fair Paretian*, 110 *YALE L.J.* 251 (2000) (offering a rejoinder to Kaplow and Shavell).

101. *See* Chang, *supra* note 75, at 177-78.

102. *Id.* at 183 (quoting RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 234 (1977)).

103. *Id.* at 185.

104. *See id.* at 183-84.

icy toward that second citizen.<sup>105</sup> Yet an unrestricted-preference policy requires that conclusion. Thus, Chang's moral position, like that of Adler and Posner, holds that the field of preferences taken into account by welfare economics must be restricted on ethical grounds.<sup>106</sup>

At the same time, the "external" preferences Chang would exclude from well-being are not coextensive with the "moral" and "disinterested" preferences Adler and Posner are inclined to exclude. Not all moral or disinterested preferences are external. As Chang notes, individuals who "prefer for moral reasons not to encounter pornography" in their daily lives offer a good example of a preference that is both moral and, in a relevant sense, personal.<sup>107</sup> Their preferences can be understood in a way that does not explicitly refer to the opportunities and lives of others.<sup>108</sup> Chang would count these preferences; Adler and Posner probably would not. And not all external preferences are moral: as Chang notes, some people might prefer to see their family or ethnic group receive special treatment due to simple feelings of sympathy and familiarity, not because they hold a moral or political view that informs that preference.<sup>109</sup> Chang would not count these preferences; Adler and Posner probably would. (It would, though, be a difficult question to decide whether such a preference is "disinterested" for Adler and Posner's purposes.)

These competing moral conceptions of well-being clearly differ in important ways. However, their true implications for the legal system turn on what procedures are available to implement them in practice. We now turn to that topic.

### C. *Past Approaches to the Practical Question in Law and Economics*

While the debate from 1979 to 1981 revealed gaps in the moral justification of law and economics, it had little impact on routine scholarly activity. The more theoretical scholars continued to favor "incomplete" analyses that assumed the existence of a valid measure of social welfare, and largely assumed away the task of how to assign welfare values in practice.<sup>110</sup> To the extent it was necessary to decide how to assign welfare values in practice, other scholars used tests based on maximiz-

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105. *See id.* at 195 (claiming that a social-welfare theory laundered of objectionable external preferences would "resist[] corruption by illiberal preferences and remain[] faithful to the motivating ideals that give this philosophy [welfarism] much of its appeal").

106. Chang, *supra* note 75, at 194.

107. *Id.*

108. *See id.*

109. *See id.* at 188.

110. *See supra* Part I.A.1 (discussing the previous work of Kaplow, Polinsky, Shavell, and others).

ing social wealth, measured by how much individuals are willing to pay for things.<sup>111</sup> This is the same procedure whose application to law was pioneered by Richard Posner. As we shall discuss below, it is closely related to the procedure of cost-benefit analysis, as taught in basic courses in welfare economics. (Following Matthew Adler and Eric Posner's terminology, we will call this *textbook cost-benefit analysis*.<sup>112</sup>)

The situation today is different. Even sympathetic scholars are paying sustained attention to the limitations of textbook cost-benefit analysis. They admit the necessity of developing methods of economic evaluation that do a better job of measuring individual well-being, thus creating a closer link between practical procedures and moral principles. But even these efforts usually take textbook cost-benefit analysis as their starting point, proposing various refinements to its framework. We therefore describe textbook analysis briefly here before looking at the recent attempts to refine it.

### 1. *Textbook Cost-Benefit Analysis*

Textbook cost-benefit analysis is "a way of evaluating policy programs by comparing their dollar costs against the market value of the benefits they provide."<sup>113</sup> In economic jargon, it employs a standard of Kaldor-Hicks efficiency as measured by willingness to pay. We summarize the steps below.

#### a. *The Concept of Willingness to Pay*

Textbook cost-benefit analysis measures losses and gains in proportion to the dollar values that the affected individuals would, or do, place on them. An individual who would pay \$500 for clean water is taken to have a stronger preference for clean water than one who would pay only \$300 for the same good. In practice, the analyst typically infers the relevant dollar values from observing the *prices actually paid* by individuals in market transactions for the goods affected by a policy change or goods related to them. If there is no market for a particular good that will be created or denied by a given policy, then the cost-

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111. See, e.g., Richard Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 762 (1988) (proposing the repeal of rent control statutes on the basis of wealth-based analysis; acknowledging the gap between wealth and individual utility, but asserting that "[t]he advantage of the wealth test is that it offers a very good proxy for subjective utility, which is not subject to strategic misrepresentation common with subjective demands not backed with dollars.").

112. See *Implementing Cost-Benefit*, *supra* note 15, at 280 (defining "textbook CBA" as "the sum of unweighted [compensating variations] based upon actual preferences").

113. Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 67 (1990).

benefit analyst "infers (as best he can)" the market price that "would be expressed *if* there was a competitive market price."<sup>114</sup> One method for doing so is to attempt to identify market goods related to the non-market good the analyst seeks to value, and then to extrapolate a price for the non-market good. Another possible method is to poll respondents about how much they would be willing to pay for a particular entitlement, *if* it were possible to buy it. All of these examples reveal that "market prices . . . play a central part in the valuation of benefits" in textbook cost-benefit analysis.<sup>115</sup> Kaplow and Shavell recognize that most commentators have regarded cost-benefit analysis as the primary economic method for comparing legal rules.<sup>116</sup>

*b. The Kaldor-Hicks Criterion*

The textbook cost-benefit analyst must make a decision after measuring the gains and losses from a policy. This decision, which evaluates the "goodness" of the proposed change, is performed through another jargon-laden test: *Kaldor-Hicks efficiency*. One applies the Kaldor-Hicks efficiency criterion by asking whether the winners from a possible policy change could *compensate* the losers from the change enough so that the losers would be indifferent between the status quo, on one hand, and the world of the new policy *plus* the compensation, on the other, while leaving the winners enough benefits left over that they still prefer their new (winning) status.<sup>117</sup>

As previously discussed, the use of cost-benefit analysis leads to choosing the policy option that the affected individuals would support with the largest net willingness to pay—in effect, the option with the highest dollar value. The monetary value of the benefits to the winners

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114. DASGUPTA & PEARCE, *supra* note 21, at 38.

115. *Id.* at 38-39.

116. Kaplow and Shavell write that "[m]any legal academics seem to be under the impression that wealth maximization is *the* economic measure of social welfare." Kaplow & Shavell, *supra* note 3, at 995. Using the criterion of wealth maximization to make policy choices is practically equivalent to making them by applying the textbook form of cost-benefit analysis. *Cf. id.* at 995-96 & nn.67-69; *see also infra* Part 1.D.2.b.

As Kaplow and Shavell note, wealth maximization means "maximizing the total dollar value of, or willingness to pay for, social resources." Kaplow & Shavell, *supra* note 3, at 995. Textbook cost-benefit analysis does the same thing. It identifies the amount of money that the individual would be willing and able to pay in order to get that option—in other words, its dollar value. It identifies the "cost" of a given option, in turn, with the amount in dollars that the individual would be willing and able to pay in order to get the *competing* policy options that he cannot get if the first option is chosen. *See* DASGUPTA & PEARCE, *supra* note 21, at 40, 47. In this way, textbook cost-benefit analysis simply selects the policy option that is supported by the largest (numerical) willingness to pay (i.e., backed by the most dollars). It is therefore equivalent to wealth maximization as defined by Posner.

117. *See* Hovenkamp, *supra* note 113, at 64-67; *Rethinking Cost-Benefit*, *supra* note 15, at 190-91.

from such an option will exceed the monetary value of the costs to those who lose from such an option. It follows that the winners from any policy that is chosen by cost-benefit analysis could fully compensate the losers and still have some surplus left—which is simply to say that any such policy satisfies the Kaldor-Hicks criterion.<sup>118</sup>

The great convenience of textbook cost-benefit analysis is that it purports to make it possible to compare how much well-being different individuals receive from the same policy by (as it were) simply adding and subtracting. Market prices provide the toehold that enables economic formalism to be applied in practice. Market prices are concretely measurable in the real world, and they provide a handy numerical measure of the relative strengths of different individuals' preferences, making tradeoffs possible.

Yet the simplicity of the textbook cost-benefit analysis procedure is offset by serious weaknesses. Note that the Kaldor-Hicks criterion used in textbook cost-benefit analysis evaluates whether the losers from a policy *could* be fully compensated by the winners. Actual compensation is *not* required and is not normally expected, although it could be paid in theory from general tax revenues. As many critics have pointed out, this fact makes the moral relevance of textbook cost-benefit analysis very debatable.<sup>119</sup>

Most crucially, weighing preferences for policies according to money means that the preferences of the rich count more. The effect of Kaldor-Hicks cost-benefit analysis is to give entitlements (e.g., the right to be protected by a legal rule) to the parties who would be willing to pay more (in dollars) for them. The measures of preference strength in this procedure are therefore subject to being distorted by what economists call "wealth effects;" a poor person might desire a good more than his wealthy friend, but cost-benefit analysis will give the good to the rich person because she will be willing to pay more for it.<sup>120</sup>

## 2. *Challenging the Consensus: Behavioral Research*

Beginning in the late 1980s, a forceful critique called into question

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118. See *Rethinking Cost-Benefit*, *supra* note 15, at 190-91.

119. See, e.g., *Rethinking Cost-Benefit*, *supra* note 15, at 190 ("Most economists appear to concede that the Kaldor-Hicks standard is not, by itself, normatively desirable."). The moral criticisms of Richard Posner's wealth maximization norm in Part I.B.1 also function as criticisms of the direct moral relevance of textbook cost-benefit analysis. Wealth maximization is essentially the moral view that a properly performed textbook cost-benefit analysis of a given policy omits no morally relevant information about that policy. Hence there is no need for intricate arguments to connect the cost-benefit analysis procedure to that moral norm, as (for example) Adler and Eric Posner must do as a result of their moral and practical positions.

120. See POSNER, *supra* note 20, at 13.

the working assumptions that underlie the "Posnerian consensus" among mainstream legal economists on the value of cost-benefit analysis. This consensus assumes that there is a reliable instrumental connection between the procedure of cost-benefit and moral values that decision-makers care about, and that there is little need for explicit argument to substantiate the assumed connection or to identify the relevant moral values. Herbert Hovenkamp, Robert Ellickson and others argued that there is little evidence that applying the techniques of textbook cost-benefit analysis to people's behavior will yield utility-maximizing legal rules.<sup>121</sup>

In this section, we examine the modern data that confirms this observation. This field of research, called behavioral psychology (or just behavioralism), documents traits of individuals' actual choice-making behavior that do not easily conform to the rational-actor model that is utilized by neoclassical economics.<sup>122</sup> In fact, behavioralism frequently identifies ways in which people's actual behavior can diverge *systematically* from the predictions of the old rational-actor model.<sup>123</sup> This raises the possibility of incorporating these predictable, though apparently irrational, behavioral choices into newer, more adequate models of the effects of different legal rules. In turn, analysts can employ these improved models to reach new conclusions about the legal system.<sup>124</sup>

The classical rational-actor model assumes that "a person . . . can rank possible outcomes in order of expected utility."<sup>125</sup> Roughly speaking, the model treats a person as if she ranked the different possible actions available to her according to how much she desired (or dreaded) each of the various outcomes that a given action might bring about, multiplied by how likely she believes each outcome is to occur.<sup>126</sup> The

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121. See Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989); Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 NW. U. L. REV. 4, 76 (1994).

122. See Ellickson, *supra* note 121.

123. See, e.g., Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously (I): The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously (II): Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999) (presenting evidence that product manufacturers can and do use advertising and marketing techniques to cause consumers regularly to underestimate the risks of product-related injuries); Christine Jolls, *Behavioral Economic Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653 (1998) (arguing that evidence drawn from human behavioral psychology suggests that legal rules that have the effect of redistributing wealth among parties distort work incentives less than income taxes with a similar redistributive effect).

124. See, e.g., Jolls, *supra* note 123 (arguing that behavioral inquiry into the respective incentive-distorting effects of legal rules and taxation raises "a pressing normative issue . . . [namely,] is it proper for government to rely on redistributive legal rules [instead of taxes] to achieve its distributive objectives?").

125. Ellickson, *supra* note 121, at 23.

126. See Shavell, *supra* note 29, at 2 nn.2-3 (providing a brief summary of the theory of expected utility).

model further assumes that when faced with such a choice, a person will choose the highest-ranked action—that is, “the course of action that will maximize his personal expected utility.”<sup>127</sup>

Behavioral research suggests two general ways that individuals’ actual choices either violate this model or require the analyst to add complications to it. First is the class of psychological results called *cognitive biases*. These are persistent “deviations and cognitive illusions” which lead individuals to make errors in evaluating the outcomes associated with different choices.<sup>128</sup> For example, individuals are subject to *framing effects*: they often make divergent choices when presented with what are really identical options, presented in a superficially different manner.<sup>129</sup> People respond differently to a hypothetical option that would “save” 200 people out of 600 than they do to an option that would “kill” 400 people out of 600.<sup>130</sup> Yet a rational actor would be indifferent between the same options.<sup>131</sup> As another example, individuals are also persistently subject to *confirmation biases*.<sup>132</sup> They fail to give weight to new information that challenges their beliefs about the likely outcomes of actions, because their thinking is irrationally dominated by those data that tend to support the views they already hold.<sup>133</sup> Many other examples could be given. Research on cognitive biases has an important impact on the work of economists and particularly on the value of cost-benefit analyses. It suggests that the choices individuals make (say, to purchase a particular good at a particular price) are often a poor guide to the utility that they receive from the outcomes associated with those choices.<sup>134</sup> Thus, to the extent that market prices reflect irrational cognitive biases rather than rational bargaining, they will be a poor measure of the strength of individual preferences.<sup>135</sup>

The burgeoning behavioral scholarship on *bounded self-interest* and *social norms* poses a second kind of challenge to the rational-actor model. The rational-actor model typically predicts that the parties to a sale, trade, or other transaction will each try to maximize their material gain from the transaction.<sup>136</sup> Scholars typically treat material incentives as more fundamental than whatever ethical or altruistic motives a per-

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127. Ellickson, *supra* note 121, at 23.

128. See Hanson & Kysar, *The Problem of Market Manipulation*, *supra* note 123, at 645.

129. *Id.* at 644-45.

130. See *id.*

131. *Id.*

132. *Id.* at 647-50.

133. See Hanson & Kysar, *The Problem of Market Manipulation*, *supra* note 123, at 647-50.

134. See *id.*

135. *Id.*

136. See Eric A. Posner, *Law, Economics and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1701 (1996).

son might entertain.<sup>137</sup> For example, the path-breaking analysis of entitlements in Ronald Coase's famous article *The Problem of Social Cost* is premised on the notion that, if an even slightly advantageous bargain is available to an individual, he will strike it, and to the extent he can appropriate the gains from the bargain to himself, he will do so.<sup>138</sup> In practice, however, it has become clear that individuals will often knowingly refrain from engrossing every penny from a transaction, apparently in order to leave a fair portion of the surplus for the other party.<sup>139</sup> Behavioral researchers have described these phenomena as a tendency to exhibit "bounded self-interest."<sup>140</sup>

Some economic analysts have sought to bring these observed divergences back within the reach of the rational-actor model by theorizing that individuals' maximizing behavior is constrained by *internalized social norms* of a more or less definite character.<sup>141</sup> A growing body of literature examines norms, developing theories of how they come to be and are perpetuated from individual to individual, and attempts to come up with ways to incorporate them into economic models.<sup>142</sup>

It is tempting to envision a connection, deep in the doctrinal structure of law and economics, between increased attention to behavioral research (and thus to the practical question) and the recent increased interest in providing philosophical defenses of the economic approach. Perhaps the previous complacency of law and economics scholars about analyzing the moral foundations of their reform proposals depended upon the premise that observing "revealed preferences" in the marketplace was an uncontroversial way to isolate effects on well-being—

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137. See, e.g., Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1577-78 (2000) ("Almost all economists . . . practice moral skepticism by exploring efficient institutional arrangements for rationally self-interested actors.").

138. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

139. See Christine Jolls, Cass R. Sunstein, & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, in BEHAVIORAL LAW AND ECONOMICS, *supra* note 3, at 13, 21-23 (describing the Ultimatum Game).

140. See *id.* at 16 ("[W]e use the term bounded self-interest to refer to an important fact about the utility function of most people: They care, or act as if they care, about others, even strangers, in some circumstances."); see also Ellickson, *supra* note 121, at 45-48 (discussing imposition of cultural norms on the rational-actor model).

141. See Kaplow & Shavell, *supra* note 3, at 973.

142. See, e.g., Cooter, *supra* note 137, at 1579 (proposing to "extend economics" to "chart the distribution, effects, and causes of internalized values"); see also Posner, *supra* note 136, at 1697; cf. Ellickson, *supra* note 121, at 45-48 (alteration in original) (presenting "a suggestive model of the internalization of culture"). Kaplow and Shavell make their own contribution to this genre, offering a speculative account of how inculcated social norms with a cultural or biological origin may account for the (to them spurious) appeal of notions of fairness to legal scholars. See Kaplow & Shavell, *supra* note 3, at 1021-24. *But see* Lawrence Mitchell, *Understanding Norms*, 49 U. TORONTO L.J. 177 (1999) (criticizing "the new norms jurisprudes" for adopting an excessively external and positivistic view of social norms that neglects the properly normative, obligatory quality of adherence to norms).

uncontroversial enough that an explicit defense was largely unnecessary.<sup>143</sup> To the extent that behavioral research has shown that people's actual choices often do *not* conform to the presuppositions of the rational-actor model, it has thrown the underlying assumptions about well-being into question as well. An independent definition of well-being—required by the data—requires a philosophical, and not merely economic, justification.

Whatever the reasons, it is clear that a new series of answers to both questions is emerging. Above, we discussed the principle of well-being. In the next section, we consider the ferment on the practical front—the ways scholars have proposed to turn the moral aspiration of promoting well-being into a practical reality.

#### D. *Contemporary Approaches to the Practical Question*

##### 1. *Adler and Posner's Improved Cost-Benefit Analysis*

Adler and Posner's discussion of the practical component of economic analysis is highly sensitive to the distinction between practical and moral goals. Adler and Posner agree with the critics of textbook cost-benefit analysis that the economic norm directly implicated in the procedure—Kaldor-Hicks efficiency—"lacks genuine normative import."<sup>144</sup> Therefore cost-benefit analysis (CBA) "itself must be recognized to lack normative significance."<sup>145</sup> Adler and Posner nevertheless support the use of cost-benefit analysis to choose legal rules in many circumstances, because, they argue, the procedure has an instrumental tendency to serve the value of overall well-being, which *does* have normative significance:

CBA is a decision procedure. It is a technique used by agencies for choosing between options, a technique whose justifiability must be evaluated in light of normative criteria with which CBA is only contingently connected. . . . [T]here is a genuine normative criterion that does plausibly justify the use of CBA, and that is the criterion of overall well-being.<sup>146</sup>

While Adler and Posner aim to defend the use of cost-benefit analysis in agency decisionmaking, they do not defend *textbook* cost-benefit

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143. See Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 73 (1990).

144. *Implementing Cost-Benefit*, *supra* note 15, at 1109.

145. *Id.* at 1110.

146. *Id.*

analysis.<sup>147</sup> Rather, they shoulder the task of “rethinking” cost-benefit analysis, and propose refinements that they hope will make it an attractive procedure for agencies to use to maximize well-being.<sup>148</sup> To revert to our framework, their work attempts to sketch the outlines of a satisfactory practical position.

For our purposes, there are three important differences between Adler and Posner’s ‘improved’ cost-benefit analysis and textbook cost-benefit analysis. First, as we have seen, Adler and Posner argue that an improved cost-benefit analysis should reflect certain moral limitations: it should not include all preferences as part of overall well-being.<sup>149</sup> It should try, to the extent that such precision is justifiable, to exclude the effects of moral or disinterested preferences from analysis, even if those preferences are backed by dollars.<sup>150</sup>

Second, improved cost-benefit analysis “might perhaps be refined to correct its endowment dependence:” that is, roughly, it might be refined to correct the problem of wealth effects.<sup>151</sup> Unfortunately, while Adler and Posner recognize the serious problems that wealth effects create for cost-benefit analysis, they can offer few solutions to the problems. They note that the ideal solution would be a method that begins by estimating (valid) preferences that are backed by willingness to pay, then changes the numerical weight of those preferences “by a factor inversely proportional to the wealth of the person affected,” thus equalizing the weight of the preferences of rich and poor.<sup>152</sup> Only *then* would an analyst trade off estimated welfare gains and losses.<sup>153</sup> Unfortunately, the development of this sort of weighting procedure has provided an almost mythical ideal for welfare economics, one that is still unrealized. As Adler and Posner admit, “[w]elfare economists have not yet, in fact, been successful in producing” any such weighting procedure.<sup>154</sup> Third, in light of economists’ inability to correct reliably for wealth effects, Adler and Posner conclude that improved cost-benefit analysis “must be confined to choice situations where endowment dependence does not cause too great a degree of inaccuracy.”<sup>155</sup>

An appraisal of Adler and Posner’s recommendation for using improved cost-benefit analysis to make policy choices must also take note of the fact that the authors are only concerned to promote “[t]he use of

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147. *Id.*

148. *See Rethinking Cost-Benefit*, *supra* note 15.

149. *See id.* at 202.

150. *See id.*

151. *Id.* at 224 (emphasis omitted).

152. *Id.*

153. *See Rethinking Cost-Benefit*, *supra* note 15, at 224.

154. *Id.*

155. *Id.*

CBA by [administrative] agencies,"<sup>156</sup> not by legislators, common-law judges or juries. The practical problems that we detail later in this Article seem likely to be particularly acute in the common-law context. Thus, they are less likely to apply to Adler and Posner's position than they are to the positions of Kaplow and Shavell and other analysts we discuss. Nevertheless, as the discussion in preceding sections has shown, many academics do not share Adler and Posner's apparent hesitation to intrude economic norms into the analysis and reform of the common law. As a careful and sophisticated attempt to refine cost-benefit analysis and to make it a valid practical procedure, Adler and Posner's work is relevant beyond the agency context. As we have also suggested, it is also still characterized by a number of problems.

## 2. Professors Kaplow and Shavell

Kaplow and Shavell do not commit themselves to a particular position on how analysts should aggregate the satisfaction of individual preferences to calculate the total welfare effects of a policy.<sup>157</sup> Their article represents a call for analysts to apply preference-based methods of decision-making to the exclusion of fairness concepts.<sup>158</sup> It does not, however, offer a single-best approach to the problems of trading off preferences in making policy decisions.<sup>159</sup> In our terms, Kaplow and Shavell's answer to the moral question is clearer than their answer to the practical one.

Nevertheless, the concept of preference is not self-defining. And in the course of describing the welfare economic framework, and in responding to anticipated objections, Kaplow and Shavell gradually reveal a practical position that is distinctive in its treatment of different possible preferences. We detail here some of the important aspects of that position.

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156. *Id.* at 168.

157. See Kaplow & Shavell, *supra* note 3, at 988.

158. See *id.* at 1315. Kaplow and Shavell state:

[W]ith regard to our primary audience of legal academics and other serious analysts of legal rules, the question is how best to conduct this enterprise over time, which is to say, how to design a research agenda. Such an agenda includes preliminary fact gathering and analysis, followed by an ongoing process of refinement and reformulation of hypotheses combined with empirical tests. The process exploits a well-recognized and important synergy between theoretical and empirical work. . . . In this setting, it is clear that the overall research program should be formulated by direct reference to . . . the advancement of individuals' well-being.

*Id.*

159. *Id.* at 988 (emphasis in original) ("[L]egal policy analysis should be guided by *some* coherent way of aggregating individuals' well-being.").

a. *Attitude Toward Orthodox Paretianism*

A notable feature of Kaplow and Shavell's position is their sympathy toward introducing into the normative analysis of law economic methods that go beyond the neoclassical analysis often presented as "welfare economics" in textbooks.<sup>160</sup> Traditional welfare economics gauges changes in individual utility by looking to revealed preferences (i.e., preferences expressed in individuals' observable choice-making behavior). The analyst does not look "behind" individuals' choice-making behavior to impose an objective value on utility changes.<sup>161</sup> Moreover, utility is assumed to be ordinal, not cardinal; direct interpersonal comparisons of utility are not permitted.<sup>162</sup>

Similarly, economists traditionally have not treated "preferences" as complex psychological entities. Instead, they have defined them in external terms, as a simple function of individuals' acts of choice.<sup>163</sup> This immensely simplifies the empirical problem of gathering data on the utility that individuals receive from particular options.<sup>164</sup> If individual Dori, upon being offered a choice of two alternatives *E* or *F* chooses *F*, then option *F* is deemed, as a matter of definition, to give Dori greater utility than option *E* did. The economist will assign a higher numerical utility value to *F* than to *E* in Dori's "individual utility function." An individual's utility function is the ordering of all of her (relevant) preferences in numerical order, according to the utility numbers that have been assigned to different outcomes in light of the individual's choice-making behavior. As long as each numbered outcome is preferred by the individual in question to all lower-numbered outcomes and no higher-numbered outcomes, the particular numbers assigned to each outcome are arbitrary, a matter of convenience for the economist. This is what is meant when economic measures of utility are described as "ordinal." The neoclassical approach continues to define

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160. See Tyler Cowen, *Introduction to ECONOMIC WELFARE* xiii (Tyler Cowen ed., 2000) (observing that "[m]ost economists pay lip service to . . . [traditional] Paretianism, and teach it to their classes" but use cost-benefit analysis to evaluate policies in practice); Kaplow & Shavell, *supra* note 3, at 998-99 (suggesting that their presentation may appear novel because "the [contemporary] welfare economic framework developed by economists has not been adequately presented in legal academic discourse").

161. See Cowen, *supra* note 160; see also VARIAN, *supra* note 20.

162. See Cowen, *supra* note 160.

163. See generally VARIAN, *supra* note 20, chs. 4, 7. Varian's leading undergraduate textbook summarizes the neoclassical approach by observing that "the theory of consumer behavior has been reformulated entirely in terms of consumer preferences, and utility is seen only as a way to describe preferences . . ." *Id.* at 54. The concept of preference, in turn, is only a way of describing actual choices: "[i]t follows from [the rational-actor] model of consumer behavior . . . that the choices [individuals] make are preferred to the choices that they could have made." *Id.* at 119-20.

164. See *id.*

orthodox welfare economics, as taught in university courses, to this day. It is also the approach to which Professors Kaplow and Shavell give allegiance—some of the time.

Even after the analyst has created all of the necessary individual welfare functions, the assumptions built into the neoclassical framework sometimes make it difficult to reach judgments about effects on *social* welfare—the total effects on all individuals' utility associated with a particular policy decision.<sup>165</sup> The main criterion of social welfare employed in neoclassical welfare economics is *Pareto efficiency*.<sup>166</sup> Under this criterion, Option *A* is superior (economists use the term 'Pareto-superior') to Option *B* if no one has lower utility in *A* than in *B* and someone has higher utility in *A* than *B*. In the welfare economics paradigm, this means that *A* is Pareto-superior to *B* if at least one individual prefers *A* to *B* and no individual prefers *B* to *A*.

The Pareto-superiority criterion has two advantages. First, because it is defined purely in terms of ordinal preference relations, it can be applied without making interpersonal cardinal utility comparisons. It is therefore adaptable to the empirical methods of neoclassical economics. Second, the Pareto-superiority criterion has generally been thought to embody an uncontroversial set of ethical commitments.<sup>167</sup> Intuitively, if someone would prefer a given social change to be made, and no one would prefer that it *not* be made, then we are likely to think that the change would represent an improvement. However, it *has* been questioned whether the Pareto criterion contradicts ethical or moral intuitions in some cases.<sup>168</sup>

The chief weakness of the Pareto-superiority criterion is that it cannot be used directly to evaluate sets of policy options when each option under consideration would cause gains to some individuals and losses to others. In such a situation, some individuals will prefer the status quo while others will prefer a change. Thus, no option will be Pareto-

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165. See Kaplow & Shavell, *supra* note 3, at 985-98.

166. See generally *id.*

167. See CATHERINE M. PRICE, WELFARE ECONOMICS IN THEORY AND PRACTICE 7 (1977) ("Pareto's analysis maintains near-universal acceptability by avoiding any controversial distributional judgment, though only by ignoring altogether this important facet of welfare.").

168. See Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970) (presenting a formal argument that the Pareto criterion is incompatible in principle with a liberal morality that would grant to each individual a minimal sphere of activity within which his/her will is sovereign). Kaplow and Shavell, of course, give the Pareto criterion pride of place in their normative theory. Their criticism of the principles of fairness emphasizes that giving independent weight to such principles logically entails (under certain other assumptions) that Pareto-inferior policy options—ones that every affected person finds less preferable than some other option—would be selected in some (perhaps purely hypothetical) circumstances. See generally Louis Kaplow & Steven Shavell, *The Conflict Between Notions of Fairness and the Pareto Principle*, 1 AM. L. & ECON. REV. 63 (1999) [hereinafter Kaplow & Shavell, *Conflict*]; cf. Kaplow & Shavell, *supra* note 3, at 1012-13 n.102 (giving an informal summary of the same argument).

superior to the others. A huge number of real-world policy choices have this form.<sup>169</sup> In short, Pareto-efficiency analysis cannot generally determine choices between different possible legal rules.<sup>170</sup> The judgment that one may wish to make in such cases is whether the gains experienced by some, in a given project, outweigh the losses undergone by others. If a cardinal measure of utility is available, the welfare economist can suggest a natural way of doing so: sum up utility gains and losses across all individuals, and select the policy option with the associated highest net value. But orthodox Paretian analysis rejects cardinal measures of utility and disallows such interpersonal welfare comparisons.

By contrast, Kaplow and Shavell acknowledge that applied policy analysis cannot be carried out unless ordinalism is supplemented by some method of making interpersonal utility comparisons: "Implicit in any social welfare function is a comparison of, and a way of trading off, different individuals' utilities."<sup>171</sup> While Kaplow and Shavell admit that the tools of welfare economics provide no "uncontroversial, verifiable way" to make such comparisons, they insist, on a somewhat weak note, that "there do exist coherent approaches to the task."<sup>172</sup> Apart

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169. See PRICE, *supra* note 167, at 19.

170. See POSNER, *supra* note 20, at 14-15 (observing that "the conditions for Pareto superiority are almost never satisfied in the real world," so that "[w]hen an economist says that . . . some . . . policy or state of the world is efficient, nine times out of ten he means Kaldor-Hicks efficient"). Kaplow and Shavell agree that the Pareto criterion has little direct application to particular problems of policy choice, but stress that it "nevertheless has powerful implications for what *criteria* for making policy choices one can plausibly employ." Kaplow & Shavell, *supra* note 3, at 1015 (emphasis in original). Again, this refers to Kaplow's and Shavell's formal argument that non-preference-based modes of evaluation should be rejected because they require one to approve certain policy changes even though all affected individuals would, in the imagined (*perhaps* real) situations, prefer the status quo to the change. See generally Kaplow & Shavell, *Conflict*, *supra* note 168.

171. Kaplow & Shavell, *supra* note 3, at 985 n.42.

172. *Id.* (citing, *inter alia*, JONATHAN BARON, *MORALITY AND RATIONAL CHOICE* 144 (1993), and John C. Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309, 317-20 (1955)). Kaplow and Shavell appear to be particularly attracted to Harsanyi's intricate work on interpersonal comparisons. Roughly, Harsanyi proposed that utilities could be compared by constructing a matrix, each of whose elements represents the effect of one competing policy upon one affected person. See Adler & Posner, *supra* note 15, at 206-07 (providing a slightly more detailed summary, which our summary closely tracks, of Harsanyi's proposal). The matrix will have as many elements as the number of competing policy options being weighed times the number of persons affected by it. *Id.* Each element represents a state: being *this* person subjected to *this* policy. *Id.* Then Harsanyi imagines that an impersonal observer could rank all of the individual states from most desirable to least, and that this could be used (with further manipulations) as the basis for a comparison of the overall welfare effects of each outcome on the population as a whole. *Id.* Despite the ingenuity of Harsanyi's proposal, the above description should suggest that there are significant difficulties in using it as a routine tool for comparing policies.

Another, older approach is associated with W. Armstrong, and involves arranging different outcomes in a scale according to which each one is 'barely preferred' to the ones above it. See DASGUPTA & PEARCE, *supra* note 21, at ch. 1.4 (describing Armstrong's theory). 'Bare preference' is taken as corresponding to a fixed magnitude that is assumed to be the same for each

from interpersonal comparisons, the authors also acknowledge that the analyst's choice of a numerical utility scale for each individual is constrained when the individual faces choices whose outcomes exhibit *uncertainty*.<sup>173</sup> In sum, while the preference framework of traditional welfare economics is still central for Kaplow and Shavell, the authors also envision an extension of more speculative conceptions of individual and social utility into the mainstream of law and economics, while retaining the preference framework.

*b. Attitude Toward Cost-Benefit Analysis and Wealth Effects*

Considering Kaplow's and Shavell's explicit rejection of wealth maximization as a moral norm,<sup>174</sup> one might expect that the authors would support modifying textbook cost-benefit analysis by adjusting preference strength to compensate for wealth effects, thus aligning cost-benefit analysis more closely with well-being.<sup>175</sup> Equally, one might attempt to gauge preference strength in a wealth-neutral manner by surveying individuals about their preferences and asking them to express their willingness to pay for certain outcomes or entitlements against a hypothetical budget that is the same for each person.

However, Kaplow and Shavell appear sympathetic to using simple wealth in practice as a proxy measure of social welfare. Economic analysis based on maximizing wealth, they argue, "may in fact reasonably approximate maximization of social welfare in many contexts."<sup>176</sup> Moreover, they argue that normative models that equate social

individual, and different persons' gains and losses can therefore (in theory) be measured against an interval scale of utility whose units correspond to the 'bare preference' relation. *Id.*

173. See Kaplow & Shavell, *supra* note 3, at 979 n.33, 985 n.42 (noting that when modeling choice under uncertainty, individual utility indices must obey von Neumann-Morgenstern axioms); see also DASGUPTA & PEARCE, *supra* note 21, at 31-32 & n.1 (explaining the von Neumann-Morgenstern index).

174. See *supra* notes 79-81 and accompanying text.

175. Cf. Kaplow & Shavell, *supra* note 3, at 992 n.58 (discussing the economic literature on optimal income taxation which attempts to incorporate a concern for the effects of the distribution of wealth).

176. Kaplow & Shavell, *supra* note 3, at 997. Kaplow and Shavell give no particular argument for this confidence that wealth maximization/orthodox cost-benefit analysis is a good approximation of social welfare; it appears to be a simple intuition about a rather thorny empirical matter. See also *id.* at 993 (asserting a belief that "many legal rules probably have little effect on the distribution of income"). Kaplow and Shavell's belief that cost-benefit analysis of legal rules may be helpful despite its omission of distributional effects may also derive from their often expressed view that legislatures are better placed than courts to fix distributional inequality. See *id.* at 994 n.65, 995 n.66. However, they offer no empirical support for the proposition that legislatures ever, in fact, perform Kaldor-Hicks corrections of private law maldistributions.

In our minds, the last word on such arguments, which have enjoyed currency for at least two decades, belongs to Duncan Kennedy. See Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND

welfare to "some simple wealth-like aggregate" may be useful for analytical purposes.<sup>177</sup> In both of these respects, "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."<sup>178</sup> Thus, Kaplow and Shavell are attracted to cost-benefit analysis not only as a theoretical tool, but also as an answer to the practical question.<sup>179</sup> At the same time, they appear willing to entertain other possible decision procedures as long as they are solely defined by their consequences and are primarily based on the satisfaction of actual preferences.

*c. Preferences: How Are They Identified?*

While Kaplow and Shavell reject content-based censorship of preferences, they do suggest that some preferences should be excluded from welfare calculations because of the circumstances in which they are elicited. Their qualms extend to several different types of potential preferences.

*i. Uninformed or Self-Defeating Preferences*

Behavioral law and economics challenges the revealed-preference framework by detailing the ways in which individuals' actual choices may not effectively promote their own well-being. One of the most important limitations on individuals' ability to maximize their own well-being is the difficulty of gathering and adequately processing information in real-life situations.<sup>180</sup> In Kaplow and Shavell's framework, this raises the possibility that an individual (call her Dori) might squarely choose policy *A* over policy *B*, even though Dori's other preferences suggest that she should prefer *B* to *A*. We would know this happened if a competent economist, drawing on sufficient empirical data about Dori's other preferences, would construct an individual utility function

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THE LAW 465, 469 (Peter Newman ed. 1998) ("Legislatures never, ever pass statutes that adjust tax and transfer programs to make up for the impact of modifications of private law rules (though of course they could if they wanted to).")

177. Kaplow & Shavell, *supra* note 3, at 997.

178. *Id.*

179. There is some tension between Kaplow's and Shavell's apparent attraction to cost-benefit analysis and their emphasis on the novelty and the moral attractiveness of the position they set out in *Fairness Versus Welfare*. Kaplow's and Shavell's frequent invocations of "well-being," and their attention-getting insistence that allowing decision-makers to employ norms of fairness risks "mak[ing] everyone worse off," and "stands in opposition to human welfare at the most basic level," lose some emotive punch if what norms of fairness "stand in opposition to" is a regime that, judging from the authors' remarks, might frequently involve choosing legal rules by textbook cost-benefit analysis. Kaplow & Shavell, *supra* note 3, at 1016, 1017.

180. See Jolls et al., *supra* note 139, at 14-15 (describing the effects of cognitive limitations on individuals' ability to respond correctly to incentives); cf. Kaplow & Shavell, *supra* note 3, at 1332 (noting that "there are limits to the amount of information that any individual can absorb").

for Dori that assigns a higher utility value to *B* than to *A*. Kaplow and Shavell's response is to trump the preference actually expressed by Dori, for Dori's own good.<sup>181</sup> That is, they would require the legal system to provide policy *B*, and not policy *A*, as long as *B* would satisfy Dori's other preferences to a sufficient degree to outweigh the actual loss (if any) to her welfare incurred in disregarding her uninformed choice between the two policies.<sup>182</sup>

Deciding which policy will maximize Dori's welfare in such a situation is not a straightforwardly empirical matter; it requires an exercise of judgment on the analyst's part. Once one acknowledges that a preference (or a decision intended to satisfy preferences)<sup>183</sup> can be "mistaken," the job of distinguishing "true" preferences from "irrational" or "mistaken" ones is essentially a matter of mutual adjustment of the data. The welfare economist draws on the available empirical information about individuals' desires (market prices, choice behavior, expressions of opinion, psychological principles, etc.) and postulates a pattern of underlying preferences that fit the data and imposes a psychological coherence on it.<sup>184</sup> To the extent an analyst discovers more and more data that tend to reflect the influence of a preference or choice that he has previously treated as "irrational" or "uninformed," he should tend to regard that preference as increasingly stable, non-anomalous, and entitled to increased weight in the welfare calculus.

## ii. Apparent Preferences That Are a Product of Framing Effects

In contrast to their limited consideration of uninformed preferences, Kaplow and Shavell are reluctant to give any weight to "preferences" that disappear or diminish in intensity when they are elicited by a trivially different stimulus. In particular, they state that opinion research into tastes for fairness is often of "limited value" due to such framing

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181. We assume for purposes of this hypothetical that the choice between policies *A* and *B* has no other welfare effects on third parties. Otherwise, if the welfare gain to others from choosing policy *B* might outweigh the benefits to Dori from policy *A* it might be proper to trump Dori's preference for *A* even if it were fully consistent with her other preferences and even if Dori were really a net gainer from policy *A* (contra the hypothetical).

182. See Kaplow & Shavell, *supra* note 3, at 1331 ("[P]roper welfare economic analysis takes these [informational] imperfections into account."); *id.* at 1332 ("[W]hen individuals' decision-making capacity is inherently limited, different legal rules may be appropriate.").

183. As Kaplow and Shavell note, the distinction between an individual who does not know how something will satisfy his preferences, and an individual who does not know what his preferences are, is merely "a semantic difference" that can be varied to suit the analyst's purposes. *Id.* at 1332 n.908.

184. See *id.* at 986 ("In several different respects, the approach of welfare economics involves value judgments.").

effects.<sup>185</sup> They believe that “preferences” that are products of framing effects are not preferences at all.

*d. How Should Preferences Be Measured?*

Kaplow’s and Shavell’s treatment of preferences also reveals a concern about the difficulty of gauging the strength of preferences that cannot be satisfied in market transactions. This concern is in some tension with the authors’ emphasis on the ability of welfare economics to take account of “everything that an individual might value,”<sup>186</sup> and their claim that welfare economics differs importantly from wealth maximization.<sup>187</sup>

For example, in the course of discussing the normative implications of welfare economics for procedural law, Kaplow and Shavell discuss research by E. Allan Lind, Tom Tyler, and other psychologists suggesting that individuals place significant value on legal procedures that are perceived as fair.<sup>188</sup> Kaplow and Shavell criticize Lind and Tyler for not trying to give a numerical value to individuals’ preference for procedural fairness by “simply asking how much, if anything, individuals would have been willing to pay . . . for greater participation or procedures that in other respects were viewed as fairer.”<sup>189</sup>

Indeed, Kaplow’s and Shavell’s concerns about non-market preferences extend to tastes for fairness generally. They observe that:

[I]t may be difficult to measure individuals’ tastes with regard to the fairness of legal rules. There usually do not exist market transactions that would provide a basis for quantifying individuals’ tastes for notions of fairness in the manner that their taste, say, for apples can be inferred from its market price.<sup>190</sup>

However, the authors note that one can get some insight into the values of hard-to-value goods by looking to the values of closely related goods or market goods bundled with the nonmarket good in question.<sup>191</sup>

A moral position as “encompassing” as the one Kaplow and Shavell

185. *See id.* at 1351 (asserting that the “unreliability of polling information is suggested by the sensitivity of responses to modest changes in the wording of the questions posed”); *see also* Kaplow & Shavell, *supra* note 3, at 1351 n.946 (discussing literature on framing effects, and divergences between willingness to pay for entitlements as expressed in opinion surveys, on one hand, and as actually observed in life, on the other); *see also supra* notes 128-131 and accompanying text.

186. Kaplow & Shavell, *supra*, note 3, at 980.

187. *See supra* notes 174-179 and accompanying text.

188. *See infra* notes 220-244 and accompanying text.

189. Kaplow & Shavell, *supra* note 3, at 1212-14 & n.613.

190. *Id.* at 1350-51.

191. *See id.* at 1351.

set out in *Fairness Versus Welfare* must, if it is to be consistent to its own premises, remain open to the existence of preferences expressed in non-market actions. Their statements indicate that they agree.<sup>192</sup> And such a system should be willing to accord non-market preferences significant weight in the social welfare calculus, as long as the reasonably available data suggest they are strongly held. If there are intrinsic difficulties in giving quantitative values to such preferences, then, we would argue, such difficulties do *not* imply that legal reform should go forward, ignoring non-market preferences and confining its attention to preferences that are easily weighed. That would subordinate the ethical imperative of promoting actual well-being to the intellectual desirability of simplifying problems enough that they can fit into a formal economic analysis, and yield clear results. That is not the spirit of welfare economics. That spirit, as Kaplow and Shavell stress against the theorists of fairness, draws its "moral force" from being "grounded in the actual situations of real individuals."<sup>193</sup>

#### *E. The Consequences of Privileging Preferences*

We have argued above that the normative application of law and economics requires much more explicit moral justification than it has received in the past. Contemporary authors like Kaplow and Shavell, Adler and Posner, and Chang have taken up that challenge, articulating moral theories that differ in important ways but retain a focus on the moral criterion of well-being. Our guiding question is whether they will be able to implement those moral principles adequately in practice.

We have already pointed out one serious problem. These new moral theories focus consciously on maximizing well-being, not social wealth. This underlines the need for practical procedures that can improve on textbook cost-benefit analysis by reducing the distortions caused by wealth effects. Yet as we have seen, despite increased attention to the problem and a good deal of hopeful prediction by Adler and Posner, and Kaplow and Shavell, there is little practical progress. Rigorous ways to go beyond market-price data remain few.

In Part II of this Article we will turn to two other problems to which the new theories must respond. We show that there is empirical evidence—much of it compiled by Kaplow and Shavell's fellow legal economists—suggesting that Americans have substantial preferences for perceived fairness and other values in the legal system. In addition,

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192. See, e.g., *id.* at 1350 (noting that the question of the strength of individuals' tastes for notions of fairness is an empirical question that is "best answered by statisticians and opinion researchers").

193. *Id.* at 1354.

there is evidence that Americans prefer not to have economic and utilitarian methods of decision-making play a large role in their legal system. If such preferences exist, they must be dealt with one way or another. We test the adequacy of Kaplow and Shavell's responses to the potential conflict that such preferences create.

In Part III, we offer predictions about the future development of law and economics. We suggest that the same discoveries about the preferences of citizens that create problems for Kaplow and Shavell's moral and practical positions are beginning to exercise an influence on law and economics scholarship more generally. We present reasons to suspect that in the years to come, economic theorists will begin advocating an increasingly distinctive and recognizable political program—*toward* increased control by professional regulatory agencies over the traditional areas of common-law adjudication, *toward* increased secrecy about government decision-making, and *away* from direct citizen participation in the formulation and application of legal policy.

## II. EVIDENCE OF LAW-RELATED PREFERENCES

In this part, we address a hypothetical legal economist who has settled on one of the broadly consequentialist moral positions discussed in the first part of this Article. We seek to direct this analyst's attention to a factor that should be taken into account by the *practical* procedures he chooses, and that should influence which legal policies he will recommend. This factor is *law-related preferences*: individuals' desires and tastes with respect to the various aspects of their legal system. Such preferences are relevant to the practice of law and economics in two ways.

First, analysts should seek to detect and measure the satisfaction of law-related preferences because their satisfaction is arguably a component of overall well-being. All the moral positions under discussion in the current literature concur that the satisfaction of individual preferences often means an increase in well-being. Thus, to the extent that a particular legal reform would violate people's conceptions of the legal system, it may be inappropriate (morally inferior) to adopt it, even if the legal reform would otherwise increase well-being; for example, increasing the satisfaction of non-legal preferences. Law-related preferences may then act as a sort of *brake*, limiting the application of proposals that would otherwise emerge from a less comprehensive analysis. In Part II.A, we set the stage for this possibility by arguing that none of the major moral positions that analysts have recently proposed can be interpreted to exclude all law-related preferences from their respective conceptions of well-being.

Second, the American legal system is distinctive in the degree to which it allows citizen actors—non-lawyers, non-bureaucrats—a significant role in implementing legal procedures and deciding outcomes, notably through the institution of the jury, but also as voters, litigants, and in other roles. To the extent that lawyers or lay individuals have law-related preferences, perceiving particular rules or practices as fair, unfair, satisfying, improper, etc., these preferences are likely to influence their behavior as participants in the legal system. That likelihood should be taken into account in formulating policies that rely on citizens to implement legal rules. In this way, preferences may act not only as a *brake* to legal reform, but also as a stumbling *block*.

Both of these considerations matter only if law-related preferences are more than a figment of the theoretical imagination. Few doubt the existence of strong, widely-shared, morally relevant preferences for items like food, shelter, entertainment, and consumer goods. The robust market for these goods is a form of intuitive evidence for the reality and strength of the preferences for them. By contrast, there is no obvious market for the satisfaction of law-related preferences. Our hypothetical reader may be skeptical: why worry about how to take account of “preferences” that may not even exist?

To answer that question, we collect in this Part the psychological literature that gives evidence of the reality of people’s tastes for legal practices. We have divided this evidence into three categories. In Part II.B, we discuss individual preferences for specific legal *procedures*. We summarize the large psychological literature on “procedural justice” and conclude that individual preferences for specific kinds of procedure exist, seem to be strong, and are distinct from preferences for the outcomes that those procedures are likely to produce. We discuss the prospects for either integrating these preferences into applied economic analysis, or explaining them away.

In Part II.C, we discuss individual preferences for specific legal *rules*. Experimental data on non-legal enforcement of norms and on behavioral psychology both suggest that in some cases people may prefer one of a pair of competing legal rules over the other (e.g., property rule protection over liability rule protection of a given entitlement in tort law). We argue in particular that Professors Kaplow and Shavell, who discuss this phenomenon, may have understated its importance. However, we conclude that law and economics generally seems amenable to including legal rule preferences in the utility calculus.

In Part II.D, we discuss individual preferences for and against certain kinds of *decision-making*. The data here suggest that *individuals sometimes experience disutility when they are exposed to utilitarian or economic decision-making procedures*. We discuss several experiments

describing this phenomenon. The prospect of this sort of law-related preference is especially troubling for economic analysis because it threatens to act as a "stumbling block," as discussed above. Such a preference makes it hard to promote economic norms while retaining citizen participation in the legal system.

Our aim is to convince analysts that there is a creature in the room; it is not yet clear whether it is an 800-pound gorilla or mere 50-pound Rottweiler. The various data we gather are similar enough, and sufficiently suggestive of real preferences, that they should not be ignored or assumed away. There is a pressing need for more empirical studies to fix the scope and strength of law-related preferences.<sup>194</sup> With this in mind, we will close this part by considering one of the factors that is most likely to limit the scope of law-related preferences: people's *knowledge of the law* and its implications for our analysis considered in Part II.E.

#### A. *The Moral Relevance of Law-Related Preferences*

If the right concept of well-being excludes the satisfaction of law-related preferences, then those preferences are relevant to economic policy analysis only as a stumbling block (a cognitive factor that may limit how well agents in the legal system do their jobs), not as a brake

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194. A word should be said about the possibility of law-related preferences for specific legal outcomes in individual cases, a topic we do not address in this Article. What we have in mind is not, say, a contract plaintiff's preference for a verdict in his favor, which can largely be understood as a simple preference for a favorable financial outcome, not (exclusively) a preference for justice. Rather, we mean the possibility that non-parties may have a cognizable preference for a certain outcome in a particular legal case.

When welfare economists and agencies are weighing a project that will have an extensive impact on the natural environment, they sometimes seek to measure the preferences of individuals who do not personally enjoy the environmental resources that would be damaged by the project, but who nevertheless are willing to pay to ensure that the environmental resource is preserved. These "disinterested" preferences are called *existence values*. See *Implementing Cost-Benefit*, *supra* note 15, at 281-82 (criticizing the use of existence values by some government agencies). Law-related preferences for legal outcomes, then, might be understood as existence values that attach to events that occur in courtrooms, not events in the natural environment.

Again, we will not fully consider the possibility of such preferences in this Article. We note however that courts in highly publicized cases sometimes feel obligated to acknowledge the force of public sentiment in favor of a particular outcome. See, e.g., *In re Exxon Valdez*, 1994 WL 182856, \*8-9 (D. Alaska 1994). The court, in *Exxon Valdez* stated:

It is the function of both Congress and the courts (principally the courts of appeal and supreme courts) to determine the extent to which public expectations with respect to financial responsibility are to be realized . . . . Were it otherwise, we would have a form of organized anarchy in which no one could count on what rule would apply at any given time or in any given situation.

*Id.*

One may also think of the conduct of the participants in the explosive rioting in Los Angeles following the acquittal of Rodney King's police assailants. Whatever one's views of the moral relevance, or indeed the moral value or defensibility, of that conduct, it is surely *prima facie* evidence that many third parties held intense, law-related outcome preferences in King's case.

(a morally relevant factor). Kaplow and Shavell's unrestricted-preference view of well-being, however, clearly *does* include law-related preferences. Such preferences are closely akin to the "tastes for fairness" that Kaplow and Shavell carefully acknowledge should find a place in proper economic analysis.

Adler and Posner's view of well-being is more nuanced. Recall that Adler and Posner justify excluding moral and other disinterested preferences from their definition of well-being on the ground that an individual can hold such a preference and yet not believe that the outcome she morally prefers would increase her own welfare.<sup>195</sup> Adler and Posner flatly reject Kaplow and Shavell's proposal to count tastes for fairness in the well-being calculus: "We do not believe that the fairness of a project increases its [welfare value] insofar as persons prefer the project just because they judge it to be fair."<sup>196</sup> Nevertheless, we think Adler and Posner's position requires them to consider at least some law-related preferences. It seems clear that if law-related preferences exist, they may not always be disinterestedly "moral" in Adler and Posner's sense. Sometimes they might be better understood, in whole or in part, as simple affective tastes. Satisfying such law-related preferences presumably does increase the welfare of the individual who holds them. As Chang points out, certain kinds of seemingly impersonal preferences may reflect the holder's feelings of sympathy or empathy for other people—here, perhaps others who are subject to the legal system—and thus cannot be dismissed as having no welfare effect on the preference holder.<sup>197</sup> It seems psychologically implausible to deny that legal rules and practices can sometimes make individuals (even those who are not in danger of violating the rules, or benefiting directly from them) "feel better" or "feel worse," in a straightforward way, about themselves and their community.

More fundamentally, the distinction between personal and disinterested preferences carries with it a good deal of philosophical and psychological baggage. From many credible philosophical perspectives, including an Aristotelian one, the fact that a legal rule or practice is perceived as morally right provides, in itself, a reason to take pleasure in it.<sup>198</sup> Indeed, Adler and Posner themselves admit that the distinction between personal preferences and "moral" or "disinterested" preferences is extremely difficult to define coherently and may be philosophi-

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195. See *Rethinking Cost-Benefit*, *supra* note 15, at 199-200.

196. *Id.* at 244.

197. See Chang, *supra* note 75, at 188.

198. Cf. ARISTOTLE, *NICOMACHEAN ETHICS* 11 (Terence Irwin trans., 1999) ("[T]he things that please lovers of the fine are things pleasant by nature: Actions in accord with virtue are pleasant by nature, so that they both please lovers of the fine and are pleasant in their own right.").

cally indefensible.<sup>199</sup> At best, we think, an analyst who adopts Adler and Posner's approach to economic analysis must address the relevance of law-related preferences on a case-by-case basis.

An analyst like Howard Chang, who supports a "liberal theory of social welfare,"<sup>200</sup> is more likely to take the categorical view that law-related preferences are "external preferences"<sup>201</sup> and hence irrelevant. Chang, again, holds that external preferences should not be included in the calculation of well-being because they are incompatible with "the liberal ideals underlying utilitarianism."<sup>202</sup>

Some possible law-related preferences clearly fail Chang's test. An individual's preference for Jim Crow laws, held on the ground that such laws express a valid racial hierarchy, must be excluded. It is a quintessential example of the sort of "racist or malicious preferences," premised on inequality, that Chang rejects.<sup>203</sup> But suppose a different circumstance. Imagine a group of citizens who prefer a highly moralistic, promise-centered conception of contract law, one that emphasizes the availability of specific performance and that uses mandatory rules. Suppose further that these citizens want a moralistic contract regime not on economic grounds (they do not have views on whether it will allocate resources more or less efficiently than other contract regimes), but rather because they believe moralistic contract law is in keeping with the dignity of treatment that (they believe) all rational beings owe alike to one another. This is a law-related preference. It is premised on a non-utilitarian philosophy; it is a "taste for fairness" in Kaplow and Shavell's lexicon. And it is an external preference: the group would prefer that a particular set of contract rules govern *all* the members of their society, not just themselves.

Does such a preference, in Chang's words, really "deny the equal concern and respect" that is "owe[d] all individuals," so as to justify excluding it entirely from welfare analysis, even if it is strongly held?<sup>204</sup> Many points of view that may lead individuals to prefer certain legal rules or institutions are premised on understandings of the meaning of human equality that, while not identical to the views of liberal utilitarians like Chang, are hardly so different from them, or so repugnant, that it would be "awkward" to give them some weight in the welfare calcu-

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199. See *Rethinking Cost-Benefit*, *supra* note 15, at 202 ("[H]ow to provide a more precise and persuasive account of this 'restriction' remains a large and unsolved problem within the philosophical literature on well-being."); see *id.* at 202 n.98 (compiling sources).

200. Chang, *supra* note 75, at 196.

201. *Id.* at 183.

202. *Id.* at 185.

203. *Id.* at 178.

204. *Id.* at 185.

lus.<sup>205</sup> Chang supports a liberal theory of *welfare*. But to the extent that Chang's theory denies real, felt preferences based on worldviews that do not sort with liberal utilitarian philosophy, its claim to being a genuinely welfare theory is diminished; it reduces to a simple imposition of liberal preferences on the community. Presumably Chang would admit that the traits an individual perceives in her natural and physical environment can powerfully influence that individual's well-being. Why, then, be so quick to exclude the individual's perceptions of her *social* and *institutional* environment? Further, in America one would expect that legal institutions would form an especially important part of that environment.

We think these arguments should give liberal legal economists pause about excluding law-related preferences from welfare calculations. Having made our case for the relevance of law-related preferences, we turn at last to evidence for their reality.

### B. *Tastes for Procedural Justice*

From a traditional economic standpoint, procedure is a transaction cost: a necessary evil in a legal system whose chief purpose is to create incentives for welfare maximizing behavior.<sup>206</sup> Analysts like Kaplow and Shavell reject using independent notions of fairness to design legal procedures. They argue that doing so will distort the ability of the system to produce well-being maximizing outcomes.<sup>207</sup>

Nevertheless, Kaplow and Shavell concede that, as in all areas of the law, individual tastes about legal procedures are an essential part of a proper welfare economics analysis. Kaplow and Shavell assert that tastes for procedures should "be weighted according to the extent individuals actually would be willing in principle to expend resources to benefit from [them]."<sup>208</sup> The relevant inquiry, then, is how strongly do people care about how the adjudication system works?<sup>209</sup> Kaplow and Shavell have an intuition: "We suspect that individuals do not have sufficiently positive tastes for legal procedures [to change the outcome of a welfare analysis]."<sup>210</sup> We also have an intuition: they are wrong.

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205. Chang, *supra* note 75, at 187.

206. See Kaplow & Shavell, *supra* note 3, at 1165 ("The inherently instrumental character of procedure suggests that largely nonconsequentialist notions of fairness in procedure are inappropriate to employ.")

207. See *id.* at 1174-80.

208. *Id.* at 1211.

209. In this Article, we have separated the analysis of legal procedure into two components: a discussion of outcomes ("the availability of legal redress") and a discussion of modes of adjudication ("the manner in which adjudication is conducted"). Kaplow & Shavell, *supra* note 3, at 1211.

210. See *id.* at 1216.

Our intuition is supported by twenty-five years of empirical and psychological literature suggesting that individuals have independent tastes for certain legal procedures. The basic conclusion of the literature is that individuals' happiness or unhappiness with the legal system is partially independent of the disposition of their case. *Process can create its own utility.*<sup>211</sup>

This understanding is in conflict with the functionalist's parasitic conception of procedure discussed above. It threatens to complicate welfare-economic analysis. Therefore, it is not surprising that Kaplow and Shavell, among others, attack the procedural justice literature on a variety of grounds.<sup>212</sup> However, before describing this attack in greater detail, we would first like to explain exactly what it is empiricists have thus far asked, and concluded, about individual preferences for legal procedures. Thus, in Part II.B.1 we describe the history, methodology, experimental data, and findings of procedural researchers. In Part II.B.2 we compare and contrast the competing psychological theories about preferences that researchers have constructed from this experimental data. In Part II.B.3 we discuss scholarly criticism of this research, and attempt to integrate it into the welfare economic paradigm.

### 1. *Procedural Justice in Review*

In 1975, John Thibault and Laurens Walker published their seminal *Procedural Justice: A Psychological Analysis*. In that book, the two researchers argued that individuals hold significant preferences for certain kinds of procedures, specifically a preference for perceived *fairness* and a preference for *process control*.<sup>213</sup>

Thibault and Walker began by positing a difference between preferences about distributive justice (the way that things of value are allocated among persons or groups) and procedural justice (the modes of dispute resolution). They then attempted to explore the former preferences by asking individuals, in a variety of contexts, how they liked their disputes resolved.

They found, first, that individuals prefer adversarial procedures to inquisitorial ones,<sup>214</sup> even though that control might not actually lead to

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211. This argument is not a moral case for the intrinsic value of procedural justice. For such an argument, see Laurens Walker et al., *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1402-03 (1979).

212. See Kaplow & Shavell, *supra* note 3, at 1212 n.613.

213. Thibault and Walker argued that individuals preferred processes that they could control over ones that were controlled by a third party. JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 13-14, 117-24 (1975).

214. *Id.* at 72-77.

an accurate presentation of the facts.<sup>215</sup> This result held true even when the adversary process led to an adverse outcome<sup>216</sup> and when Thibault and Walker investigated the preferences of observers of legal proceedings, rather than participants.<sup>217</sup>

The two psychologists theorized that people's taste for adversary litigation (both as litigants and as members of society) related to their preferred distribution of control over the process between disputants and decision-makers. Simply put, fair procedures are seen to give litigants control; unfair procedures do not. People see ultimate decisions as fairer when the process that generated them was litigant led; and vice versa.

Finally, Thibault and Walker proposed a connection between preferences for procedural and distributive justice. They argued that individuals prefer process control because it enables them to retain control over outcomes that they desire. Thus, Thibault and Walker saw procedural justice as an important factor in individuals' understanding of distributive justice, but primarily a derivative one. Their instrumental argument for process values is summed up by their prescient message to the then-emerging law and economics movement: "any assessment of the economic factor [e.g., costs of procedures] ought to take into account the social cost of a procedural system that either repeatedly fails to furnish accurate results or repeatedly fails to furnish results acceptable to the subjects of the process."<sup>218</sup>

E. Allan Lind and Tom R. Tyler, the second major duo of the procedural justice literature, expanded on Thibault's and Walker's work in their 1988 book, *The Social Psychology of Procedural Justice*.<sup>219</sup> Lind's and Tyler's significant contribution lies in their constructing a psychological theory to explain why individuals care about procedure: the "group value" theory. That theory argues that people are strongly affected by identification within groups, and that these groups are defined both by their "group identities" (unique shared characteristics) and their "group procedures."<sup>220</sup> The former defines the group in its relationship to the outside world; the latter regulates how the group regulates it-

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215. Thibault and Walker found that adversaries skewed unhelpful facts to favor themselves. Thus, presented with evidence reflecting a 25/75 skew, adversaries presented a 36/64 spin. Inquisitorial opponents did not. Moreover, the individuals knew they were putting a slant on the facts. *See id.* at 32-40.

216. *See id.* at 76.

217. *Id.* at 93, 113-16 (detailing a behind-the-Rawlsian-veil preference for adversary system).

218. THIBAUT & WALKER, *supra* note 213, at 123.

219. For a general review of Lind's and Tyler's work, see Paul G. Chevigny, *Fairness and Participation*, 64 N.Y.U. L. REV. 1211 (1989) (book review).

220. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 230-37 (1988).

self.<sup>221</sup> Thus, our society's procedure is tied to our sense of identity: when procedures are unfair, our group (and thus our self) identity is damaged.<sup>222</sup>

This general description of Lind's and Tyler's theory threatens to understate the strength of their book. They first offer a sophisticated critique of Thibault and Walker, focusing on the link in the earlier work between process control and distributive justice. Thibault and Walker believed that control over evidence and arguments would have both direct psychological effects on people, and indirect effects on institutional legitimacy. If people perceived processes to be fair, then they would also experience more happiness in the outcomes that they received. It would follow that people's preferences for process reflect a desire for a fair outcome rather than an external value.<sup>223</sup> By contrast, Lind and Tyler argue for entirely different understanding of process preferences, one that places them in a primary position *vis-a-vis* outcomes.

In practice, this means that Lind and Tyler had to test the relationship between perceptions of outcomes and perceptions of procedures. Summarizing various studies, Lind and Tyler concluded that regardless of whether individuals receive favorable or unfavorable legal outcomes, a fair process makes them more accepting of the outcomes and the legal system in general.<sup>224</sup> Fair legal process, they argued, "increase[s] satisfaction and . . . ameliorate[s] discontent across a wide variety of legal situations."<sup>225</sup>

The authors demonstrated the importance of process through their discussion of the "legitimation" effect.<sup>226</sup> Summarizing various earlier researchers, Lind and Tyler found that procedural unfairness could lead to erosion of individuals' obedience to the law, although the effect was somewhat indirect.<sup>227</sup> But just as importantly, individuals accept decisions that they perceived to have been procedurally fair with greater frequency.<sup>228</sup> Lind and Tyler concluded that when process is fair, dis-

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221. *Id.*

222. *Id.*

223. LIND & TYLER, *supra* note 220, at 96.

224. *See id.* at 66-76. The authors note that this preference may be less strong when outcomes are severe: a defendant facing certain execution would be less concerned with process than an individual facing a relatively insignificant traffic court fine. However, they cite studies suggesting the opposite is true. Thus, a study found that felony defendants' evaluation of their treatment by the system depended more on process than outcome (the severity of their sentences). *Id.* at 73.

225. *Id.* at 75.

226. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

227. LIND & TYLER, *supra* note 220, at 76-81.

228. *Id.* at 81 (summarizing individual willingness to refrain from challenging arbitration awards).

putes do not fester (and thus are not appealed).<sup>229</sup>

Unfortunately, arguing for a "fairness" preference is question begging. Welfare economics, in particular, would need a more detailed account of what preferences individuals had for different legal procedures in different contexts. Happily, Lind and Tyler have begun this accounting. They explain that, in contexts as diverse as plea bargaining, alternative dispute resolution (ADR) proceedings and jury design, individuals prefer one particular characteristic consistently: *litigant control* over proceedings.<sup>230</sup>

However, this preference for litigant control does not, in and of itself, decide the question of whether process preferences are simply derivative of self-interested outcome preferences. Lind and Tyler attempted to separate out these effects by considering individual tastes for presenting an argument, while detaching that effect from the outcome of that argument. In effect they sought to answer whether it makes people feel good to present an argument to a judge, even when they know the argument will not affect the outcome of the trial. Drawing upon a series of prior lab studies, Lind and Tyler concluded that procedural preferences do indeed reflect a strong "voice" effect.<sup>231</sup>

First, Lind and Tyler examined an earlier study finding that individuals who were allowed simply to discuss how decisions would be made (without actually having decisionmaking power) felt better about later outcomes arising from those discussions than individuals who were not allowed to discuss them.<sup>232</sup> Of course, individuals were even more pleased when allowed to actually help design these decision-making procedures.<sup>233</sup> However, evidence that preference expression has its own utility supports Lind and Tyler's conception of an independent taste for process.

The two authors also drew on a study by Tyler that tested the strength of the process-control effect by manipulating the bias, competence and consideration of the decision-maker, and by varying the substantiality of the outcomes involved.<sup>234</sup> Tyler found that the process-control effect disappeared only when the disputants' decision-maker was seen not to have listened to the disputant.<sup>235</sup> Having one's views considered is thus more important than having one's view prevail, at

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229. *Id.* at 82.

230. *Id.* at 84-92.

231. *Id.* at 100-05.

232. LIND & TYLER, *supra* note 220, at 102 (citing L. Musante et al., *The Effects of Control on Perceived Fairness of Procedures and Outcomes*, 19 J. EXP. SOC. PSYCH. 223 (1983)).

233. *Id.* at 100-05.

234. *Id.* at 104.

235. *Id.*

least in evaluations of how fair legal procedures are.<sup>236</sup>

Now the simple conclusion that people experience some utility by either making arguments themselves, or having advocates do so for them, is not yet the kind of data that can be plugged easily into a welfare economic analysis. It is necessary to measure the strength of this preference relative to other preferences that might be served by the legal system.<sup>237</sup> However, if people value process as highly as Lind and Tyler believe that they do, then the design of legal policy must incorporate a concern for the means by which they will be implemented, as well as the allocative ends to be served by the policies. And if preferences for procedure are not just deeply held, but also widely spread, then ignoring them might undermine the behavior shaping premises of the welfare economic project.<sup>238</sup>

More recent research in the field has confirmed and expanded upon Lind's and Tyler's conclusions. Thus, a 1990 study examined what would happen if, after a decision had been made, informed individuals were simply allowed to present their arguments to the decision-maker. Fully aware that these arguments would have no effect, individuals allowed to speak nevertheless felt more fairly treated than those who were not—a pure process effect.<sup>239</sup> Similarly, a researcher examined the effect of experts in courtrooms, and concluded that adversarial experts (as opposed to court-appointed ones) lent more legitimacy to the process in the eyes of the losing party.<sup>240</sup>

The consistent message of this work is that individuals have an independent taste for fair procedures, which is primarily defined as having a voice in the decision-making process. When this taste is not respected, individuals lose faith in the distributive outcomes and in the

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236. The rules of evidence, which often preclude disputants from articulating their views as they would like, are also structured to help some disputants (especially criminal defendants) prevail. Thus, to the extent that criminal defendants hold preferences about procedure that are similar to those of the population in general, those preferences may be in conflict with the disputant's more immediate self-interest. *See id.* at 106.

237. In Part II.C.3, *infra*, we discuss in more detail the legal economists' critiques of psychological research. Lind and Tyler do discuss this issue, concluding that the relative strength of procedural fairness preferences *vis a vis* distributional/cost concerns varies across situations, although usually fairness was the dominant preference. *Id.* at 139.

238. In other words, if procedure influences legitimacy, which influences compliance, then procedure could affect individual behavior just as much as the substantive legal rules that are applied through procedural practices. Alternatively, if procedure influences litigation behavior directly (e.g., by inducing individuals to appeal or not to appeal from legal results), then it will add to the social costs of litigation and thus affect the utility calculus directly.

239. E.A. Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Non-instrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY AND SOC. PSYCHOL. 952-59 (1990).

240. Robert Mark Johnstone, *Perceptions of Justice: An Examination of the Effects of Type of Expert, Verdict, Role, and Trial Experience on Procedural Justice Judgments* 50-65 (1996) (unpublished Ph.D. dissertation, University of Oregon) (on file with the Harvard Law School library).

system itself. Respecting this taste, on the other hand, can create faith in the system even though the procedures fail to protect disputants from bad outcomes.<sup>241</sup> The empirical data supporting the Thibault-Walker-Lind-Tyler research should cause Kaplow and Shavell to reconsider their "intuition" that procedures do not matter to the populace.<sup>242</sup>

## 2. *Competing Explanatory Models*

We now turn to a brief explanation of what might motivate individuals to value procedural justice, even in the face of evidence about its costs. There are two competing theories about why individuals exhibit tastes for certain procedures. The first, Thibault's and Walker's self-interest model, suggests that individuals seek control over decisions (through a fair process) because they want to retain an effect upon them.<sup>243</sup> The second, Lind's and Tyler's group-value model, argues that procedure creates group identity, and violations of norms of procedure thus undermine self-identity.<sup>244</sup>

These two competing theories imply different predictions about what kinds of procedures individuals will prefer (and also about whether such preferences are internally stable or externally manipulable). The self-interest model predicts the following variables that will strongly influence individual's judgments about procedure: "(1) the favorability of the procedure to the perceiver, (2) the amount of control over outcomes afforded the perceiver, (3) the fairness of the outcomes provided by the procedure, and (4) the consistency with which the procedure is applied across people."<sup>245</sup>

On the other hand, the group-value model predicts that procedural preferences would vary based on the ethical characteristic of each group, but would generally include a preference for value expression and dignified treatment. Second, the group value model predicts that procedures will be more important for individuals who are uncertain of their status within society and those who are traditionalists.<sup>246</sup>

We find Lind and Tyler's group-value theory somewhat more plau-

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241. Lind and Tyler analyze this problem as one of "false consciousness," and they reason that one might cause individuals to experience utility by manipulating their procedural preferences, even though the system is, in truth, stacked against them. LIND & TYLER, *supra* note 220, at 4, 76, 201-02. However, they note that if experimental subjects find out about this deception, the perceived benefits of voice and control disappear. *Id.*

242. See LIND & TYLER, *supra* note 220, at 217 (describing how procedural preferences should cause law and economists to reconsider outcome-based evaluations of utility).

243. See THIBAUT & WALKER, *supra* note 213, at 120-23. *But cf.* Kaplow & Shavell, *supra* note 3, at 1164-65 (stressing that procedural preferences should be treated as merely derivative of preferences for favorable outcomes).

244. LIND & TYLER, *supra* note 220, at 231.

245. *Id.* at 226.

246. *Id.* at 238.

sible as an explanation of why process matters to individuals. As we interpret the relevant literature, we think most researchers working in this area would agree that as a theory it has been better at predicting the actual behavior of real people.<sup>247</sup> However, there may well be a middle ground between the two models that would explain both why people care about procedure, even when it is divorced from outcome, and why they seem to care somewhat less about it when outcomes are unfavorable.<sup>248</sup>

### 3. *Objections to the Procedural Preference Literature*

There have been several major strands of criticism directed at the procedural justice researchers. First, critics have argued that laboratory preferences are entirely artificial (e.g., reflecting what people believe to be "nice" rather than what they want).<sup>249</sup> Second, scholars criticize the procedural justice literature for its inability to sharply separate preferences for procedures from preferences for desired outcomes.<sup>250</sup> Third, critics have argued that, even if laboratory preference rankings are not artificial, they fail to convey any information about how much people actually value goods.<sup>251</sup> We address each of these criticisms in turn.

#### *a. Are Laboratory Results Real?*

The most significant of the three criticisms is the claim that laboratory results do not expose real preferences but rather pieties of fairness that individuals would not honor if it came to making hard tradeoffs in practice.<sup>252</sup> Kaplow and Shavell contrast the procedural justice findings

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247. See *id.* at 239-40 (arguing for the model, but noting that differences in how people react to bad outcomes is not explained by theory); see also Jody Karen Clay-Werner, *Perceptions of Gender Bias in the Legal System: A Procedural Justice Account* 53-54, 75 (1997) (unpublished Ph.D. dissertation, University of North Carolina (Chapel Hill)) (on file with the Harvard College Library) (summarizing recent research and refining model); Johnstone, *supra* note 240, at 23-25 (summarizing recent research). But see James Lea, *Who Cares About Procedural Justice: An Examination of Individual Differences* 136-41 (1992) (unpublished Ph.D. dissertation, Queen's University) (finding, in study focusing on individual differences, that evidence for each theory varied based on both internal characteristics of subjects and situational characteristics of the experiment).

248. LIND & TYLER, *supra* note 220, at 240-41 (describing potential hybrid theories).

249. Kaplow & Shavell, *supra* note 3, at 1212 n.613; see also Chevigny, *supra* note 219, at 1212.

250. See, e.g., Robert M. Hayden & Jill K. Anderson, *On the Evaluation of Procedural Systems in Laboratory Experiments: A Critique of Thibault and Walker*, 3 LAW & HUM. BEHAV. 21 (1979).

251. Kaplow & Shavell, *supra* note 3, at 1214.

252. Chevigny, *supra* note 219, at 1212 ("[S]ubjects who seem to prefer neutral procedures may be expressing political pieties to which they think it would be best to appear to subscribe."). Sometimes criticism is directed to the use of college students, who are somewhat unrepresentative of the population at large, as experimental subjects. See Samuel R. Gross, *The American*

with polls in which individuals claim to be concerned with legal costs<sup>253</sup> and with the economists' own intuitions that Americans are simply ignorant of legal procedure.<sup>254</sup> They conclude that the procedural justice literature stemming from Thibault's work reflects simply *opinions about policy*, not *tastes for procedure*.<sup>255</sup>

We agree that the issue is not concluded, but we are skeptical about Kaplow's and Shavell's skepticism. The procedural justice literature has not yet assigned a market value to procedural preferences. Yet, unless that is to be made an inflexible condition of the relevance of psychological literature, the procedural justice literature is sufficiently corroborated that legal economists ought to be troubled by it. There have been twenty-five years of academic research demonstrating that preferences about procedure are significant.<sup>256</sup> Moreover, in Lind's and Tyler's work (and in the work of later supporting authors), real-world tests of these procedures have confirmed the existence of significant preferences for procedure.<sup>257</sup> Simply saying that laboratory work has no explanatory power seems, in the words of Lind and Tyler, a "spurious" response for fellow social scientists to make.<sup>258</sup>

Moreover, critics of procedural preferences, such as Kaplow and Shavell, do not offer compelling evidence demonstrating that they are laboratory artifacts. They assert that procedural preferences are outcome dependent because successful parties do not care about unfair procedures.<sup>259</sup> The published evidence suggests otherwise.<sup>260</sup> In addition, the preferences of individual litigants are not the only preferences that are relevant to the design of welfare-maximizing legal procedures.<sup>261</sup> Kaplow and Shavell point to a plank of the Republican Party's 1994 political platform, the Contract With America, and suggest that it demonstrates that citizens (or perhaps only Republican voters) do not

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*Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 740 n.22 (1987).

253. Kaplow & Shavell, *supra* note 3, at 1214 n.614.

254. *Id.* at 1164-65.

255. *Id.* at 1214.

256. Lea, *supra* note 247, at 12-18.

257. See, e.g., Tom R. Tyler & R. Folger, *Distributional and Procedural Aspects of Satisfaction with Citizen-Police Encounters*, 1 BASIC AND APPLIED SOC. PSYCHOL. 281-92 (1980); see also LIND & TYLER, *supra* note 220, at 48-57 (discussing field studies). Cf. Chevigny, *supra* note 219, at 1212 (concluding that "[t]here is enough evidence" to support Lind and Tyler's experimental data).

258. LIND & TYLER, *supra* note 220, at 43.

259. Kaplow & Shavell, *supra* note 3, at 1215.

260. See LIND & TYLER, *supra* note 220, at 67-73 (discussing the effect of procedure on positive outcomes and concluding that individual's preference for fair procedures is present, though attenuated, even when people win at trial).

261. This is so because it is possible that all members of society would be willing to pay a certain amount (or would pay that amount if they had funds equal to others) to ensure that procedures remained fair. Thus, although individual litigants might prefer not to have a jury trial in the individual case, the preferences of society as a whole might require it as an option.

have tastes for procedural justice.<sup>262</sup> We are unconvinced that such a promise, never enacted into law,<sup>263</sup> and part of a platform largely modified and rejected,<sup>264</sup> is sufficient evidence against the appeal of procedural fairness.

Finally, even if it were true that successful litigants do not care about procedure, and that the public in general had expressed no tastes for it, the preferences of *unsuccessful* litigants would remain, and these should be significant to welfare economists who are committed to count all preferences. The clear message of the procedural justice literature is that unsuccessful litigants are more satisfied with legal institutions, are less likely to appeal decisions, are more satisfied with outcomes, and are generally happier when they have some control over procedures than when they do not.<sup>265</sup> Criticism of the procedural justice literature that does not consider these findings is inconclusive.

*b. Is the Procedural Preference Literature Methodologically Flawed?*

Some criticisms of the procedural justice literature single it out as especially flawed because of its inability to separate outcome-preferences reliably from procedural ones.<sup>266</sup> Indeed, Lind and Tyler themselves explicitly point out this methodological problem in previous research.<sup>267</sup> There are reasons to believe that Lind and Tyler's school of procedural justice research has begun to design experiments that can separate outcome preferences from procedure preferences.

*c. Do Procedural Preferences Convey Relevant Welfare Information?*

A third criticism of procedural preferences is that they do not con-

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262. Kaplow & Shavell, *supra* note 3, at 1214 n.614.

263. Thomas A. Eaton & Susette M. Talarico, *A Profile of Tort Litigation in Georgia and Reflections on Tort Reform*, 30 GA. L. REV. 627, 629 n.2 (1996) (reviewing legislative history of federal bill and noting that it was vetoed by President Clinton).

264. *GOP Marks Contracts Anniversary*, DALLAS MORNING NEWS, Sept. 28, 1997, at 8A ("Although much of the Contract With America had been enacted, some has passed in heavily modified forms, and at least one major element—term limits for members of Congress—was rejected.").

265. See *infra* Part II.C.1 and notes therein; see also Chevigny, *supra* note 219, at 1217.

266. Compare Vladimir J. Konecni & Ebbe B. Ebbesen, *External Validity of Research in Legal Psychology*, 3 LAW. & HUM. BEHAV. 39 (1979) (discussing problems with laboratory psychology generally) with Hayden & Anderson, *supra* note 250 (critiquing Thibault and Walker's work).

267. LIND & TYLER, *supra* note 220, at 129-45 (discussing experiments attempting to isolate the difference).

vey information in a form usable by economists.<sup>268</sup> This criticism reduces to a demand for dollars: how much will people be willing to pay to satisfy their supposed tastes for fairness in procedure?<sup>269</sup>

We agree with this criticism in one sense: it rightly points out that the procedural justice literature does not ask individuals to balance the costs of implementing procedures against the benefits of satisfying preferences. It is thus difficult to tell exactly how much individuals value the voice and fairness effects discussed above. We endorse welfare economists' call for more experimental data about procedural preferences.<sup>270</sup>

However, we note that simply using willingness to pay as a measure of utility (or disutility) is not consistent with the moral theories of well-being that Kaplow and Shavell and other contemporary theorists endorse. Simply asking people how much they will pay for procedure could conceivably omit important distributional and psychological information relevant to the encompassing "well-being" norm endorsed by Kaplow and Shavell.<sup>271</sup> In other words, some sort of non-market correction will probably have to be applied to the market data in any event.

Furthermore, we suspect that *any* evidence of procedural preferences that is likely to appear in the future will not take the form of actual market transactions. Considerable inference and extrapolation will be required in order to assign a number value to preferences. Official legal procedures are not priced on a competitive market like television sets. Kaplow and Shavell discuss the common use of alternative dispute resolution procedures, but recognize that they are not decisive evidence against procedural preferences.<sup>272</sup> They imagine hypothetical legislation that might set a "price tag" on procedural preferences, thus permitting a form of direct measurement of procedural preferences.<sup>273</sup> However, barring some unanticipated legislative reforms, that experiment would also have to be conducted in a laboratory setting, or by polling individuals about their preferences. If those results suggested strong preferences, would welfare economists then impugn the poll data as mere

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268. Kaplow & Shavell, *supra* note 3, at 1212 n.613 ("The basic problem is that most prior empirical work does not seem to have been designed in a manner that could identify or quantify actual tastes for procedures."). That is, most of the procedural preference literature falls into the category that Hovenkamp describes as "'subjective' information about preference[s]," rather than the "revealed market preference" that economists know how to work with. Hovenkamp, *supra* note 121, at 37.

269. Kaplow and Shavell offer a hypothetical designed to expose this very quantity, and believe that it would prove their point about the relative worthlessness of procedural tastes. Kaplow & Shavell, *supra* note 3, at 1216.

270. For a critique of such work into "revealed preferences," see *id.* at 55-59.

271. See *supra* notes 80-91 and accompanying text.

272. See Kaplow & Shavell, *supra* note 3, at 1216.

273. See *id.*

artifacts? This could have serious theoretical consequences. For example, the law and economics commentators discussed in Part I agree that it is morally necessary, when performing economic analysis of law, to use practical procedures that compensate for distributive effects in order to make valid interpersonal utility comparisons possible. How are analysts in other contexts going to gauge variations in the marginal utility of income without using poll data, or something equally speculative?

We simply mean to emphasize that there is a limit to the extent to which Kaplow, Shavell, and the other new legal economists can be parsimonious about admitting experimental data of preferences that are not in the form of market prices, and yet still claim to have rejected crude theories of wealth maximization.

The challenge for experimental research is clear. There is a need for experiments that attempt to separate what is an expression of a "pity" from what is a genuine procedural taste—in other words, a need to force people to make relatively hard choices—preferably against a *wealth-neutral backdrop* such as a hypothetical standardized budget—so that we can be sure that their preferences are just that. Our intuition is that the procedural justice literature will hold up under this pressure. If real preferences separate themselves from the chaff, we have argued that welfare economics must incorporate them into the utility calculus.

### C. *Tastes for Legal Rules*

A welfare-economic analysis that did not take into account any preferences for specific legal rules that exist would fail to promote well-being, as understood by the current conceptions of welfare economics.<sup>274</sup> In this section we present evidence of such preferences. We discuss two psychological patterns that inform people's attitudes toward different possible legal rules. Such preferences may be more likely to come into play among litigants, jurors, lawyers, and similar participants in the legal system. Other people will often be unaware of these rule-pairs or fail to understand them. Even to the extent that they do comprehend the choice available, they might be indifferent about their outcome, whether because they believe the content of legal rules will not affect them,<sup>275</sup> or that it should not.<sup>276</sup>

In Part II.C.1, we discuss two general types of preference for legal

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274. See *id.* at 1350.

275. See Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEG. STUD. 537, 543-44 (1998) (discussing the unimportance of the implied warranty/caveat lessee pair of rules for individuals in the middle of a term lease).

276. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 60-64 (1991) (arguing that some residents of a close knit community believed that resort to the law violated a norm of "good neighborliness").

rules: attributively fair rules; and endowment protecting ones. We then, in Part II.C.2, attempt to apply these general preferences to situations of policy choice confronted by legal economists.

### 1. *Preferences for Rules*

From a merely outcome-centered welfare economic perspective, preferences for one legal rule, as such, over another are obstacles in the way to efficient legal reform. Like preferences for procedure, preferences for rules make legal analysis based on promoting well-being more difficult to perform, less reliable, or both—unless those preferences are relatively weak or malleable.

A developing body of psychological evidence suggests that legal rules reflect common sense attributions of responsibility and blame. That is, the perceived fairness of a legal rule depends on whether it comports with how individuals believe the law should attribute responsibility among different moral actors. This proposition is fleshed out in a forthcoming article by Jon Hanson and Ana Reyes.<sup>277</sup> It is supported by a psychological framework known as *attribution theory*.<sup>278</sup> To the extent that Hanson and Reyes can establish clear differences in the degree of fairness that individuals perceive in different rules, their work will also suggest the existence of corresponding preferences for the rules viewed as fair. Under many theories of well-being, such preferences must be viewed as a component of well-being. That will tend to contradict Kaplow and Shavell's view that legal rule preferences are of little significance to welfare economics.<sup>279</sup>

Internalized tastes for fair rules are not the only tastes that welfare economics must recognize. Individuals also prefer (and are in theory willing to pay for) legal rules that protect entitlements that they believe they already own.<sup>280</sup> To the extent that individuals value rules that re-

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277. Jon D. Hanson and Ana Reyes, *Attribution Theory* (unpublished partial manuscript on file with authors).

278. Cf. Bernard Weiner, *An Attributional Theory of Achievement Motivation and Emotion*, 92 PSYCHOL. REV. 548 (1985) (providing a history of the theory).

279. Kaplow and Shavell argue that tastes for "fair" punishments can be considered as a part of the utility calculus when they exist, but believe that such occasions are rare. See Kaplow & Shavell, *supra* note 3, at 1291 n.800. ("Our conjecture is that, for many violations of the law, individuals will not have strong independent tastes regarding the level of punishment.")

280. Most of this literature is framed in terms of the effect of rules on how individuals value goods. See Elizabeth Hoffman & Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 WASH. U. L.Q. 59 (1993) (reviewing literature); see also Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990) (describing a famous experiment involving valuations of coffee mugs); Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991). However, this increase in valuation can be viewed as quantifying a taste for the type of protection that the rule offers. See Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541 (1998) (finding

spect initial allocations of property entitlements over their reverses, these preferences would presumably be incorporated into the welfare calculus as well.

Another type of rule-preference may correspond to the role of judicial precedent. We introduce this factor because behavioral psychology research reveals that individuals consistently prefer the current state of affairs to a changed one. In plain language, they (and we) have a taste for the status quo.<sup>281</sup>

Evidence for this bias is varied and strong. Individuals choose to remain at their jobs rather than switch to other, higher paying ones.<sup>282</sup> They tend to keep their current phone or electrical services over new ones that might be more reliable.<sup>283</sup> In the legal context, they tend to prefer default contract terms over new ones (even though the new ones might benefit them).<sup>284</sup>

Although in some cases the disruptions from a change in law that violated the status quo effect would be relatively negligible, in some cases they are significant.<sup>285</sup> We do not know how welfare economics should proceed. The only options seem to be as follows: (1) always ignore status quo bias effects as uninformed,<sup>286</sup> (2) ignore status quo bias effects when they could be confused with other preferences whose effects are more easily quantified,<sup>287</sup> (3) incorporate status quo bias effects in every welfare calculus as a small (general) cost incurred when

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that the endowment effect occurs when goods are protected by property rules and not liability rules, thus property rules alone create (and are expressed by) the relevant preference).

281. See Hoffman & Spitzer, *supra* note 280, at 70 (discussing status quo bias); see also Russell B. Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998); Russell B. Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998) [hereinafter Korobkin, *The Status Quo Bias*] (results of study about contract terms). Cf. William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 8 (1988) ("Faced with new options, decisionmakers often stick with the status quo alternative."); see also Jonathan Baron & Joshua Greene, *Determinants of Insensitivity to Quantity in Valuation of Public Goods: Contribution, Warm Glow, Budget Constraints, Availability, and Prominence*, 2 J. EXPERIMENTAL PSYCHOL. APPLIED 107, 113 (1996) (testing strength of bias in various populations).

282. See Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 348 (1984).

283. See Raymond S. Hartman et al., *Consumer Rationality and the Status Quo*, 106 Q.J. ECON. 141, 143 (1991).

284. See Korobkin, *The Status Quo Bias*, *supra* note 281, at 646-48.

285. See Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L.Q. 347, 361-62 (1996) (discussing how status quo bias might create a preference for non-wealth maximizing standardized contracting terms even between commercial actors).

286. Absent any real data about the informational content of preferences for legal rules, Kaplow and Shavell appear to take this position. See Kaplow & Shavell, *supra* note 3, at 1350-55.

287. See Korobkin, *The Status Quo Bias*, *supra* note 281, at 626 n.58 (discussing the confusion between status quo effects and endowment effects).

one changes rules,<sup>288</sup> or (4) incorporate status quo bias effects on a case-by-case basis.<sup>289</sup>

## 2. *Specific Applications*

People's individual preferences for rules, their general bias for the status quo, and the endowment effect come together in interesting ways in the property rule/liability rule puzzle. The puzzle of whether property or liability rules most efficiently protect property rights is a central question of the law and economic literature, with most commentators arguing that liability rule protections facilitate bargaining and therefore maximize efficiency.<sup>290</sup>

However, in recent years, law-and-behavioralism's viral insights have infected even this venerable cathedral of the law and economic debate.<sup>291</sup> One key insight is that initial ownership of a property right makes individuals even less willing to bargain it away.<sup>292</sup> A few legal economists, including Kaplow and Shavell, have responded that this evidence provides an "unclear and unhelpful" guide to analysis.<sup>293</sup> Most, however, have grappled with the exact content of the data, ques-

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288. Empirical researchers would presumably establish the social costs of changing rules in a general case by averaging highly publicized and lowly publicized changes together.

289. Thus, overturning *Roe v. Wade*, 410 U.S. 113 (1973), might create a higher status-quo bias cost than overruling *United States v. Lopez*, 514 U.S. 549 (1995), which is a decision of comparable legal importance, but one less likely to have penetrated the public consciousness. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (arguing that certain socially momentous legal decisions are entitled to special precedential force).

290. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (reasoning that liability rules are more likely to encourage bargaining when transactions costs are high); see also Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996) (arguing that liability rules are almost always appropriate). Cf. James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440 (1995) (suggesting that dispositive resolution of the dilemma is impossible).

291. See Rachlinski & Jourden, *supra* note 280; cf. Jennifer Arlen, Comment, *The Future Behavioral Economic Analysis of Law*, 51 VAND. L. REV. 1765, 1777-81 (1998) (arguing that presence of endowment effect makes normative policy analyses impossible absent further research).

292. See Hoffman & Spitzer, *supra* note 3; see also Daniel Kahneman et al., *supra* note 280.

293. Kaplow & Shavell, *supra* note 3, at 745-48. Kaplow and Shavell divide their argument against the usefulness of entitlement psychology into three parts. First, they point out that allocating a property rule to one party means not allocating it to another—a preference for property rules can not inform who should receive the initial entitlement. *Id.* Second, they point out that to the extent that initial allocation has created a bond, its breaking can be analyzed in utilitarian ways. *Id.* To us, this means that the strength of the attachment created by property rules (which, as we have shown, can be quite strong), will be considered when deciding whether a liability rule would be more appropriate. They finally dismiss claims about natural entitlements and distributive justice as circular and lacking in conceptual content, respectively. *Id.* We do not believe that Kaplow and Shavell have responded to the real point of the behavioralist literature, namely that individuals might have a preference for property rules *qua* property rules, and might have a preference for the status quo *qua* status quo.

tioning whether the effect is a preference for property rules over liability rules, or a preference for the status quo.<sup>294</sup> There are a few writers of this latter group who believe that individuals exhibit a real preference for property rules, and warn against attempts to “tinker” with it.<sup>295</sup> The mainstream academic consensus, however, still tends to favor the *liability rule* protection of initial entitlements, which appears to reduce the endowment effect.<sup>296</sup>

Translating this literature to our concerns, we see that welfare economics has seriously complicated the already puzzled property/liability rule puzzle. People’s preferences for legal rules (whether informed by fairness, ownership made venerable by endowment, or even the status quo) make it difficult to recommend adopting a legal regime that is otherwise believed to be efficient (liability rule protection for most property rights). Moreover, this specific application seems susceptible to broad generalizations. It therefore makes us wonder when, if ever, welfare economics will be able to boldly call for legal change. The tension between the status quo and change is omnipresent, as is (to a lesser extent) the preference creating endowment effect.

#### D. (Dis)tastes for Economic Decision Making

The material in the preceding two sections may not have surprised the informed reader. The idea that ordinary people prefer fair solutions to legal problems is obvious. However, welfare economics contains within itself an emergent tension to which it may be difficult to respond.<sup>297</sup> Some recent experiments sharply suggest that people may not want policymakers to use economic, preference-based decision-making to choose between competing legal practices in their community.

The experiments we will discuss are particularly notable because they closely simulate actual legal deliberation, and the participants are specifically asked to assign dollar values. This experimental data is thus better suited to meet Kaplow and Shavell’s strictures than the data of preferences for procedural justice considered in Part II.B. It suggests

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294. See Rachlinski & Jourden, *supra* note 280, at 1572-74.

295. *Id.* at 1575-76; cf. Hope M. Babcock, *Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are? Of Beavers, Bob-o-Links, and Other Things That Go Bump in the Night*, 85 IOWA L. REV. 849, 899, n.219 (2000) (discussing Rachlinski and Jourden).

296. See Rachlinski & Jourden, *supra* note 280, at 1575.

297. A familiar variant of utilitarian theory known as “rule-utilitarianism” attempts to resolve the practical difficulties of implementing utilitarianism by holding that the analyst’s job is simply to identify the general rule that will tend, on the whole, to maximize welfare to a greater degree than other competing rules of similar generality. Kaplow and Shavell frequently express views similar to rule-utilitarianism. We note, however, that identifying the “best” legal rule under rule-utilitarianism depends in part upon aggregating the net welfare effects of that rule across a range of individual situations when the rule is likely to be applied. Assessing those individual situations, in turn, may involve the same types of difficult calculations previously discussed.

that individuals are “actually . . . willing in principle to expend resources to benefit from” law-related preferences.<sup>298</sup> People, it seems, do not like economists to make their legal decisions for them.<sup>299</sup> These preferences, unlike those we have previously discussed, are specifically concerned with the absence or presence in the legal system of numerical, consequentialist decision-making procedures like the ones supported by Kaplow and Shavell and others. We therefore dub them “anti-utilitarian preferences.”

In the following section, we review the works of three prominent scholars who have performed empirical work teasing out the strength of anti-utilitarian preferences. Then, in Part III.E, we attempt to explain when these preferences arise, and articulate why welfare economics ought to respect them.

### 1. *W. Kip Viscusi and the Anti-Utilitarian Jury*

W. Kip Viscusi is one of the most prominent defenders of economic decision-making. He believes that “we all benefit” when textbook cost-benefit analyses are performed by corporate decision-makers.<sup>300</sup> He has argued that regulatory agencies act inefficiently if they do not base their decisions on such tradeoffs,<sup>301</sup> and that such failures disproportionately harm racial minorities.<sup>302</sup> Viscusi strongly encourages legal scholars to use cost-benefit based decision-making to analyze legal rules and institutions of all kinds.<sup>303</sup> He thinks individuals perform cost-benefit analy-

298. See Kaplow & Shavell, *supra* note 3, at 1211.

299. Cf. LEARNED HAND, THE BILL OF RIGHTS 73 (1958). Hand states:

For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.

*Id.*

300. See W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?* 52 STAN. L. REV. 547, 550 (2000).

301. See W. Kip Viscusi, *Regulating the Regulators*, 63 U. CHI. L. REV. 1423, 1436-37 (1996) (arguing that agencies should be bound by the “intuitively appealing” “benefit-cost” test).

302. See W. Kip Viscusi, *Risk Equity*, 29 J. LEGAL STUD. 843 (2000) (arguing that cost-benefit decisionmaking by administrative agencies empowers minorities).

303. See W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285 (1998) (applying cost-benefit analysis to punitive damages); see also W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 GEO. L.J. 381, 395 (1998) (arguing that legal analyses which do not employ cost-benefit analysis are not constructive). Cf. W. Kip Viscusi et al., *Deterring Inefficient Pharmaceutical Litigation: An Economic Rationale for the FDA Regulatory Compliance Defense*, 24 SETON HALL L. REV. 1437 (1994) (analyzing intersection of regulation and tort law through cost-benefit lens). See also W. Kip Viscusi, *Individual Rationality, Hazard Warnings, and the Foundations of Tort Law*, 48 RUTGERS L. REV. 625, 667 (1995) (applying cost-benefit analysis to warning label law); cf. James T. Hamilton & W. Kip Viscusi, *The Benefits and Costs of Regulatory Reforms for Superfund*, 16 STAN. ENVTL. L.J. 159 (1997) (applying cost-benefit analysis to EPA’s Superfund program).

ses all the time.<sup>304</sup> He seems to favor cost-benefit decision-making by judges,<sup>305</sup> and he also believes that juries should regularly perform cost-benefit analyses.<sup>306</sup>

In light of Viscusi's staunch belief in the desirability of economic decision-making in the legal system, one of the most striking leitmotifs in his work is his consistent acknowledgment that average individuals find cost-benefit analysis in tort cases severely distasteful. Thus, he offers evidence that others have called his own economic analyses of safety issues "an offense to human decency."<sup>307</sup> He recognizes that corporations have had a great deal of trouble articulating their cost-benefit decision-making persuasively to the public.<sup>308</sup> Indeed, he has begun to suspect that individuals have an "ingrained hostility towards rational, mathematical analyses of benefits and costs in the domain of risk,"<sup>309</sup> and argues for framing economic analysis in ways that might ameliorate this hostility.<sup>310</sup>

Confronted with this tension, Professor Viscusi decided recently to test exactly how citizens feel about cost-benefit decision-making in the legal system.<sup>311</sup> He asked how potential jurors reacted to corporate risk balancing when that balancing led to a decision to market a product containing a defect that had killed someone.<sup>312</sup> Viscusi presented mock jurors with five different accident scenarios.<sup>313</sup> In the first two scenarios, the corporation had performed no cost-benefit analysis, but the cost

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304. See Mark K. Dreyfus & W. Kip Viscusi, *Rates of Time Preference and Consumer Valuations of Automobile Safety and Fuel Efficiency*, 38 J.L. & ECON. 79 (arguing that consumers effectively use cost-benefit analysis in making the cost/safety tradeoff while buying a car).

305. W. Kip Viscusi, *Regulatory Economics in the Courts: An Analysis of Judge Scalia's NHTSA Bumper Decision*, LAW & CONTEMP. PROBS., Autumn 1987, at 17 (praising Antonin Scalia for using cost-benefit decision making while analyzing agency decisions). Viscusi noted that the "benefit-cost test should be regarded as a tool of advocacy not entirely different from noneconomic arguments that can be mustered in support of a policy." *Id.* at 24.

306. Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901, 913 (1998) ("Ideally, the jury in its role as a risk manager should promote the rational analyses of risk and safety by the parties who may end up in litigation following adverse events. More specifically, the objective should be to maintain a sensible benefit-cost tradeoff.")

307. See Viscusi, *supra* note 300, at 550 n.5 (citing an opposing brief in litigation).

308. See *id.* at 567-86 (providing examples of companies that performed cost-benefit analyses being forced to pay large punitive damage awards); see also W. Kip Viscusi, *The Governmental Composition of the Insurance Costs of Smoking*, 42 J.L. & ECON. 575, 605 (1999) (asserting that making cost-benefit arguments is "uncomfortable"); Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, *supra* note 303, at 321 (asserting that making such calculations may offend some jurors' sensitivities).

309. Hastie & Viscusi, *supra* note 306, at 913.

310. W. Kip Viscusi, *Equivalent Frames of Reference for Judging Risk Regulation Policies*, 3 N.Y.U. ENVTL. L.J. 431 (1995) (arguing for a new framework that would allow cost-benefit decision making to be publicly accepted).

311. See Viscusi, *supra* note 300 (reporting and analyzing his "juror judgement survey").

312. Viscusi apparently believes that the very existence of a properly performed cost-benefit analysis should not be evidence of non-negligence. See *id.* at 550.

313. *Id.* at 592.

to make the improvement varied.<sup>314</sup> In the third and fourth scenarios, the corporation had performed an analysis, but employed significantly different monetary valuations of human life.<sup>315</sup> In the fifth scenario, the corporation had made a *mistaken* calculation while applying various valuations of life.<sup>316</sup>

Professor Viscusi found that, even absent a cost-benefit analysis, individuals were willing to punish the company in his hypothetical scenarios with punitive damages in eighty-eight percent of the cases.<sup>317</sup> But, in the latter three scenarios, when the analyses had been performed correctly, individuals were willing to award punitive damages ninety-three to ninety-five percent of the time.<sup>318</sup> This difference is statistically significant,<sup>319</sup> but small enough that Viscusi's most interesting results came from varying the damage estimates employed in the cost-benefit analyses.

Absent a cost-benefit analysis, individuals imposed an average of \$2.91 million in punitive damages.<sup>320</sup> But when companies employed cost-benefit decision-making, they were penalized \$4.59 million—fifty percent more.<sup>321</sup> Valuing human life at higher numbers only seemed to increase the juror's ire (a product of a psychological anchoring effect, Viscusi argues),<sup>322</sup> and incorrect cost-benefit analyses were (counter-intuitively) less repellant to jurors than their well-performed counterparts.<sup>323</sup> Professor Viscusi finally compensated for various demographic and statistical factors represented in his pool of subjects.<sup>324</sup> He concluded that attempting to justify a legally relevant decision by cost-benefit analysis increased the risk of punitive damages by five percent and the punitive damages awarded by forty-seven percent.<sup>325</sup>

Professor Viscusi found these results upsetting, to say the least. Although he realizes that "[e]conomic analysis . . . is inherently unpleasant and may offend jurors,"<sup>326</sup> he believes that it is a simple "mistake"<sup>327</sup> for jurors to punish corporations for their systematic and socially beneficial thinking about risk.<sup>328</sup>

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314. *Id.*

315. *Id.*

316. Viscusi, *supra* note 300, at 592.

317. *Id.* at 556.

318. *Id.* at 556-57.

319. *Id.* at 557.

320. Median value: \$1 million. *Id.* at 557.

321. Median value: \$10 million. Viscusi, *supra* note 300, at 557.

322. *Id.* at 558.

323. *See id.* at 559.

324. *Id.*

325. *Id.*

326. Viscusi, *supra* note 300, at 566.

327. *Id.* at 586.

328. *See id.* at 590.

It is unclear what Professor Viscusi believes to be the cause of this aversion to utilitarian thinking. He discusses various biases (including hindsight bias) that undermine individuals' abilities to think rationally about risk-benefit decisions after an accident has occurred.<sup>329</sup> He gives examples of these biases being applied in a variety of historical trials that produced large punitive awards.<sup>330</sup> And yet his results also clearly demonstrate that citizens exhibit non-random,<sup>331</sup> coherent preferences against utilitarian (or "cold-blooded")<sup>332</sup> decision-making heuristics by actors in the legal system.<sup>333</sup>

## 2. *Cass Sunstein, and the Anti-Utilitarian Law Students*

Cass Sunstein is another supporter of cost-benefit based legal decision-making, although his view is more nuanced than Professor Viscusi's.<sup>334</sup> In a recent paper,<sup>335</sup> Sunstein and two co-authors questioned whether one instance of such decision-making, setting punitive damages according to a consequentialist model designed by Professors Polinsky and Shavell,<sup>336</sup> has any support among the citizenry. They concluded that "the public will be skeptical of an effort" to incorporate the Polinsky-Shavell model of optimal deterrence in the legal system and "[a]n attempt to move policy in this direction could be widely perceived as unfair and wrong."<sup>337</sup>

Before arriving at this disheartening (from a welfare economic perspective) conclusion, Sunstein and his co-authors engaged in a series of experiments designed to test whether people "believe in optimal deter-

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329. See *id.* at 586-90. Professor Viscusi is not the only author who believes that cognitive failures, rather than anti-utilitarian tastes or social norms, are the source of damage awards that punish cost-benefit analyses. See James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 296-303 (1990) (arguing that juries are generally incapable of accurately measuring the marginal costs and benefits of adding new warnings).

330. See Viscusi, *supra* note 300, at 567-86.

331. See *id.* at 586-90.

332. See *id.*

333. If cognitive biases were the only operative factor, Professor Viscusi's results would not all point in the same direction. See Hanson & Kysar, *Taking Behavioralism Seriously (I)*, *supra* note 123, at 722-25 (noting the indeterminacy of research on the 'direction' or 'tendencies' of common cognitive biases).

334. Compare Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, in COST-BENEFIT ANALYSIS, *supra* note 3 (noting that cost-benefit serves as institutional safeguard against popular prejudice and cognitive biases), with Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 642 n.25 (1999) (noting that while most people agree that cost-benefit analysis makes sense, its specific definition may either command support or create revulsion). See also Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 43-72 (1995) (critiquing conventional cost-benefit analysis for focusing too narrowly on immediate ends and means).

335. See Sunstein, Schkade, & Kahneman, *supra* note 5.

336. See Polinsky & Shavell, *supra* note 29.

337. Sunstein, Schkade, & Kahneman, *supra* note 5, at 250.

rence.”<sup>338</sup> According to the Polinsky-Shavell model, optimal deterrence occurs when jurors are asked to determine punitive damages by multiplying the inverse of the probability of detection of the tortfeasor’s actions by the amount of the compensatory award that would compensate the victim’s loss.<sup>339</sup>

Plainly the “optimal deterrence” model of punitive damages is a utilitarian, cost-benefit based decision heuristic. The Polinsky-Shavell article notes that punitive damages are also used to further the aim of punishment, but its analysis largely omits that aim.<sup>340</sup> Polinsky and Shavell conceive of the aim of punishment as promoting “the pleasure or satisfaction people obtain from seeing blameworthy parties punished”<sup>341</sup> or the satisfaction of “an abstract philosophical principle calling for retribution.”<sup>342</sup> Both of these goods are similar to the “tastes for fairness” that serve as a brake on welfare analysis in the monograph of Kaplow and Shavell. In a sense, the pure optimal deterrence model derived from the work of Polinsky and Shavell may be thought of as an attempt to conceptualize a role for punitive damages to serve in the *absence* of tastes for fairness.

To investigate the acceptability of this model, Sunstein and his co-authors performed two experiments.<sup>343</sup> In the first, they asked 699 citizens to judge mock personal injury cases and determine whether the probability of detection of the tortious conduct should affect the damage award.<sup>344</sup> The likelihood that the wrongdoer would be caught was varied from twenty percent, to ten percent, to one percent in different samples.<sup>345</sup> Their basic result was “striking and simple.”<sup>346</sup> Even varying the probability of detection by twenty-fold had *no* significant effect on the amount of the punitive award the would-be jurors offered.<sup>347</sup> Indeed, the effect went in an opposite direction—greater probabilities of detection engendered larger awards.<sup>348</sup>

However, the authors acknowledge that their initial study subjects may not have been sufficiently exposed to, or educated about, the value of cost-benefit thinking.<sup>349</sup> They therefore turned to a new pool of subjects, closer to home, who would seemingly be uniquely willing and

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338. *Id.* at 239; see Polinsky & Shavell, *supra* note 29.

339. *Id.* at 238.

340. Polinsky & Shavell, *supra* note 29.

341. *Id.* at 948.

342. *Id.* at 948 n.252.

343. Sunstein, Schkade, & Kahneman, *supra* note 5, at 239-40.

344. *Id.* at 241-43.

345. *Id.* at 241.

346. *Id.* at 243.

347. *Id.*

348. Sunstein, Schkade, & Kahneman, *supra* note 5, at 243-44.

349. *Id.* at 244.

able to apply utilitarian decision-making in legal settings—second-year and third-year law students at the University of Chicago.<sup>350</sup>

The study asked whether, in two different fact situations, a specifically articulated optimal deterrence policy was appropriate.<sup>351</sup> Sunstein and his co-authors sadly report that even the law students, by very strong majorities,<sup>352</sup> rejected policies that maximized deterrence. Moreover, most of the law students believed that the rest of society would agree with them.<sup>353</sup> Sunstein and his co-authors conclude that “[t]he fact that optimal deterrence policies are rejected in both the administrative and the judicial domains among a group likely to be predisposed in their favor strongly suggests that any effort to move in the direction of optimal deterrence would encounter significant popular resistance.”<sup>354</sup> They argue that this result confirms “messy” real world evidence tending to show that “juries do not pursue optimal deterrence.”<sup>355</sup>

Without this study, it would be possible to imagine that the rejection of optimal deterrence by juries arises from their cognitive biases and general irrationality, rather than a substantive view of what the legal system should be.<sup>356</sup> However, even University of Chicago law students, conditioned and requested to apply the use of this form of cost-benefit decision-making to hypothetical tort disputes, refused by overwhelming margins. Sunstein and his co-authors thus conclude that reforming the legal system to optimize deterrence faces severe hurdles. Juries may nullify their instructions.<sup>357</sup> Individuals will widely perceive policies to be “unfair and wrong.”<sup>358</sup> In a remarkable passage, Sunstein and co-authors speculate that the government may need to adopt various paternalistic policies if it wishes to pursue normative proposals based on optimal deterrence. Government may need to conceal its true decision-making norm from citizens,<sup>359</sup> re-educate them about its wisdom,<sup>360</sup>

350. *Id.* “University of Chicago Law School students generally learn a great deal about deterrence theory in their first year of law school . . . [this] training . . . alerts [them of the need] to consider both level and probability of penalty in achieving optimal deterrence.” *Id.*

351. Students were given a recommendation that they should apply optimal deterrence decision making, and asked whether they strongly agreed, somewhat agreed, somewhat disagreed, or strongly disagreed with the statement. *Id.* at 245.

352. Sunstein, Schkade, & Kahneman, *supra* note 5, at 246. Optimal deterrence policies were rejected by eighty-four percent of the law students in one setting and seventy-five percent in another.

353. Sixty-seven to eighty-seven percent thought that “most people” would reject the optimal deterrence approach. *Id.* at 246.

354. *Id.* at 248.

355. *Id.* at 249.

356. *Cf.* Sunstein, *Cognition and Cost-Benefit Analysis*, in *COST-BENEFIT ANALYSIS*, *supra* note 3, at 223.

357. *See* Sunstein, Schkade, and Kahneman, *supra* note 5, at 250.

358. *Id.*

359. *See id.* For a longer discussion of this option, see *infra* Part III.A.

360. *See* Sunstein, Schkade, & Kahneman, *supra* note 5, at 250.

confine optimal-deterrence decision making to limited contexts,<sup>361</sup> or shift authority from the legal system to bureaucracies.<sup>362</sup> It would seem that only by shifting power from the people can the government be free. Then, "whatever ordinary people think, the relevant administrators will seek to promote optimal deterrence."<sup>363</sup>

### 3. *W. Kip Viscusi Returns with Yet More Bad News*

Professor Viscusi has recently responded to Sunstein's anti-deterrence paper with an empirical study of his own.<sup>364</sup> Although he describes the experiments by Sunstein and others as "carefully controlled,"<sup>365</sup> he nevertheless believes that they did not test citizens' willingness to apply utilitarian reasoning with enough specificity. He therefore devised an experiment directly testing whether individuals would apply the Polinsky-Shavell punitive damages model.<sup>366</sup>

Viscusi instructed individuals to perform three calculations before selecting a punitive damage award. First, they were instructed to set the award that would be appropriate from a pure deterrence perspective. That number, they were told, should equal the level of damages (the compensatory judgment) divided by the probability of detection.<sup>367</sup> Second, they were told to think about what level of damages was necessary to *punish* corporate wrongdoing,<sup>368</sup> but were instructed that such punishment may occur through the compensatory (and not the punitive) damage scheme.<sup>369</sup> Third, they were told to compute a weighted average of the first two numbers to find the optimal punitive award. In Viscusi's view, this "precise guide" should have corrected for various cognitive biases that affect jurors.<sup>370</sup> Viscusi predicted that his step-by-step damages-setting procedure would reduce punitive damages overall.<sup>371</sup>

Professor Viscusi gave each model jury these instructions, and then one of five factual scenarios.<sup>372</sup> The scenarios were designed to vary the amount of the concealment of wrongdoing by the corporate tortfeasors, and the corresponding likelihood that the tortious conduct would be detected.<sup>373</sup> Viscusi also tried to alter the anchoring effects created by

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361. *See id.*

362. *See id.*

363. *Id.* We discuss this solution *infra* Part III.B.

364. *See* Viscusi, *supra* note 4.

365. *Id.* at 314.

366. These instructions appear in an appendix to Viscusi's paper. *See id.* at 344-46.

367. *See* Polinsky & Shavell, *supra* note 29, at 889 (describing the procedure).

368. A notion with no counterpart in consequentialist legal theories.

369. *See* Viscusi, *supra* note 4, at 345.

370. *See id.* at 318-19.

371. *See id.*

372. *Id.* at 346-49.

373. In some cases the tortfeasors openly poisoned the environment, knowing that seventy-

party attorneys or external sources, hoping to determine whether the Polinsky-Shavell optimal-deterrence proposal is practical.<sup>374</sup>

The results were discouraging. Viscusi found that, on average, only fifteen percent of respondents would correctly apply the Polinsky-Shavell calculus.<sup>375</sup> "Quite simply," he says, individuals "ignore the guidance of the deterrence table and [do not take] into account the differing value of the detection probability when setting the optimal deterrence amount."<sup>376</sup> The amount of money that individuals believed necessary to punish corporations proved far more significant to determining the amount of their final damage award than did their view of the deterrence test.<sup>377</sup>

Viscusi proposes two different explanations for his results. First, he suggests that low education may have prevented some juries from being able to make the necessary deterrence calculations.<sup>378</sup> This dovetails with Viscusi's conclusions in earlier work about the effect of cognitive biases on the ability of individuals to measure risk.<sup>379</sup> However, Viscusi concludes that education alone does not explain individuals' unwillingness or *inability* to apply the utilitarian formula offered to them. In fact, the responses differed significantly among ethnic and gender lines: minority status and gender were the two most significant determinants of whether an individual would apply the instructions.<sup>380</sup> Sixty-two percent of those giving incorrect or missing answers were female.<sup>381</sup> Simply being a woman apparently makes you five percent less likely to apply Polinsky's and Shavell's utilitarian deterrence formula.<sup>382</sup> Suggestively, Professor Viscusi concludes that while this *failure* may reflect lower mathematical skills among women, it may also reflect "a greater reluctance by female respondents to surrender their punitive damages judgment to a mathematical formula."<sup>383</sup>

Members of minority groups were even more hostile to the Polinsky-Shavell formula. Black respondents were eleven percent less likely than whites to give the "correct" deterrence maximizing result.<sup>384</sup> Hispanic respondents also rejected Polinsky and Shavell at a rate eight

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five percent of the time they would not be caught; in other cases they did so at midnight. *See id.* at 320-21.

374. *See* Viscusi, *supra* note 4, at 319.

375. *See id.* at 326.

376. *Id.* at 329.

377. *See id.* at 333.

378. *See id.* at 338.

379. *See supra* text accompanying notes 348-349.

380. *See* Viscusi, *supra* note 4, at 338.

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

percent higher than whites.<sup>385</sup>

Thus, two characteristics: being educated, and being a white male, were the only ones positively correlated with a willingness to apply a pure deterrence formula in a toxic tort case. In light of this study, Viscusi concludes that attempts to reform tort damages will fail as long as individual citizens retain control over the process.<sup>386</sup> He echoes his earlier call for removing legal cases from the hands of citizens, who are "simply reluctant or unable to carry out even the most basic mathematical calculations."<sup>387</sup>

Sunstein's and Viscusi's research implies that Polinsky's and Shavell's optimal deterrence model of tort damages provokes fierce distaste among those exposed to it, to the point of prompting widespread nullification and disobedience. To revert to our prior metaphor, it is clear that law-related preferences will act as a powerful stumbling block to any attempt to implement such a policy in a jury system: the jurors will not obey.<sup>388</sup> The results of Sunstein's survey of law students suggests that even bureaucrats may defect.

What about the direct welfare effects of such a policy? That is, suppose that the Polinsky-Shavell damages model is welfare-maximizing in allocative terms. Suppose further that someone can be found to implement it (which seems doubtful). Then to what degree will the frustration of the law-related preferences disclosed by the two studies act as a "brake" on the welfare gains associated with the policy? Again, unless one dogmatically excludes as irrelevant all preference information that is not readily monetized, the reality of the preferences disclosed in the punitive damages studies is clear, especially as results of social science research go. On the other hand, their magnitude is totally unclear. Economists who urge the need for tort reform rightly point out the huge dollar values involved in punitive damage awards: if these awards are consistently wrong from the standpoint of welfare (excluding law-related preferences), and the losses do not somehow cancel each other out, then the welfare loss produced is likely to be very serious. Such losses would be serious enough to swamp even large welfare gains that resulted from respecting the desires of average people for a non-utilitarian, fairness-based system of assigning punitive damages. The

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385. See Viscusi, *supra* note 4, at 338.

386. See *id.* at 344.

387. *Id.* This statement is not entirely supported by the rest of Professor Viscusi's paper. Individuals were able to average the amounts they awarded for deterrence and those they awarded for punishment. In over seventy-five percent of the cases, they did so correctly. See *id.* at 326. That suggests that, as with (presumably) the Chicago law students, the salient trait of Viscusi's non-lawyer subjects was not an inability to compute, but rather a reluctance to choose an amount that would correlate to the mathematically determined optimal deterrence number. Indeed, Viscusi acknowledges this possibility himself. See *id.* at 338-39.

388. See Viscusi, *supra* note 4, at 326.

answer must await more empirical inquiry. One crucial consideration will be determining whether these preferences are produced, and hence satisfied or frustrated, only when individuals are in a jury room, or otherwise directly exposed to the workings of the tort system, or whether a more widespread disappointment would be involved. Again, we discuss this limitation in Part II.E below.

A second important question that remains open about these studies is whether other welfare-economic proposals for reforming tort damages will produce the same negative reactions that the optimal-deterrence model does. The vehemence may simply reflect a flaw in Polinsky's and Shavell's model. That model seems custom-designed to inflame law-related preferences and tastes for fairness in general to a high degree, especially when presented in a "pure" form that does not permit juries to assign damages for punishment. (Recall that Polinsky and Shavell's model instructions *do* authorize the jury to punish.)<sup>389</sup> The model first tells jurors to assess "punitive damages," and then orders them to apply a procedure that seems to flout or ignore the fairness-based and retributive norms that distinguish punitive damages from normal tort damages. For example, the welfare losses from simply abolishing punitive damages, ordering juries merely to compensate, might be smaller, and might provoke less nullification. Or maybe not. Again, this question is open for future study.

#### 4. *Jonathan Baron, and the Need for Education*

Psychologist Jonathan Baron's research concentrates on the "everyday intuitions that stand in the way of utility maximization, particularly moral intuitions."<sup>390</sup> Baron believes that consequentialism should be preferred as a decision heuristic over intuitive alternatives such as common notions of fairness.<sup>391</sup> However, much of his scholarship is dedicated to identifying, then confronting, deeply felt individual intuitions and tastes against utilitarianism. His thesis is simple: "[u]tilitarianism often conflicts with our intuitive beliefs about what is morally right."<sup>392</sup> Baron's research identifies anti-utilitarian dispositions that seem to pose a powerful "stumbling block"<sup>393</sup> almost anytime individuals are asked to apply consequentialist legal principles or policies.

In Baron's view, the basic moral norm that seems to prevent indi-

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389. See Polinsky & Shavell, *supra* note 29, at 889 (describing the procedure).

390. Jonathan Baron, Research, Books, Papers, available at <http://www.sas.upenn.edu/~jbaron/pprs.html> (last visited Mar. 24, 2001).

391. Jonathan Baron, *Nonconsequentialist Decisions*, 17 BEHAV. & BRAIN SCI. 1 (1994).

392. See Jonathan Baron, *Heuristics and Biases in Equity Judgments*, in PSYCHOLOGICAL PERSPECTIVES ON JUSTICE 109, 111 (Mellers & Baron eds., 1993).

393. See Viscusi, *supra* note 4, at 326.

viduals from embracing utilitarianism can be simply stated: "Do No Harm."<sup>394</sup> Thus, Baron asked individuals whether they would (as policy makers) recommend widespread vaccinations, given that the vaccination would have both harmful and helpful effects. He found that individuals were reluctant to maximize the benefits to society by recommending the vaccine. They preferred to allow harm to occur by omission rather than to cause a smaller magnitude of harm by commission.<sup>395</sup> Similarly, Baron has found that individuals exhibited tastes against welfare-justified trade treaties when they cost real people their jobs.<sup>396</sup> This bias "toward inaction"<sup>397</sup> is similar to the status quo bias discussed above,<sup>398</sup> and may derive from the same intuitive moral judgment.

Second, like Sunstein and Viscusi, Baron has found a dispiriting lack of willingness among members of the public to apply deterrence-based utilitarian decision procedures in common criminal, administrative, and tort settings. Thus, Baron found that individuals imposed roughly the same penalties on a given course of conduct regardless of whether they were told that imposing a penalty would cease harmful future conduct, or that it would prevent beneficial activity.<sup>399</sup> In a related experiment, individuals were actually given express, consequentialist arguments for deterrence before being asked to determine penalties in a hypothetical situation. Again, about half of the subjects explicitly rejected consequentialist reasoning.<sup>400</sup> Individuals simply believe that the legal system should be focused on the moral characteristics of the situation here and now: "consequences of a past action . . . should not be judged based on its ramifications for future actions/decisions."<sup>401</sup> Citizens commonly reject utilitarianism by contrasting it to the just or fair result: "Either the company is to blame or it isn't," in the words of one of Baron's model jurors.<sup>402</sup>

This anti-deterrence preference is related to another phenomenon that appears in Baron's work; a general distaste for coercive utilitarian-

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394. For a fascinating example of how the "Do No Harm" principle can conflict with legal rules, see Catherine Elliott, *Murder and Necessity Following the Siamese Twins Litigation*, 65 J. CRIM. L. 66 (2001) (describing how parents of conjoined twins refused to harm one of the pair by agreeing to a separation that would save the other, and examining the legal proceedings by which the state eventually compelled the operation).

395. See Ilana Ritov & Jonathan Baron, *Reluctance to Vaccinate: Omission Bias and Ambiguity*, 3 J. BEHAV. DECISION MAKING 263 (1990). Ritov and Baron conclude that, "subjects are reluctant to vaccinate when the vaccine can cause bad outcomes, even if the outcomes of not vaccinating are worse." *Id.* at 275.

396. See BARON, *supra* note 6, at 97-103.

397. See Baron, *supra* note 392, at 129.

398. See *supra* notes 237-245 and accompanying text.

399. See Jonathan Baron & Ilana Ritov, *Intuitions about Penalties and Compensation in the Context of Tort Law*, 7 J. RISK & UNCERTAINTY 17 (1993).

400. BARON, *supra* note 6, at 123.

401. *Id.*

402. *Id.*

ism. Thus, individuals disfavor imposing taxes based on a cost-benefit analysis of their effect on behavior, because, such policies impose utilitarianism on the public.<sup>403</sup> Subjects reject reforms like abolishing political advertising, eliminating medical malpractice suits, and a one hundred percent tax on gasoline, *even when they know the benefits of such policies outweigh the costs*, because to do otherwise would disadvantage some part of society through an imposed economic calculus.<sup>404</sup> Baron warns that it is our “wishful”<sup>405</sup> tastes for personal autonomy that might motivate this anti-coercive “rule of thumb.”<sup>406</sup> He discounts the rightness (though not the strength) of the beliefs of those individuals who dislike having their “rights” trumped by “bureaucratic games.”<sup>407</sup>

Finally, Professor Baron has sketched out some evidence for a type of anti-utilitarianism taste that is not simply negative: a positive taste for equality and deontological thinking.<sup>408</sup> Thus, individuals wish for decisions about the environment to be made through deontological thinking, not utilitarian balancing.<sup>409</sup> Baron later modified his vaccination experiment and found that even after factoring out the status quo bias, individuals exhibit a positive taste for equality—at the expense of efficiency—when deciding between competing social programs.<sup>410</sup>

Baron believes that these intuitions stand squarely in the path of a society enriched by the fruits of utilitarian thinking. He recommends a variety of ways “around” these tastes. These proposed solutions range from a rejection of cynicism about government,<sup>411</sup> to a new kind of politics itself;<sup>412</sup> from a different kind of national press,<sup>413</sup> to a newly accu-

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403. See *id.* at 54-56 (noting that resistance is in part an anti-coercive norm and in part a disbelief in the elasticity of behavior); see also Jonathan Baron & James Journey, *Norms Against Voting for Coerced Reform*, 64 J. PERSONALITY & SOC. PSYCHOL. 347 (1993).

404. See Baron, *supra* note 392, at 130-31.

405. See BARON, *supra* note 6, at 29-30.

406. *Id.* at 142; see *id.* at 29, 30, 53, 142, 163.

407. *Id.* at 29.

408. Deontological moral thinking is the opposite of consequentialist thinking. Deontological views hold that the moral goodness or badness of an action depends, not upon the consequences of that action, but rather upon a direct relationship between the actor, her actions, and/or the immediate situation in which the action takes place.

409. Jonathan Baron, *Deontological vs. Utilitarian Values for Natural Resources*, available at <http://www.sas.upenn.edu/~jbaron/env.html> (last visited Mar. 23, 2001).

410. Baron asked his subjects to choose between vaccinating and not vaccinating two groups (boys and girls), and found that even when there was no status quo effect, individuals exhibited significant negative reactions to decisions that would produce unequal results, even when they programs would maximize overall benefits in society. Baron, *supra* note 392, at 132-34.

411. See BARON, *supra* note 6, at 185-87 (calling for individuals to trust the government to perform accurate cost-benefit analyses).

412. See *id.* at 194-95 (calling for the government to fund politicians who present cost-benefit based solutions to national problems).

413. See *id.* at 193-94 (calling for reporters to focus on the empirical consequences of policy decisions, and not the public's reaction).

rate and omniscient Internet.<sup>414</sup> Indeed, should such narrow solutions not pan out, Baron is driven to advocate truly radical reforms to enable the new utilitarian era, including new kinds of parenting,<sup>415</sup> or comprehensive proposals to re-educate our children so that they become aware of the wisdom of the welfare economic project.<sup>416</sup>

*E. The Possible Scope of Anti-Utilitarian and Other Law-Related Preferences*

The evidence of law-related preferences considered here leaves two major issues open. The first, as we have discussed repeatedly, is the absence of numerical values. If an individual is confronted with a legal policy or institution about which he holds law-related preferences or tastes for fairness, how do we measure what he is likely to give up in order to satisfy that preference? We have endorsed the need for more refined investigation here, though the inability to assign dollar values to these preferences does not justify complacency about their effects.

But there is a second important issue. It is plausible that many legal rules and institutions do not give rise to significant law-related preferences because individuals simply do not know about them. There is strong empirical evidence that most individuals subject to the law do not actually know what it is.<sup>417</sup> Even if individuals have a general sense of a legal rule, they may not understand how it is applied.<sup>418</sup> The idea that non-lawyers might have real preferences about the law and its procedures can seem counterintuitive. After all, the timely, costly ritual of law school exists to indoctrinate lawyers to know the law's distinctions in a way that the general public does not.

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414. See *id.* at 199-200 (arguing that Internet chat rooms have restored a "premium on facts and figures that concern expected consequences").

415. See *id.* at 201 (suggesting that parents ensure that their children understand social and moral theory by buying them world-building computer games like Sim Earth and Sim City).

416. See BARON, *supra* note 6, at 196-99 (calling for education starting in elementary school about utilitarian thinking); see also Baron, *supra* note 392, at 135 (noting that "people should be taught to understand the utilitarian approach").

417. See, e.g., Martha Williams & Jay Hall, *Knowledge of the Law in Texas: Socioeconomic and Ethnic Differences*, 7 LAW & SOC'Y REV. 99 (1972) (discussing interviewers' findings that while legal knowledge varied with socio-economic status, even wealthy individuals did not know a large proportion of relevant private law); see also Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893 (1982) (asserting that patients did not know that their confidences had legal protection).

418. See ELLICKSON, *supra* note 276, at 48-53, 137-55 (while interested parties may understand the law in a general way, this knowledge does not incorporate the specific implications of rules like strict liability); cf. Pauline D. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447 (1999) (asserting that workers' misunderstanding of how the law is applied is based on their confusion of social norms and legal rules); see also Kaplow & Shavell, *supra* note 3, at 1352.

Paradoxically, even as Sunstein, Viscusi, and Baron are uncovering pronounced discontent among model tort juries with the application of quantitative cost-benefit procedures, federal agencies in Washington are blithely formulating binding regulations with the aid of cost-benefit analysis, as they have done for the past twenty years. This has been standard procedure for agencies developing major regulations since the issuance of a presidential Executive Order early in President Reagan's administration.<sup>419</sup> The Reagan order imposed a fairly rigid requirement that all major regulations be justified by a (textbook) cost-benefit analysis. It was supplanted during the Clinton presidency by Executive Order 12,866, the current cost-benefit analysis order.<sup>420</sup> Order 12,866 still gives cost-benefit analysis a central role in the formulation of regulatory policy, though it also gives the agencies more freedom to deviate from textbook cost-benefit analysis by including distributional weights, existence values, and the like.<sup>421</sup> Legal academics have engaged in a lively controversy over the policy of requiring agency cost-benefit analysis, but evidence of any *popular* outcry over the requirement is scarce. As far as we can tell, a large portion of the federal law-making apparatus has been yoked to economic norms without causing significant outrage to law-related preferences or other tastes for fairness.

Yet this is not from a lack of popular interest in the legal system. The United States has often been described as a uniquely law-obsessed society: "a vast, bustling school of law," in the words of a contemporary observer.<sup>422</sup> The law, its procedures, and even some of its technicalities are constantly on display (sometimes in palpably inaccurate forms) in television, movies, and books.<sup>423</sup>

We are unsure how to synthesize these seemingly contradictory data. If forced to speculate, we would suggest that regulatory policy makes neither good drama nor gripping news, and that scholarly articles debating its moral correctness are unread by all but a handful of Americans. Ignorance of the law may be no excuse, but it is a reality: utilitarians only outrage those who know about them.

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419. See Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

420. Exec. Order No. 12866, 3 C.F.R. 638 (1993).

421. *Id.* President George W. Bush, in turn, has appointed personnel to the White House Office of Management and Budget (the office which oversees the agency regulatory process) who support a more restrictive implementation of the cost-benefit analysis requirement. So far the rigidity (or rigor) of agency cost-benefit analysis seems to be greater under Republican presidents, lower under Democratic ones. See Cindy Skrzycki, *OMB Chief Vows Scrutiny of Agencies: Daniels Wants Consultation With States on Major Rules*, WASH. POST, May 25, 2001, at E3.

422. MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 258 & n.3 (1994) (paraphrasing Lawrence Friedman, *Law, Lawyers and Popular Culture*, 98 YALE L.J. 1579, 1598 (1989)).

423. See generally *id.*, ch. 12.

### III. CAN A PREFERENCE-BASED LEGAL POLICY CO-EXIST WITH DEMOCRACY?

We return to our guiding question: in light of improved empirical information, what is required for economic analysts to put the moral commitment to maximize well-being into practice? In this final part we summarize the problems that our analysis has raised and briefly discuss several possible responses to them.

#### A. *Problems Confronting Normative Law and Economics*

##### 1. *Developing Improved Practical Techniques to Measure Welfare*

We argued in Part I that despite years of scholarly effort, the distortions caused by wealth effects still pose a serious problem for legal economists. The new normative analysts are careful to stress the ways that their moral positions differ from wealth maximization; this is one of the qualities that makes their moral positions potentially attractive as bases for reform. Yet they admit that there are no consistent, practical methods for disentangling preference strength from wealth, which is necessary to maximize welfare. This perennial headache of welfare economics shows no sign of easing soon.

Our discussion of citizens' preferences about the legal system in Part II suggests another reason that improved practical techniques are important. Analysts like Kaplow and Shavell, who are committed to incorporating all actual preferences into the welfare calculus, must find ways to assign welfare values to preferences that are difficult to assign market prices. At present, polls, surveys, psychological experiments and the like are the chief tools for investigating such preferences. Analysts may seek to reject some of these hard-to-price preferences "on the merits" as morally irrelevant. They may also decide (if evidence permits) that these preferences are of negligible strength, and so can be ignored. But there are limits to the extent to which analysts can simply reject evidence of such preferences out of hand on *methodological* grounds, because of its form, and still claim to be concerned with maximizing welfare. The evidence of law-related preferences discussed in Part II may fall into this category.

##### 2. *Law-Related Preferences as Components of Welfare*

If some preferences about the content and fairness of the legal system are significant enough to alter the outcome of economic analysis,

then fixing their limits will be important. The question seems wide open: which legal practices are strongly valued? For example, are popular preferences more intense with respect to the law of prostitution than the law of personal bankruptcy? By how much? If potentially large values go unmeasured, then rules that may be welfare-maximizing in other respects (allocatively efficient with respect to material goods, creating proper incentives, distributively neutral, etc.) may not in fact be welfare-maximizing. Or they simply may not be as big an improvement as they seem. Perhaps further research will show that law-related preferences have low welfare effects. But our claim, based on the evidence in Part II, is that the answer cannot simply be derived from intuition.

### 3. *Law-Related Preferences as Influences on the Behavior of Legal Actors*

Drawing on research by Baron, Sunstein, Viscusi, and others, Part II presented direct evidence that law-related preferences sometimes cause ordinary people to act in ways that make legal institutions deviate from the goals of welfare economists. Some analysts are still inclined to explain these phenomena as reflecting irrational cognitive biases—and this may be true at times. But Sunstein, Viscusi, and Baron all concede that the most natural explanation of their research is not irrationality, but a consistent, strongly held *moral* reaction to economic thinking. People asked to apply economically grounded procedures to legal or policy scenarios sometimes refuse for moral or personal reasons, nullifying their instructions because they are offended by the procedures. Even well-educated law students appear to share this revulsion, which leads one to think it may affect politicians and judges as well as jurors. This revulsion could also affect political behavior such as voting. These possibilities alone make clear that law-related preferences have important policy ramifications.

Again, open (and intriguing) empirical questions remain about the scope of law-related preferences. What is definite is that analysts have begun to take the problem seriously enough to speculate about responses.

#### *B. Hiding the Ball: Secrecy as a Response to Law-Related Preferences*

##### *1. Possible Policies of Secrecy*

Kaplow and Shavell concede that “there will sometimes be a sig-

nificant conflict between the policy that decision-makers, based on advice from legal policy analysts, understand to be best and the policy that ordinary citizens think is fair."<sup>424</sup> They recognize that there may be a need for judges (among other actors) to resort to the "language of fairness" in explaining the basis of their decisions.<sup>425</sup> In other words: not only do people want certain outcomes, but people want the choices that created those outcomes to be non-utilitarian ones. Similarly, Sunstein and his co-authors note that secrecy is a possible response to the data showing that individuals sharply reject the type of thinking embodied in the optimal-deterrence model.<sup>426</sup>

Kaplow and Shavell are somewhat coy about the form secrecy should take. They state that government decision-makers ought to continue receiving "good advice" from the scholarly community. This good advice should consist of welfare maximizing analyses. The two professors are less clear about what judges should do with this advice when they receive it—*Fairness Versus Welfare* is a piece whose intended audience is scholars, not judges.<sup>427</sup> However, they suggest that judges might consider hiding the true bases of their decisions by employing a code—the language of fairness—which will placate the masses.<sup>428</sup>

The authors note that such a policy would be easy to employ because judges could employ notions of fairness to support almost any policy choice.<sup>429</sup> They go on to suggest that such coding might be unnecessary in any event. At present, they argue, the "masses" don't read court opinions, lawyers and other elites do.<sup>430</sup> Elites, presumably, would be able to appreciate and approve of the complexities of welfare economics.

Finally, though, Kaplow and Shavell recognize that government decision-makers are to some degree accountable to ordinary citizens, and they squarely confront the possibility that citizens might personally dislike both the bases and the results of welfare economic decision-making. They respond that citizens might nevertheless accept a welfare-economic legal system as a matter of principle, because they might *wish* their rulers to base their decisions on methods of moral reasoning alien to their own. Kaplow and Shavell do not offer any empirical support for this proposition.<sup>431</sup> To render it plausible, they argue that the prospect

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424. Kaplow & Shavell, *supra* note 3, at 1320.

425. *Id.* at 1319-20.

426. See Sunstein, Schkade, and Kahneman, *supra* note 5, at 250.

427. Kaplow & Shavell, *supra* note 3, at 1321.

428. See *id.* at 1319.

429. *Id.*

430. See *id.* at 1319 n.869.

431. See *id.* at 1322-23.

of using welfare economics to reshape the legal system does not raise any *special* moral or political issues. Instead, it is an example of a quite general tendency. It is common in many walks of life, the two authors reason, for experts' advice to suggest different results than the beliefs of ordinary citizens.<sup>432</sup> And there is usually little popular discontent about such divergences; after all, that is what experts are for. Why, then, should a legal system whose substance and procedures are based on expert economic advice be regarded any differently?

This argument is confused. The examples of specialized advice that Kaplow and Shavell mention all have to do with the knowledge possessed by *technical* experts (one of their examples is safety engineers). Individuals may indeed be relatively comfortable surrendering their judgment on technical issues to certified experts, but it is not at all clear that most people believe that credentialed professionals are entitled to their deference in *moral* matters—and the type of expert advice Kaplow and Shavell propose to give is moral. It is reasonable to assume that popular disagreement with experts about the proper moral basis of the legal system will be of a different kind, and far more strongly held, than disagreement with experts about the fine points of hydroelectric turbine design. And to the extent that such disagreements are strongly held, Kaplow and Shavell must take them into account, both as components of welfare and as behavioral influences on legal actors.<sup>433</sup>

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432. Kaplow & Shavell, *supra* note 3, at 1323.

433. The philosopher Bernard Williams has observed that many utilitarian ethical theories imply a division between "a class of theorists who can responsibly handle the utilitarian justification of non-utilitarian dispositions, the other a class who unreflectively deploy[s] those dispositions." BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 108 (1985). As Williams notes, the great utilitarian theorist Henry Sidgwick confronted such a problem near the end of the nineteenth century in his chief philosophical work, *The Methods of Ethics*. Sidgwick feared that, while utilitarianism was true, widespread dissemination of that truth might not promote human welfare. In light of utilitarianism, that implied that disseminating it would be morally wrong. Attempting to inculcate utilitarian attitudes in normal citizens might "do more harm by weakening current morality than good by improving its quality." HENRY SIDGWICK, *THE METHODS OF ETHICS* 489-90 (7th ed. 1907) (1874); see also BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 109 (1985).

Sidgwick therefore inclined to the view that utilitarian theorists should carefully limit the publicity that they gave to their ethical views. Similarly, today improved empirical information seems to be driving Kaplow and Shavell to consider limiting the number of citizens who learn that utilitarian norms are at work in the legal system. Sidgwick mused:

[O]n Utilitarian principles, it may be right to do and privately recommend, under certain circumstances, what it would not be right to advocate openly; it may be right to teach openly to one set of persons what it would be wrong to teach to others; it may be conceivably right to do, if it can be done with comparative secrecy, what it would be wrong to do in the face of the world.

*Id.* at 109.

## 2. *Problems with Secrecy*

We foresee three objections to a legal regime bent on hiding the decision-making technique from the people. First, it is possible that the people will uncover the man behind the curtain. To the extent that Kaplow and Shavell propose that a broad class of actors hides its real motivations (the judges), while a smaller class of actors actively explores the real principles of decision (scholars), it is likely that someone, sometime, will let the cat out of the bag. Indeed, complete secrecy is unrealistic. Rather, welfare economists would have to hope that a regime of mixed secrecy will suffice, whereby the real norms of decision are translated into "fairness" terms, but the public is generally aware that more complicated economic analyses underlie these decisions. However, it is unclear that even a mixed secrecy regime could cohere for long. For example, scholars hostile to the practical or moral foundations of the welfare project might attempt to write descriptive pieces in mainstream publications, seizing on particularly salient examples that pit welfare solutions against fairness norms.<sup>434</sup>

Second, hiding the moral bases of legal policies from the people affected by them may be morally objectionable in itself. Analysts who were previously inclined to exclude some preferences from the concept of well-being on ethical grounds may feel uneasy about supporting a system that is accepted, and promotes well-being, only because its nature is not generally known. Thus, as Adler and Posner observe, it is philosophically plausible to argue that preferences premised on a seriously mistaken understanding of reality should not be included in the concept of well-being. They give the example of a researcher who carries on a happy and productive scientific career, and regards his past professional activity with great satisfaction.<sup>435</sup> Unbeknownst to the researcher, his government has clandestinely funneled his scientific work into "a secret weapons program" that would horrify him if he knew about it.<sup>436</sup> In such a case, it might be wrong to view the researcher's career as having improved his well-being, even though he, in his ignorance, remains fully satisfied. Analogously, if a reformed legal system brought great tangible benefits to citizens, but was secretly based on procedures and ideas of which the citizens would seriously disapprove (if only they knew), it may be difficult to say that the system is normatively desirable.

In addition, special moral and ethical problems may arise if academ-

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434. We find this project tempting.

435. *Rethinking Cost-Benefit*, *supra* note 15, at 203.

436. *Id.* The premise that the researcher would strongly disapprove of the project is implicit in Adler and Posner's presentation.

ics become involved in policies that involve deliberate concealment of the norms underlying the legal system. The social norms of openness and transparency are important characteristics of academic culture, and we are skeptical that academics would be open to such a significant change in that culture.

C. *Giving the Ball to Bureaucrats: Regulatory Responses to Anti-Utilitarian Preferences*

A second solution to the problem of anti-utilitarianism has been adverted to several times in the text above: remove power from populist decision-makers. Professors Baron, Viscusi, and Sunstein are all, to some degree, tempted to transfer the authority to implement legal policies from democratic common law institutions to government bureaucracies.

Sunstein is the most explicit regulator of the three scholars. His failure to convince University of Chicago law students to maximize what he saw as social welfare has left him shaken. In his article's conclusion, Sunstein argues that simply hiding decision-making norms from the populace, as Kaplow and Shavell appear to endorse, will be insufficient. A better solution would be to remove power to unelected (and insulated) bureaucrats, who will maximize welfare in the face of contrary individual preferences.<sup>437</sup>

Viscusi similarly suggests a vast reduction in the power of judges and juries to regulate corporate decisions on product and environmental safety.<sup>438</sup> Corporations, he seems to be saying, will either self-regulate (through the cost-benefit mechanism) or be subject to partial regulation by the government (possibly to keep these cost-benefit analyses honest).<sup>439</sup>

The radical and paternalistic qualities of these proposals are indirect evidence of the strength of the anti-utilitarian preference among the general public. However, we will sound a note of doubt about the practicality of the "regulatory" solution of Sunstein, Viscusi, and Baron. First, as a matter of politics, it is a complicated question whether the majority will acquiesce to being deprived of the ability to make the hard choices about political goods. (We decline to address that question here.) But even to the extent that "ordinary individuals" remain unin-

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437. *Id.*; see also Jolls et al., *supra* note 139, at 48-49 (suggesting that a stronger bureaucracy might be better than a "populist government" at avoiding the bad consequences of what they see as irrational choices, and concluding that the question of whether this is a wise policy should be answered empirically, and not morally or philosophically).

438. Viscusi, *The Social Cost of Punitive Damages against Corporations in Environmental and Safety Torts*, *supra* note 303, at 335-36.

439. *Id.*

formed about bureaucratic decisions, individuals adversely affected by bureaucratic decisions will constantly push to return them to the public sphere, where their influence might be better heard.<sup>440</sup> But even if this were not so, and we could somehow tie ourselves to the mast of a purely regulatory state, we believe that bureaucrats are people too. Indeed, many of them may have once been Professor Sunstein's law students, or Professor Baron's anti-utilitarian undergraduates. The point is that there is little evidence, as Professor Sunstein himself admits, that bureaucrats overseeing tort or environmental disputes with serious fairness dimensions *will* do what efficiency requires when it conflicts with their own moral beliefs.<sup>441</sup> It is more likely that pushing power from the legal system to the government will simply discount the preferences of the majority of the people while substituting the preferences of the few, and it may substitute the biases of elites for the choices of a broader cross-section of the nation.

*D. See Spot Run, See Spot Jump, See Spot Perform the Welfare  
Calculus: Re-Education as a Response to  
Anti-Utilitarian Preferences*

A third possible solution to the problem of anti-utilitarianism is re-education. People's preferences can sometimes be changed by being taught to prefer something else. One after the other, many of the authors discussed in this Article have broached the idea that the government should teach citizens enough about utilitarianism to make consequentialist legal decision-making palatable.<sup>442</sup> Baron considers this idea in the most detail, so we briefly present his ideas as an example of what such a re-education program might look like.

Baron argues that all citizens should be taught that their sincerely held moral intuitions will sometimes run contrary to proper, utilitarian, social practices.<sup>443</sup> In order to teach citizens to distrust their moral intuitions, Baron argues for a multi-level, multi-year commitment. On the home front, we have already mentioned Baron's commitment to world simulating computer games as the engine of social change.<sup>444</sup> In junior high school, Baron believes students should be taught about consequentialism, even though he acknowledges that it will "conflict with intui-

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440. Professor Sunstein and his co-authors argue, however, that bureaucrats are more likely to be protected from such popular pressures than judges and legislators. See Jolls et al., *supra* note 139, at 48.

441. *Id.*

442. See Kaplow & Shavell, *supra* note 3, at 1323 n.877; see also Sunstein, *supra* note 5, at 250; BARON, *supra* note 6, at 196.

443. BARON, *supra* note 6, at 196.

444. See *id.* at 201.

tions that students and their parents have."<sup>445</sup> In high school, he argues all students should be taught a course in "social theory."<sup>446</sup> This course ought to be frankly ideological, teaching students "the basic ideas of the free market and why it leads to efficient outcomes,"<sup>447</sup> asking students to perform "simplified cost-benefit analysis"<sup>448</sup> of regulations, and teaching them about the biases that might pervert their *own* decision making. As for college students, Baron finds it "disturbing" that many have not been exposed to deterrence based theories of criminal punishment, and might require mandatory courses in welfare economic concepts for all students.<sup>449</sup>

Baron makes clear that he believes students (and the citizenry) should understand that economics is not truly political. He appears to believe that if citizens "walk through" basic economic problems, they will become convinced that the validity of more complicated welfare economic policy proposals does not simply rest on value judgments.<sup>450</sup> This would, presumably, make welfare analyses less vulnerable to political protest by opponents of their normative proposals; it would inoculate welfare economics against charges of moral sectarianism.

We refrain from passing judgment here on the morality of such social techniques. However, we imagine several significant practical hurdles to re-education. These problems fall loosely within the following three categories: lack of resources, secrecy, and unintended consequences.

First, it is likely that at least some of these proposals would require significantly increasing the involvement of the federal government in the public education of its young citizens. Absent federal involvement, there would be no way to be sure that each state was teaching its citizenry utilitarian thinking at the same rate, a consequence of federalism/localized-education that would create huge complexities in welfare analyses of the effects of legal rules.<sup>451</sup> Moreover, the federal education budget does not now, as a general matter, force states to teach specific subjects. Changing the structure of the educational system to create a nationally uniform subject matter would clearly entail serious constitu-

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445. *Id.* at 197.

446. Although he argues that such a course might be available "at first" on an elective only basis. *Id.* at 196.

447. *Id.* at 197.

448. BARON, *supra* note 6, at 196.

449. *Id.*

450. *See id.* at 197.

451. For example, under local educational control residents of Massachusetts might learn consequentialist decision-making; residents of Alabama might not. In that case, perhaps the ability to implement legal policies and rules created through welfare economic analysis would have to vary state by state, creating the need for inefficient jurisdiction-by-jurisdiction tailoring. Who knows?

tional and political entanglements, and scholars have not yet even begun to consider how these issues would work out.

Even assuming that academics could successfully create a uniform utilitarian education program, such a program would fall victim to the same problems as policies of secrecy discussed above. If individuals knew that their children were being educated in utilitarian decision-making, and then found out that the program hoped to create a society of thinkers comfortable with utilitarianism, popular outrage might be considerable. Parents, after all, would not yet have been re-educated to appreciate consequentialism, and might therefore be offended by the Big-Brother-like, traditional-morality-destroying program. This belief, however irrational, could create a serious political obstacle.

Third, the re-education program, if it worked, might destroy the altruistic and social norms that bind society together. Professors Kaplow and Shavell acknowledge that many internalized social norms push individuals to behave in society's interest rather than their own.<sup>452</sup> If people were consistently consequentialist, "they might act in their self-interest," which would not maximize overall welfare.<sup>453</sup> It is for this reason they argue for a difference between the principles that guide legal policy analysts and the principles that guide ordinary individuals in their lives.<sup>454</sup>

This concern is not entirely fanciful. There is evidence that studying economics—whose modes of reasoning are relentlessly consequentialist—makes a person less altruistic, less involved in one's community, and more politically conservative.<sup>455</sup> Some studies report that economists are more likely than other educated individuals to give nothing to charity over the course of a year.<sup>456</sup> Economists are also more likely, despite their knowledge of game theory, to be "defectors" (that is, to act self-interestedly) in iterations of the famous "prisoner's dilemma."<sup>457</sup> Most disturbingly, education in economics appears to retard the onset of a general tendency toward altruism that normally increases with age, experience, and maturity.<sup>458</sup>

452. See Kaplow & Shavell, *supra* note 3, at 1305.

453. *Id.*

454. See *id.* at 1306 n.836.

455. See, e.g., Robert H. Frank et al., *Does Studying Economics Inhibit Cooperation?*, J. ECON. PERSP., Spring 1993, at 159 [hereinafter *Inhibit Cooperation*]; see also Robert H. Frank et al., *Do Economists Make Bad Citizens?*, J. ECON. PERSP., Winter 1996, at 187. Professors Kaplow and Shavell argue that the data on this issue is mixed. See Kaplow & Shavell, *supra* note 3, at 1369 n.993 (citing sources). However, the very fact that there is some data tending to support their intuition that consequentialism is at odds with the norms that hold society together should make them wary about implementing a re-education campaign on any broad basis.

456. See *Inhibit Cooperation*, *supra* note 455, at 162.

457. See *id.* at 163-65.

458. See *id.* at 168 (showing a gap in defection rates between economics majors and non-majors tends to widen as students move toward graduation).

Under present conditions, we suspect that a program of consequentialist re-education that was ambitious enough to make a difference would be self-defeating, disastrous, or otherwise seriously impractical.

*E. Limiting the Scope of Law and Economics Based Reform*

Less fanciful responses to these problems are available. In Part II, the most pointed empirical evidence of law-related preferences concerned two aspects of common-law adjudication: procedural justice (II.B) and the assessment of punitive damages in tort (II.D). Intuitively, these fields form part of the "moral heartland" of the legal system. They are domains where the influence of fairness and moral values on the legal system is likely to be at a zenith. (The criminal law of *malum in se* offenses is another such domain.) To be sure, some of the evidence in Part II.C does deal with other fields of law, and the evidence we have assembled may fall in the "moral heartland" simply because that is where researchers have chosen to direct their attentions. Nevertheless, our analysis suggests that analysts must be especially cautious in devising policies that will extend welfare economic norms into these common-law fields.

Confirming this view, we find that those economic analysts who seek to reform the common-law fields, such as Kaplow, Shavell, Sunstein, and Viscusi, also propose the most dramatic responses to law-related preferences, such as secrecy and increased bureaucratic control. By contrast, one senses that there is less public awareness, hence less public concern, with domains such as administrative agency regulation. No one doubts that administrative regulations, especially on the federal level, can have major welfare effects. But the technicality and intricacy of most matters of agency concern do not seem to arouse the same passion in the public at large as the issues presented in tort disputes, criminal cases, and the like.<sup>459</sup> Of course, these hunches need to be confirmed by empirical research. Still, it may be a sensible strategy for legal economists to limit their attention to areas such as administrative regulation, which have important effects on well-being, yet where tastes for fairness and law-related preferences are likely to play a smaller role.

Professors Adler and Posner's normative position gains considerably in credibility and appeal because it is expressly limited in applica-

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459. This is not always the case. Environmental regulatory disputes, in particular, can raise strong passions. More psychological pitfalls may confront a typical EPA economic analyst who seeks to gauge the effects of a regulation on well-being than would confront a typical FTC economic analyst in the same position.

tion to the domain of cost-benefit analysis by regulatory agencies.<sup>460</sup> Academics have recently paid intense attention to the specific foundations of agency cost-benefit analysis.<sup>461</sup> This may simply reflect the fact that agency rulemaking is, at present, the locus in the real-world legal system. But it may also reflect a more or less conscious intuition that the agency regulation field is less likely to present the minefield of individual preferences that may complicate the analysis of common-law fields.

Adler and Posner make another important concession. They stipulate that because of the problem of wealth effects, available practical techniques may be inadequate to deal with situations where the affected individuals differ widely in wealth.<sup>462</sup> This, too, is an important concession that increases the plausibility of Adler and Posner's overall normative position.

#### IV. CONCLUSION

What is the answer to our title question? The recent scholarship discussed in this Article represents an important step toward developing a satisfactory normative position in law and economics. Of course, scholars who outright reject the sort of broadly consequentialist moral principles defended by Kaplow and Shavell, Adler and Posner, and Chang will dismiss our title question with a curt "no." We appreciate that forceful criticisms of consequentialist morality exist. We have, however, chosen to place such direct philosophical criticism mostly outside the scope of this Article.

The connection between principle and practice in law and economics is still not close enough. One obstacle is wealth effects and interpersonal utility comparisons in general. They pose an unsolved problem.

The psychological data that we analyzed in the previous two parts suggest that a consistent, preference-based reform of the legal system faces practical problems. The welfare effects of any given change in legal rules will be complicated and unpredictable. Furthermore, since these effects will not often involve goods with a market price, it will be hard for economists to measure their magnitudes. There is a real need to develop improved standards for incorporating poll, survey, and other experimental data in the welfare calculus.

Moreover, law-related preferences seriously complicate the issue of

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460. In this Article we have nevertheless considered the applicability of Adler and Posner's improved version of cost-benefit analysis to common-law fields. Adler and Posner's decision to confine their prescriptions to the agency regulation field is not logically required by the rest of their position.

461. See generally *Implementing Cost-Benefit*, *supra* note 15.

462. See *Rethinking Cost-Benefit*, *supra* note 15, at 246.

designing appropriate *institutions* to put welfare economic principles into practice. Scholars who have addressed this issue find themselves tempted into paternalism. For example, in order to implement a principled commitment to optimal deterrence, analysts recommend removing the jury's age-old power to punish bad actors with punitive damages. Others hope to reduce citizens' role in formulating legal policy by creating two sets of legal discourse: one for public consumption, and one for legal elites. Such proposals are practically problematic, because of the difficulty of enacting them. And they are also morally troubling.

In the end, the answer to our title question depends in large part on the results of future empirical research, and on the scope of legal economists' ambitions. Even giving legal economists the best data that they could hope for, we suspect that their proper, moral, role will be limited to the most arcane corners of our regulatory state. Can law and economics be both practical and principled? With respect to the common law and its moral heartland, we think not.