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Efficiency and Conservatism

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Efficiency and Conservatism

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I. INTRODUCTION

The concept of "efficiency" plays a central role in law and economics. Indeed, it has been argued that efficiency is more central to the normative foundations of law and economics than it is to contemporary welfare economics more generally.¹ Yet despite its centrality, some basic questions about the nature of this efficiency idea remain obscure. Precisely why does one want to posit such a norm? Can the efficiency norm really be useful in deciding concrete policy questions? Does the efficiency norm have a political content, and in particular does it have a conservative political orientation?

The argument of this Article can be briefly stated. In Section I, it is argued that we need an efficiency norm to capture the fundamental idea of avoiding waste, or a sacrifice of one good thing that is not a necessary loss in the pursuit of another good thing. An anti-waste ideal is made important more by a plurality of plausible conceptions of distributive justice than by worries about the impracticability of interpersonal utility comparisons. Section II argues that efficiency can indeed be a pragmatically useful norm, if one expands the traditional Pareto criterion of efficiency not in the direction of Kaldor-Hicks efficiency but in the direction of ex ante efficiency. Adopting the rules that the parties rationally would have imposed upon themselves had transaction costs been lower is a procedure that is consonant with a broad array of reasonable views on distributive justice. Section III reconsiders the objections leveled against the idea of Kaldor-Hicks or wealth maximization, and argues that the objections are either invalid or inapplicable to the ex ante efficiency norm. Section IV argues that efficiency is a term that in itself has no particular political orientation, but that the concept nevertheless can serve as a component of a conservative political philosophy, whether one wishes to hold such a philosophy or merely understand it when held by others.

II. THE FUNCTION OF POSITING AN EFFICIENCY NORM

This portion of the Article looks at the motives for seeking an efficiency norm, or the functions one expects such a concept to perform. This question of function will prove to be of considerable importance,

1. Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797, 797-98 (2000) (noting that welfare economics is generally flexible about social objectives, if clearly specified, but law and economics has focused almost exclusively on efficiency).

because our ultimate goal is to identify a notion of efficiency that is true to the purposes that animate the Pareto efficiency norm but that has a broader practical scope than Pareto efficiency.

The analysis of this section is divided into four parts. Part A looks critically at the idea that the principal motive for an efficiency criterion is the need to overcome the problem of comparing utilities interpersonally. Part B argues, however, that there was a grain of truth in the worry about interpersonal utility comparisons, which was that the legal system might be seeking to promote a plurality of values. When there are multiple good things in the world, there is a need for an efficiency or anti-waste concept telling us when resources can be used so as to better promote one of those values without sacrificing the others. Part C finds that pluralism in the many views of distributive justice that can be defended as reasonable norms. Pareto efficiency, and any successor worthy of the term "efficiency," should aspire to be a common ground norm among persons holding this plurality of reasonable views of distributive justice. Finally, Part D looks at a challenge to the efficiency idea put forward by Judge Guido Calabresi, who argued that efficient changes were conceptually incoherent in a Coasian universe and that this fact should be celebrated rather than bemoaned. It is argued that Calabresi's conceptual indictment applies only to a system in equilibrium and does not preclude efficient moves in the direction of bringing about that equilibrium, and that society would lose a great deal if efficient policy change were not possible.

A. The Overstated Problem of Interpersonal Utility Comparisons

Let us begin our inquiry with a question of motivation. What is the reason for positing a norm like "efficiency"? To what normative intuition does it respond?

A natural place to look for motivation would be the stated intentions of the economists who coined the leading efficiency concepts. Vilfredo Pareto, for example, argued that a move from State of Affairs X to State of Affairs Y constituted a desirable move if there was someone better off in Y than in X and no one worse off.² Such changes are now known as Pareto efficient changes, and the state of affairs from which no further Pareto efficient changes are possible is now known as a Pareto optimal state of affairs.³

2. VILFREDO PARETO, *MANUAL OF POLITICAL ECONOMY* 47-51, 105-06 (Ann S. Schwier & Alfred N. Page eds., Ann S. Schwier trans., Augustus M. Kelley Publishers 1971) (1927) (setting forth this criterion).

3. In modern terms, Pareto optimality can be described as a patterned or end-state theory of justice, while Pareto efficiency can be regarded as a historical theory. JULES COLEMAN, *MARKETS, MORALS, AND THE LAW* 72 (1988) (drawing this distinction).

Pareto himself explained his motivation as being a worry about interpersonal utility comparisons.⁴ He was concerned that there was no scientifically acceptable way to measure the utility of different people in such a way that the utility levels could be cardinally compared and added. One could be certain that total utility had increased if some people were better off and no one was worse off, so this modest utilitarian judgment seemed better grounded than those which required comparisons across persons. It remains true that one can only say that total (or average)⁵ utility has increased if the concept of total (or average) utility has a coherent meaning, i.e., if one is not simply trying to add or average apples and oranges. But coherence and cardinal measurability are different notions, and Pareto efficiency seemed to circumvent the latter and ground utilitarian judgments on the former alone.⁶

The Kaldor-Hicks criterion was also originally motivated by the problem of interpersonal utility comparisons.⁷ Nicholas Kaldor and John Hicks argued that a policy change represented progress if the winners from the change could compensate the losers from the change and still be better off.⁸ The Kaldor-Hicks criterion can be *applied* without making interpersonal utility comparisons. The beneficiaries can be better off, by their own lights, even after compensating the losers for any losses that they would otherwise have suffered by their own lights. As long as a medium of exchange existed, which could be paid by the winners and would remove the losses from the losers, the utility of the winners and losers could be cardinally unmeasurable.

There is an important difference between Pareto and Kaldor-Hicks efficiency, however, with regard to the issue of interpersonal utility comparisons. Both the Pareto and the Kaldor-Hicks criterion can be *applied* without making interpersonal utility comparisons. But only the Pareto criterion can be *defended* without making those compari-

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4. Pareto's views on the metaphysical nature of aggregation of utility across individuals are traced in Russell Hardin, *Magic on the Frontier: The Norm of Efficiency*, 144 U. PA. L. REV. 1987 (1996).
 5. One of the issues in utilitarianism is whether the ideal state of affairs is one that maximizes average or aggregate utility. The two theories differ when issues of population size are treated as variable, i.e., whether one should seek to increase population if aggregate utility is increased even if the average utility of the population fell. See J. SMART & B. WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 27-28 (1973).
 6. See COLEMAN, *supra* note 3, at 100-04 (providing that utility judgment can be made from Pareto as long as standard of comparability exists, even without cardinal utility).
 7. This history is discussed in Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 88-92 (1992).
 8. Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549, 550-51 (1939); J.R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939) (defending this criterion).

sons.⁹ Indeed, even if there is no such thing as total utility, but only Jack-utility and Jill-utility, it seems to be a good thing to increase Jack-utility if Jill-utility is not affected. But if there is no such thing as total utility, or if it cannot be measured, how can one say that a policy change that increased Jack's wealth by \$100 and decreased Jill's wealth by \$80 was progress? The Kaldor-Hicks criterion does not require that Jack actually compensate Jill for her loss, only that he could do so. All one can say—on the assumption that wealth for Jack and Jill translates into Jack-utility and Jill-utility¹⁰—is that Jack-utility went up and Jill-utility went down; one cannot defend the change (or criticize it) without some way of comparing these gains and losses.

Although the problem of interpersonal utility comparisons explains the origins of the efficiency concepts, it is not clear that it provides the best contemporary motivation for continuing their use. Human beings are members of the same species, with rather similar biological wiring; there is no obvious reason to say that a toothache for one person is a radically different and incomparable experience to a toothache for another.¹¹ And to say that one cannot assert that Jack's toothache ordinarily causes him less pain than Jill's being stretched out on the rack is downright silly. Outside of law-and-economics, welfare economists are increasingly recognizing that they have overemphasized the problem of interpersonal utility comparisons,¹² and now they tend to speak more confidently of "social welfare functions" that assume the society can sensibly make comparisons between small gains in utility for some persons and large losses for others.¹³

The problem of interpersonal utility comparisons cannot be dismissed entirely. It seems likely that some people experience the pain of a toothache more than others, and it would clearly be difficult to tell from objectively measurable evidence exactly how much subjective pain each person associated with a roughly similar physical state. More importantly, once one leaves the area of shared biological needs,

9. The relationship between Kaldor-Hicks and interpersonal utility comparisons is addressed in Lewis A. Kornhauser, *Constrained Optimization: Corporate Law and the Maximization of Social Welfare*, in *THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW* 87, 98 (Jody S. Kraus & Steven D. Walt eds., 2000).

10. This assumption is explored further in the text accompanying notes 121-29, *infra*.

11. ABBA P. LERNER, *THE ECONOMICS OF CONTROL: PRINCIPLES OF WELFARE ECONOMICS* 24-49 (1944) (discussing problem of interpersonal utility comparisons among people from same basic species).

12. Matthew D. Adler & Eric A. Posner, *Implementing Cost-Benefit Analysis When Preferences Are Distorted*, 29 *J. LEGAL STUD.* 1105, 1111 (2000) (noting that economists have backed away from view that interpersonal comparisons are impossible, and also arguing that any such view would be wrong).

13. See generally Louis Kaplow & Steven Shavell, *The Conflict Between Notions of Fairness and the Pareto Principle*, 1 *AM. L. & ECON. REV.* 63, 65-66 (1999).

it is no longer clear that people pursue some common end that can be called "utility" and compared. How does one compare the "utility" of the self-seeking hedonist, the altruist who lives a life of self-denial, and the scientist who struggles with innumerable failures before achieving some lifelong goal that she has little time to appreciate? If one asked these three people "How happy are you on a scale of 1 to 10?" it is not clear that the term "happy" would mean the same thing to the three people, or whose meaning should prevail for purposes of adding or averaging their utilities.¹⁴

So the Pareto concept still has some role to play in areas of interpersonal incomparabilities. If a policy change would make the hedonist, the altruist,¹⁵ and the scientist better off by their own lights, perhaps by providing each of them with the money to carry out their projects, that policy seems to improve on the status quo without having to adjudicate among the conceptions of happiness entertained by the three people.

Nevertheless, interpersonal noncomparability does not seem to be an adequate motive for continuing the central role of efficiency as a normative concept, and such a large role seems especially out of place for law-and-economics. As a broad generalization, law deals with the more interpersonally comparable side of human nature. Getting run over by a car, or drinking toxic waste, or being raped, or imprisoned, or being defrauded out of one's property, or going homeless because the law says one has no property, are lousy experiences for virtually everyone. The law has less to say about the ultimate purposes of life once needs have been fulfilled, about supererogatory conduct, or about aesthetic or existential issues.

B. Efficiency as a Norm for Avoiding Waste in the Face of Multiple Values

Although the interpersonal comparability problem has been overstated, the history of that experience may suggest a broader lesson for the motive behind the efficiency idea. One can debate the relative merits of the world views of the hedonist, the altruist, and the scientist. Ultimately, however, one suspects that there is something good in the conception of happiness of each of these individuals. It is not

14. Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981) (noting that there is no one neutral thing called "welfare"; some value conscious states, others success, and some value still other notions of a good life).

15. There is an issue about whether other-regarding preferences should be counted. Moral convictions are more than simply tastes; they are also normative arguments that deserve to be treated on their own merits and evaluated as true or false. But they are also tastes, and genuine sources of happiness and unhappiness as well. For an argument that these preferences should not be given weight in cost-benefit analysis, see Adler & Posner, *supra* note 12, at 1113.

clear, for example, that one would want to add a Sadist as a fourth person, and seek a Pareto improvement that made the Sadist better off without making the others worse off.¹⁶ The point is not that there is nothing to be said about the relative desirability of the goals of the hedonist, the altruist, and the scientist, that the goals do not need to be traded off, or that the government has an obligation to remain neutral among the goals.¹⁷ The point is rather that one wants to be certain that a trade-off among these good things is indeed necessary. If a policy change could promote one of these good things without sacrificing one of the other good things, then refusing to make the change is wasteful.

The core idea of efficiency is the avoidance of waste.¹⁸ When there are multiple things that are good, efficiency asks us to make sure there are no changes which could advance one of these goods without sacrificing the others. In a world of value pluralism, efficiency is not everything. After all the waste has been eliminated from the system, there will remain difficult normative choices about the inevitable remaining tradeoffs among genuinely good things. But it is a critical beginning of the analysis, to make sure that one is not working with false trade-offs that make the dilemmas appear more tragic or confining than they need to be.

Is efficiency a meaningful concept when there is only a single good thing? In one sense, the answer is that efficiency is the *only* value in that setting. Since there is only one good thing, anything that does not single-mindedly maximize that thing is wasteful. So everything that is not morally optimal can be characterized as wasteful, and vice versa. On the other hand, one is not likely to bother with the language of "efficiency" in a single-value world. Right actions are those which promote the good, wrong actions are those which disserve the good; to say that right actions are more efficient than wrong actions adds nothing. Efficiency language is likely to be used when wasting is one vice among many, not when it is coextensive with vice.

For example, is there an efficiency problem for Robinson Crusoe—or, to update the example, for Tom Hanks in the film *Cast Away*? In a sense, one could argue that he faces nothing but an efficiency problem. He has a preference structure, a conception of happiness, that he wants to promote, and he needs to make sure that he does not dissi-

16. The problem of objectively bad preferences is discussed in Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005, 1028-29 (2000) and Adler & Posner, *supra* note 12, at 1114-21.

17. For a critique of the idea that a liberal government can be neutral among all conceptions of the good, see Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763 (1993).

18. Robert D. Cooter, *The Best Right Laws: Value Foundations of the Economic Analysis of Law*, 64 NOTRE DAME L. REV. 817, 817 (1989) (noting that avoidance of waste is the way "efficiency" term is used in ordinary conversation).

pate scarce resources on means which will fail to promote those preferences as effectively as the foregone alternative uses of those resources would have done. He might even benefit on concrete issues from an economist adviser, who could remind Tom Hanks that bygones are economically bygones, and that the fact that an ice skate was designed to be used to skate on ice does not preclude the possibility that its highest and best use is now cutting open coconuts. But it hardly helps to be told to use his resources in a manner which most efficiently promotes his preferences, or to refrain from wasting resources on projects that do not promote his preferences.

It should be noted that not everyone agrees that the Robinson Crusoe world is one of a single good. His existing preferences may create a unitary objective, but should he retain those preferences or change them? And what if he faces incommensurabilities, such as the need to retain his sense of religious integrity (in not eating meat) and his need for protein?¹⁹ Is there an algorithm for maximizing the sum total of "happiness" from doing one's religious duty and having a full stomach, or are these different kinds of happiness that cannot be summed?

I do not wish to take a position on the question of whether there are genuine incommensurabilities in a Crusoe world. The point I would stress is that if there are such incommensurabilities, then the language of efficiency would once again begin to seem quite logical. Perhaps there are ways that Crusoe could do better for his diet than he is currently doing *without* sacrificing his religious convictions, such as by looking for nuts as a source of protein. The tragic choice of whether he ultimately needs to sell out his religious convictions in order to get the protein he needs to stay alive might be headed off through weeding out wasteful or inefficient practices (like spending the time it would take to gather nuts on hunting for meat and gathering berries instead) that do not help to solve his dilemma.

C. Pluralism Among Reasonable Views of Distributive Justice

The pluralism issue, and the role of efficiency in avoiding false trade-offs between multiple goods, can also be identified at the level of social choice. Suppose that we were certain that utilitarianism was the right moral system. Anything that maximized the average happiness of the group of individuals was desirable; anything that decreased their happiness was undesirable. Would there be a need for an "efficiency" norm in this setting? I do not think that there would

19. It has been argued that incommensurabilities should not defeat the idea of rational trade-offs or cost-benefit analysis. Matthew Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371 (1998); Robert H. Frank, *Why Is Cost-Benefit Analysis So Controversial?*, 29 J. LEGAL STUD. 913, 914 (2000).

be. In a sense, it would be perfectly accurate to say that actions which failed to promote utility were inefficient; we were wastefully promoting happiness only a little when the same resources could have been used to promote happiness a lot. But it adds nothing to the central norm of maximizing utility. Again, historically, the efficiency norm arose in economics out of worry that the single norm of maximum utility could not survive the interpersonal comparability problem.²⁰

With the decline in the popularity of utilitarianism, however, the confidence that there is a single norm to which all other norms are merely instruments has similarly declined. In particular, one encounters pluralism in conceptions of distributive justice.²¹ The pluralism is great even within the academic community, and there is plenty of reason to believe that these conceptions are biased toward the interests of the academic community, and that the number of plausible conceptions of distributive justice would grow even larger if people with non-academic interests were equipped with academic tools for articulation. As a thought experiment, imagine that everyone in the world were given a team of first-rate philosopher/advocates whose job it was to articulate a plausible conception of distributive justice that would justify retaining and augmenting the share of benefits currently being received by that person. The conceptions would not necessarily have to be ultimately true (if objective truth can really be asserted of normative propositions), but they would need to be assertible in good faith and not ridiculous on their face. How pluralistic would such a fully articulated normative discussion appear?

The answer, surely, is that the discussion would be overwhelming in its diversity. The distributive justice theory might focus on the alleviation of poverty. But is the goal to eliminate inequality of income entirely, to maximize the minimum income even if inequality was great, to meet basic needs as defined objectively or culturally, or to equalize only enough to maximize utility? Should one seek to alleviate poverty worldwide, poverty within the country, all the poverty that was the result of unjust actions, poverty that was not the result of prior choices such as preferring leisure over income, or poverty that was not the result of lack of personal talent but only inadequate opportunities to develop talent? Can it be alleviated by forcing labor

20. See *supra* notes 2-14 and accompanying text.

21. The writings of Maimon Schwarzschild are especially interesting on the topic of value pluralism. Maimon Schwarzschild, *Value Pluralism and the Constitution: In Defense of the State Action Doctrine*, SUP. CT. REV. 1989, at 129; Maimon Schwarzschild, *Religion and Public Debate in a Liberal Society: Always Oil and Water or Sometimes More Like Rum and Coca-Cola?*, 30 SAN DIEGO L. REV. 903, 907-10 (1993); Maimon Schwarzschild, *Pluralist Interpretation: From Religion to the First Amendment*, 7 J. CONTEMP. LEGAL ISSUES 447 (1996); Maimon Schwarzschild, *Pluralism, Conversation, and Judicial Restraint*, 95 NW. U. L. REV. 961 (2001).

contributions, by extracting body parts, or by confiscating homes from the more fortunate? Or the distributive justice theory could be one of distribution in accordance with merit. But is the criterion of merit that a person worked harder than others, bore more responsibility and anguish, contributed more to satisfying existing tastes of others, achieved more to promote tastes as they ought to have been, had more education than other jobs of less than "comparable worth," endured safety risks or personal hardships, or something else? Or the distributive justice theory could be historical in character. One is entitled to those holdings which came about through just processes. But is property income just, or inheritance, or income from monopoly? What about rectification for past wrongs? Should we rectify holdings only for wrongs committed by the state in the past or by private citizens as well? How far back should one go in undoing the effects of these wrongs?

Again, if it sometimes seems that there is only a modest amount of diversity of view on the issue of distributive justice, this is likely the result of confining the discussion to academics, who have distinctive interests. Consider the popular theory of justice proposed by John Rawls. His second principle is that we should seek to maximize the position of those occupying the minimum position in society.²² But his first principle, to be accorded lexical priority, says that society should give individuals the greatest possible liberty that is compatible with a similar liberty for others.²³ Academics, whose relative influence in the society is not in their pocketbooks but in the power of their pens, hardly could ask for anything more. Free speech is to be tolerated no matter what practical difference in influence and power arises, and the economy is to be the plaything of a collectively organized society influenced heavily by the academics.²⁴ Is there any doubt that in a broader discussion these would not be universal priorities? Would there not be good faith advocates for restricting the disproportionate influence of the chattering classes, or for forcing them to pay for the influence they exert through sacrifices in other realms?

I do not believe it is an exaggeration to say that everyone, from Bill Gates to Charles Manson, if given the full resources of contemporary philosophy, would be able to articulate good faith, plausible theories that they are entitled to retain their present status against declines,

22. JOHN RAWLS, A THEORY OF JUSTICE 75 (1971) ("Assuming the framework of institutions required by equal liberty and fair equality of opportunity, the higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society.").

23. *Id.* at 60-61 (including freedom of thought and freedom of speech among these liberties).

24. For a critique of the special interests and world view of intellectuals as a class, see THOMAS SOWELL, KNOWLEDGE AND DECISIONS 352-68 (1980).

and indeed that they should have their position augmented. The point here is not to commit to relativism, or the belief that there is no truth of the matter regarding distributive justice, though perhaps that is possible. If there is an ultimate normative truth regarding distributive justice, however, we are a very long way from knowing what that truth is, especially since the ultimate truth is very likely to involve some complex combination of distributive factors, all of which are desirable to some degree. And even if we knew what the truth was, there would be no guarantee that the conception of distributive justice that would command widest adherence would embody that truth, or that the members of the society would not tear each other to shreds in the process of arguing over their relative social value.

Against this background of philosophical pluralism, the motivating force for an efficiency concept such as Pareto becomes clearer. A Pareto efficient change by definition does not make anyone worse off. It can be recognized as progressive by advocates of a wide variety of concrete notions of distributive justice. This is not to say that the Pareto criterion is value-free.²⁵ It affirms that it is a good thing if Jack's position is improved, and a good thing if Jill's position is improved. It will not appeal to conceptions of the right in which individual welfare is unimportant, or to malicious or envious conceptions in which the world is regarded as better precisely because someone else's welfare has been reduced.²⁶

D. Calabresi's Challenge to the Conceptual Possibility and Normative Attractiveness of Efficiency

A well known problem with Pareto efficiency concerns the scope of its normative power.²⁷ It is rare that a move from one state of affairs to another will not harm someone. Even a simple trade, which might benefit both parties to the transaction, could harm third parties by altering prices. The next section of the Article will address ways of trying to increase the scope of the Pareto prescription without sacrificing its character as an efficiency norm. At this point, however, it is appropriate to confront a conceptual challenge to the very possibility of efficient changes in the direction of the Pareto norm. This challenge

25. *Id.* at 360 (arguing that there is no such thing as efficiency independent of values).

26. There is a difficult question about whether envy is to be counted as a legitimate taste, such that a person is worse off unless she is compensated for the envy she feels at someone else being better off. Envy may be analogized to spite, malice, or sadism and treated as a "bad" preference that should not be satisfied. What makes this especially plausible is the hope that such preferences can be changed if they are not rewarded.

27. This is especially true given the many difficult-to-measure preferences entertained by individual people. This point is stressed in Mario J. Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641, 642-46 (1980).

was put forth by Judge Guido Calabresi²⁸. Calabresi argues that the Pareto concept is pointless. If there were a change that could benefit someone while harming no one else, we would already have made it.²⁹ This is essentially the Coase theorem, saying that all opportunities for mutually beneficial trade will be seized regardless of the legal system's initial starting points, so that at any point in time the only changes that policy makers can recommend will necessarily make some one worse off.³⁰

Calabresi acknowledges that the Coase theorem is generally understood to operate only in the absence of transaction costs. If transaction costs are high, some trades are effectively blocked that would be mutually beneficial but for those transaction costs. But Calabresi argues that transaction costs are really no different in this respect from other kinds of costs.³¹ For example, transporting goods from one place to another is costly, and it is certainly true that many more mutually beneficial trades would be possible if transportation were costless. But this is simply engaging in a Nirvana fallacy. Transaction costs are a function of existing technology just as transportation costs are. Until that technology improves, it is not much help to be told that mutually beneficial trades would be possible if transactions or transportation were costless. And with existing technology all mutually beneficial trades will have been seized and the policy maker must confront a universe in which his or her recommendations will necessarily make someone worse off.

Traditional welfare economics posits a "Pareto frontier" of points that are Pareto optimal, i.e., from which it is not possible to make someone better off without making someone else worse off.³² The received view is that an inefficient state of affairs is one that is not on the Pareto frontier, but rather lies to the southwest of some point on the frontier. By moving northeast toward the frontier, someone is being made better off without making anyone else worse off, and an inefficiency has been removed. Calabresi argues that we are always on the frontier, so it is nonsense to speak of moving from somewhere off

28. Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211 (1991).

29. *Id.* at 1216 (noting that the fact that change has not been made shows that someone, rightly or wrongly, believes it will harm them).

30. Coase first presented the thesis that has become known as the Coase theorem in R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). The connection to the Coase theorem is made in Calabresi, *supra* note 28, at 1218.

31. Calabresi, *supra* note 28, at 1219 ("Thus, the existence of transaction costs no more keeps us from reaching a frontier that is, in fact, currently available to us, than does the fact that today a given degree of friction is a reality of life and that manna does not at the moment rain from heaven.").

32. A general discussion of the Pareto frontier concept is presented in PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 486-87 (12th ed. 1985).

the frontier to somewhere on it.³³ It is true that new technologies might lower transaction costs, just as they might lower transportation costs or the costs of building new factories, and any such technological changes would have the effect of pushing the frontier outward. But since the Coase theorem states that, regardless of the legal rule, available mutually beneficial trades will be seized, parties will remain on the frontier as it moves outward. There is no room for policy change to push people toward the frontier.

Could not some academic propose a new institutional arrangement, perhaps an auction of pollution rights, which makes trades possible that previously were impossible? Calabresi acknowledges that this is possible, but argues that the academic is now essentially engaged in inventing a new technology, albeit a technology of social organization rather than of material technique.³⁴ If the academic's idea is adopted, the Pareto frontier will now have been pushed outward, and one can count on trades to seize the new opportunities and remain on the frontier. What has not happened, however, is a policy which effectively moved people from a position off a given frontier to a northeasterly position on the frontier. And since this is the essence of a Pareto change, the criterion is pointless.

What are we to make of Calabresi's challenge to the efficiency concept? Let us begin with the idea that where a potential for mutually beneficial trade exists, people would already have made it. This is a familiar argument in economics. Noneconomists may tell a story about gasoline prices differing in different states, and the immediate question that economists have is how that story could be compatible with the arbitraging activities that the different prices would inevitably have generated. Indeed, an equilibrium is largely defined in terms of the exhaustion of opportunities for mutually beneficial trade.³⁵

However, it must always be remembered that equilibrium conditions are not created by magic. Consider the "efficient capital market hypothesis" in the area of securities markets. The hypothesis is that the market price of a stock incorporates publicly available information about that stock. There is a fair amount of evidence for this hypothesis, probably enough to suggest to the average person that they are not likely to get rich trying to read the Wall Street Journal and pick individual undervalued stocks.³⁶ However, the market could only have become efficient because of the activities of people bringing infor-

33. Calabresi, *supra* note 28, at 1212.

34. *Id.* at 1212.

35. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 9-10 (5th ed. 1998) (providing that equilibrium is the stable point where no incentives to alter price or output to achieve additional trades exist).

36. Richard A. Ippolito, *Efficiency with Costly Information: A Study of Mutual Fund Performance, 1965-1984*, 104 Q.J. ECON. 1 (1989) (noting that it is empirically difficult to systematically beat the market).

mation to bear on prices through their trades. With a microscope, so to speak, one can see that a market which looks efficient to the naked eye is the result of actions taken, often by specialized investment analysts and near-insiders, that moved the market very rapidly from an inefficient to an efficient state.

A familiar joke has the economist and the student walking down the street, and the student spots a \$20 bill lying on the ground.³⁷ The student asks the economist if she should pick up the \$20 bill, and the economist answers, "Of course not. If the bill were really there someone would already have picked it up." The story is a joke because the economist's advice, in context, is quite ridiculous. Since the \$20 bill is lying there, an equilibrium has not yet been reached, and the correct advice is to take the money and move the system toward the equilibrium in which the opportunities have indeed been seized. On the other hand, the economist's statement clearly contains a kind of wisdom. For example, if a person were to propose walking up and down the streets looking for \$20 bills as a way of making a living, it would presumably be sensible to advise that person that the prospects are not too good, since \$20 bills lying on the street already would have been picked up.

In short, there is nothing incoherent in the idea of moving from a position off the Pareto frontier to a position on the frontier. These moves happen all the time. When Calabresi says "We would already have done it," there obviously was a time—perhaps a very short time—before it was done when we had not done it. Equilibrium states do not arise by chance but by the actions of individuals moving the system toward equilibrium.

Calabresi's point might be directed at the improbability of the academic's being able to identify some situation in which the economy is below the Pareto frontier. When one says "We would already have done it" this might be translated as "People who are more plugged into the real world than the academic, and whose costs of discovering concrete facts are lower, would already have done it."

This revised thesis is more plausible, at least in certain contexts. Certainly when an academic asserts that the price of gas is different in two different states because entrepreneurs have not gotten around to realizing that arbitrage possibilities are present, one can be pretty sure that the academic is missing something that the entrepreneurs understand. This is because disinterested academics are not likely to know more than interested market actors about the latest conditions of oil prices, transportation costs, sales taxes and the like. However, in other situations it is not so clear that the academic is at a disadvan-

37. This joke is analyzed in Daniel J. Chepaitis, *The National Labor Relations Act, Non-Paralleled Competition, and Market Power*, 85 CAL. L. REV. 769, 790 n.65 (1997).

tage. The inefficiency may be the result of a system in which actions that were narrowly rational for market actors have worked at cross-purposes and created a negative-sum game which a person with a broader perspective and distance from the daily wars might be able to see before others do.³⁸

Suppose, however, that Calabresi's thesis as revised is correct, and that academics are always wrong when they think that they have spotted possible Pareto efficient changes that others have missed. This in itself would be important information, certainly not pointless. First, efficiency analysis would remain important for positive purposes. We could study the rules that have been adopted with an eye toward understanding the efficiencies that nonacademics already implicitly saw before any academic explicitly analyzed the issue. And, indeed, much of the law-and-economics enterprise has had a positive rather than a normative character, showing that the system implemented many efficient rules long before academics developed the language of efficiency as a way of explaining what had happened.³⁹ Moreover, this thesis would have normative implications. Changes proposed either by academics or others might be neglecting the efficiencies of an existing policy that had already been adopted by nonacademics at a previous time.

Calabresi is certainly correct that the mere fact that certain mutually beneficial trades are blocked because transaction costs are not zero is unhelpful.⁴⁰ Unless there is a policy that can eliminate these transaction costs, they might as well be viewed as part of the definition of the Pareto frontier that exists at the present time. However, policies can alter some transaction costs, making it easier or harder to make particular trades. For example, environmental policy might facilitate trades between firms that can reduce their pollution at low cost and firms that cannot. Calabresi is willing to accept that policy changes might reduce transaction costs, but he suggests that these changes are not moving us toward a Pareto frontier but moving the Pareto frontier outward.⁴¹ For our purposes this is not a significant

38. James Buchanan has described this process as the "churning state," a negative-sum game in which competing interest groups lobby for advantage in ways that work to the detriment of all. JAMES M. BUCHANAN, *THE ECONOMICS AND THE ETHICS OF CONSTITUTIONAL ORDER* 245-46 (1991).

39. POSNER, *supra* note 35, at 5 ("The fact that with few exceptions lawyers and judges are not self-consciously economic in their approach to law is a trivial objection to the positive economic analysis of the common law. The language of economics is a language designed for scholars and students, not for the people whose behavior the economist studies. Poets do not use the vocabulary of literary critics; judges do not use the vocabulary of economists.").

40. Calabresi, *supra* note 28, at 1212 ("Transaction costs (including problems of rationality and knowledge) no less than existing technology, define what is currently achievable in any society—the Pareto frontier.").

41. *Id.* at 1216 (contrasting movement of frontier with movement to frontier).

point because it does not establish the pointlessness of the Pareto conception. If the policy change moves the society to the northeast, everyone has been made better off, and it does not matter whether this is conceptualized as moving toward a fixed line or moving the line.

One of the most interesting features of Calabresi's article is his attitude toward the claim that the Pareto criterion is pointless. He suggests that this fact should be celebrated and not bemoaned. Once we accept the pointlessness of Pareto, we realize that we occupy a fully normative universe in which some people always have to lose from policies.⁴² We can no longer hide behind a technocratic neutrality that tries to duck all the important questions of normative tradeoffs.⁴³ In short, efficiency should be thrown out the window as a norm, and with no regrets.

Perhaps we are into the realm of aesthetics here, but I do not share Calabresi's attitude toward the death of efficiency. The fully normative world is not only a clash of interests, of winners and losers. It is also a clash of ideologies, of plausible conceptions of distributive justice that are part of the pride and self-concept of individuals and classes. Efficiency analysis asks us to consider first the possibility that there might be common interests, which do not threaten to degenerate into material and ideological warfare. Moreover, if there are such common interests, this has implications for the kind of society we should want. In particular, there might be common interests in retaining an atmosphere of tolerance and free intellectual inquiry. If there are likely to be a lot of issues on which people have common interests, and many efficient changes that can be made, then inquiry does not have to be perceived as a weapon, to be funded, defunded, suppressed, and distorted to suit interests and ideologies.

The point here is not that the fully normative world can be avoided entirely. Ultimately there will be clashes of interests and ideologies, and a kind of war will be fought, though hopefully with minimal bloodshed. The point is rather that if there were *nothing but* this war, no common interests or efficient moves, then the society would almost surely degenerate into a very ugly place, rather like Lenin's grim vision that everything reduces to "who" is to be doing what to "whom."⁴⁴ In that world, academic inquiry into the truth cannot be rationally tolerated, unless one is somehow very sure that this inquiry will advance one's side of the war.

42. *Id.* at 1217 ("We would have entered into a fully normative world where the identity and merit of the winners and losers becomes of the essence.").

43. *Id.* at 1217 ("What we cannot do, though, is to hide what is involved in such a world behind an interpersonally neutral criterion and act as though we are not making moral judgments . . .").

44. This phrase is discussed in FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 101-08 (1944).

III. EXPANDING THE DEFINITION OF EFFICIENCY BEYOND PARETO

This section of the Article seeks to apply the previous discussion of the function of an efficiency norm in order to identify a concept that has more practical scope than the Pareto efficiency criterion but remains responsive to the basic motives for positing an efficiency norm in the first place. The argument of this section is divided into five parts. Part A argues that the Kaldor-Hicks concept has been a failure as an efficiency norm aspiring to replace or extend the reach of the Pareto criterion. Part B argues, however, that the Pareto efficient moves which result from a combination of Kaldor-Hicks transactions and redistributive policies do indeed represent common ground among a wide variety of reasonable views of distributive justice. Part C argues that the best way to expand the scope of the efficiency norm is through the notion of *ex ante* efficiency. Policies that rational parties would support *ex ante* even though some of those parties will end up losing *ex post* can be defended as common ground among reasonable views of distributive justice, and thus represent the appropriate extension of the efficiency norm given its fundamental function. Part D looks at the issue of *de minimis* expected losses, and argues that the *ex ante* criterion should deal with that issue in a manner that is consistent with the function or motive behind the efficiency norm, finding expected losses to be *de minimis* when the reasonable background views of distributive justice would so identify them. Finally, Part E examines the question of whether deontological norms represent either a challenge to the efficiency ethic or support for it. It argues that there is no significant conflict between efficiency and nonconsequentialist norms of this kind, and that a consent ethic offers some potential for additional support to the efficiency norm.

A. The Failure of Kaldor-Hicks as an Efficiency Norm

Most individual policies harm someone, and therefore cannot be either directly praised or condemned on Pareto efficiency grounds. The challenge is to find a way to make the concept of efficiency into a more useful evaluative tool without sacrificing its fundamental character as a norm of avoiding waste, of pointless sacrifice of one good thing in the pursuit of another good thing.

As many commentators have seen, the Pareto criterion, which seems useless in evaluating individual policies, can be much more useful in evaluating packages of policies.⁴⁵ Any particular lawsuit for breach of contract, for example, necessarily involves winners and

45. See, e.g., A. Mitchell Polinsky, *Probabilistic Compensation Criteria*, 86 Q.J. ECON. 407, 409 (1972) (discussing bundles of changes that have some effective randomness in distribution).

losers. But if one thinks about the institution of contract enforcement as a whole, it becomes more likely that everyone can benefit from the existence of the institution. One will be a promisor and a promisee on many different occasions, and one will also have indirect interests (as consumers, employees, suppliers, etc.) in promisors and promisees on innumerable contractual disputes.

It has been argued that the Kaldor-Hicks criterion can be justified on these grounds of package Paretianism.⁴⁶ A Kaldor-Hicks efficient move increases the wealth of the winner more than it decreases the wealth of the loser. Because winners win more than losers lose, one can hope that playing this game many times will result in everyone's coming out ahead. But this is not certain. One problem is that the gains and losses may be *systematic* rather than random.⁴⁷ If a particular person is on the losing side of a disproportionate number of Kaldor-Hicks transactions, she need not benefit no matter how long she plays the game. Another problem is that *large individual losses* from particularly unlucky single plays of the game may be enough to dwarf the gains one can expect from playing the game over time.⁴⁸ For example, one might be killed or severely injured as a result of a particular transaction, and the policy which brought this about could not be said to advance the interest of the person killed or severely injured no matter how many benefits that person obtained from the policy before that one unlucky transaction.

The one serious systematic tilt of the Kaldor-Hicks criterion is its disadvantaging of the poor.⁴⁹ Kaldor-Hicks analyzes policies based upon willingness to pay, which in turn is a function of ability to pay. For example, in one transaction a poor person might be engaged in an occupation that caused a noise which slightly inconvenienced a rich person. However, because the victim was so rich, she was willing to pay a large number of dollars to have the inconvenience go away, and if it was large enough the Kaldor-Hicks criterion would require the

46. This is a part of Posner's consent-based justification for Kaldor-Hicks or wealth maximization. See generally Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980).

47. Lucian A. Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?*, 8 HOFSTRA L. REV. 671, 672 (1980) (illustrating that Posner's wealth maximization policy produces systematic losses for some groups).

48. Lewis Kornhauser has discussed "irreplaceable commodities," especially those that cannot be replaced with money because their absence affects the marginal utility that can be derived from money, and their effect on cost-benefit analysis. See Lewis A. Kornhauser, *On Justifying Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1037, 1044 (2000).

49. Izhak England, *The Failure of Economic Justice*, 95 HARV. L. REV. 1162, 1176 (1982) ("Where preferences backed up with money are sovereign, there is no room for indulgence toward those who lack the drive or the ability to maximize wealth.").

poor person to cease her operation without compensation. In another transaction a rich person might be engaged in a business that caused a terrible noise which severely jarred the nerves of the poor person. But because the poor person had so little money, she did not "value" noise reduction sufficiently to justify the cost of imposing noise abatement technology on the wealthy person's business.

It has sometimes been argued that Kaldor-Hicks is itself an efficiency criterion, independently of its ability to serve as an indirect means of promoting Pareto efficient changes over time through a package of Kaldor-Hicks changes. Richard Posner defended wealth maximization as an efficiency norm independent of Pareto efficiency.⁵⁰ And cost-benefit analysis, which weighs policies based upon the willingness to pay of the parties positively or negatively affected by them, has gained significant foothold in legislation without being tied to Pareto notions.⁵¹

The bias against the poor is a normative reason to be worried about the spread of cost-benefit analysis and Kaldor-Hicks efficiency. More importantly for present purposes, the bias against the poor is a reason for saying that Kaldor-Hicks is not an *efficiency* norm. As the previous section noted, efficiency is a concept directed at avoiding waste, or the needless sacrifice of one good thing in the pursuit of another.⁵² If the poor systematically lose from Kaldor-Hicks, this might be defensible on some substantive theories of distributive justice, perhaps those which focus on rewarding the productive.⁵³ But it is not the neutral criterion that purports to be common ground for people holding different views of distributive justice.

B. Pareto Efficiency and the Reasonable Normative Objections to Kaldor-Hicks and Redistributive Policies

This section seeks to build an argument that efficient changes can represent common ground for individuals holding a variety of reasona-

50. See POSNER, *supra* note 35, at 14-15 ("The conditions for Pareto superiority are almost never satisfied in the real world, yet economists talk quite a bit about efficiency; the operating definition of efficiency in economics must not be Pareto superiority. When an economist says that free trade or competition or the control of pollution or some other policy or state of the world is efficient, nine times out of ten he means Kaldor-Hicks efficient.").

51. Use of cost-benefit analysis by the U.S. Department of Agriculture, by the EPA, by the Department of Transportation, and other agencies, is discussed in Adler & Posner, *supra* note 12, at 1117-21.

52. See *supra* notes 16-19 and accompanying text.

53. See Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775, 788 (1981) (arguing that it is unclear why the unproductive have the right to be consulted regarding social institutions that involve wealth of the productive).

ble views of distributive justice. The structure of the argument is essentially an "overlapping consensus" claim such as that made popular by John Rawls.⁵⁴ The argument is that Pareto efficient changes should be acceptable to an overlapping consensus of reasonable views of distributive justice, and that any notions which seek to broaden the efficiency idea beyond Pareto in order to be more pragmatically useful should aspire to fulfill the same overlapping consensus criterion. "Reasonable" views can be understood epistemically or metaphysically. Epistemically, they are views that, to the best of our knowledge, might be true; they cannot be ruled out by conclusive arguments. Metaphysically, a reasonable view is one that (we believe) has some merit and thus some place in the ultimate normative truth, though perhaps only as a factor to be considered along with other considerations in some more comprehensive normative vision.

Let us begin by considering some of the normative arguments that have seemed to many to represent reasonable objections to particular policies. As an example, consider a specific policy change, perhaps a tightening of the rules of nuisance from a reasonableness to a physical invasion test, and imagine that this tightening would be a Kaldor-Hicks efficient change, but one that would work to the systematic benefit of the rich. We can hypothesize that one started with state of affairs S, in which there were two individuals X and Y. X is the poorer of the two, having personal wealth of \$40, while Y's personal wealth is \$60. The Kaldor-Hicks efficient rule would move us to state of affairs K, in which X now has \$39 while Y has \$63. Now imagine a package policy creating state of affairs P, which resulted when one adopted both the Kaldor-Hicks efficient move and a redistribution of wealth from Y to X of \$2. Thus, in State of affairs P X has \$41 while Y has \$61. Finally, consider a fourth state of affairs R, which resulted from merely redistributing the wealth available in S by \$2, without simultaneously adopting the Kaldor-Hicks efficient legal change. In R individual X would have \$42, while Y would have \$58. The situation can be summarized in the following chart:

State of Affairs	X's Wealth	Y's Wealth
S (status quo)	\$40	\$60
K (K-H policy)	\$39	\$63
P (package policy)	\$41	\$61
R (redis only)	\$42	\$58

Let us compare these states of affairs. Does the move from S to K represent progress? Total wealth is greater, but it is hard to conclude with any confidence that the new state of affairs is superior. This is

54. JOHN RAWLS, *POLITICAL LIBERALISM* 133-72 (1993); John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 2-5 (1987).

Ronald Dworkin's example of the book seized by a tyrant from a poor and sick person to a wealthy person who "valued" the book more but probably would never read it.⁵⁵ There are some highly plausible objections to such a move. One is the *reduction in utility* as a result of the diminishing marginal utility of wealth.⁵⁶ Another is the violation of *Rawlsian side constraints*, by worsening the position of the less well off individual in order to secure greater social gains for others.

Now compare S to R. Does this represent progress? Undoubtedly it would to many people. However, there are arguments, at least plausible if not ultimately persuasive, for why this is not necessarily the case. In particular, the historical process by which Y has acquired more wealth than X may need to be considered. Numerous historical processes may explain the present distribution of wealth. Let me consider two of those processes in some depth: that the difference is a result of different choices made by Y and X, and that it results from a difference in natural talent. Other explanations, such as inheritance or wrongs committed by the parties, are considered in a footnote.⁵⁷

One reason for Y's having greater wealth may be that Y has made different choices than X. Y may have worked hard rather than pursued leisure, saved rather than consumed, taken on risks and responsibilities rather than stayed on predictable paths, and the like. These choices might affect the distributive justice of a policy of redistributing wealth from Y to X. If one thought these choices reflected moral *merit*, one might believe that redistribution of those merited rewards was unjust. Or one might entertain a notion of *liberal equality*, in which resources are not rendered unequal merely because people choose to use their resources in different ways.⁵⁸ In fact, one might say that

55. See Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 197 (1980) (giving an example in which Derek has book, values it at \$2 because he is so poor; the book is taken away in order to give it to Amartya, who values it at \$3 because he is so rich).

56. A strong defense of this position is made in Mark S. Stein, *Diminishing Marginal Utility of Income and Progressive Taxation: A Critique of the Uneasy Case*, 12 N. ILL. U. L. REV. 373 (1992).

57. Gifts and inheritance represent choices of the donor. While the donee has not necessarily done anything particularly meritorious, there is an argument that confiscating these funds would unfairly penalize the choice of the donor, who could have consumed the resources herself instead of leaving it to children or charities. A related point is that a policy of confiscation will distort these choices *ex ante*, causing people with money to consume it rather than save it and leave it to others. Money that is the result of past injustices presumably can be taken away justly if it can be identified, but there may be issues of detrimental reliance and of identification of the products of injustice, especially if the injustice occurred in the distant past, that need to be considered.

58. The distinction between wealth differences that flow from differences in initial entitlements or brute luck and other wealth differences that flow from differences in choices is stressed in Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 306 (1981).

such a Y is not really wealthier than X if one counted correctly the psychic wealth that X had derived from leisure, the pleasures of avoiding risk, and the like. Finally, a policy of redistribution in this setting might have adverse *indirect utility effects*, as people similarly situated would now have less incentive to make the choices that would put them in Y's position in the future, and more incentive to make the choices that would put them in X's position in the future.⁵⁹

Of course, choices are not the only reason that Y might have greater wealth than X. Another reason to consider is difference in natural talent. Y may just be born smarter than X, or stronger, or more handsome, or with greater health, and these natural talents may translate into superior wealth even with equal effort. The previous arguments would then not justify Y's retaining this wealth. Y cannot be said to have done anything particularly meritorious when one is referring to gifts with which Y was born. Liberal equality would now presumably frown on Y's advantages, which were not attributable to autonomous choices but to differing initial endowments.⁶⁰ And although it would be a difficult policy to implement, a tax on natural ability rather than on effort should in theory not produce adverse effects on incentives that would yield indirect sources of disutility.⁶¹

On the other hand, there remain plausible arguments against redistribution of these gains. In particular, if Y is wealthier than X because of differences in natural talents, there is a question of violating *libertarian or Kantian constraints* by a policy of redistribution. Is Y being used merely as a means of promoting X's satisfaction?⁶² This would be particularly obvious if the policy involved forcibly redistributing a kidney from Y, who was lucky enough to have two, to X, who needed one to stay alive. Some people would have no problem with such forcible redistribution of body parts if required to promote utility or Rawlsian justice, but the opposing view—that Y is entitled to his own kidney, and should not be forcibly harvested for the greater good of others—seems at least plausible. Or what if Y were forced to labor for the benefit of X? This hypothetical causes one to confront the ques-

59. This would be the case whether the redistribution was done by the tax system or through less direct means such as tilting the private law system in favor of the poor. Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667-68 (1994) (noting that disincentive is from redistribution itself rather than from tax means of accomplishing redistribution).

60. Dworkin, *supra* note 58, at 306.

61. See Chris W. Sanchirico, *supra* note 1, at 802 (providing that distortions would not arise from tax on ability, but arise because the state is pragmatically forced to tax choice-related manifestations of ability).

62. See Kenneth J. Arrow, *Some Ordinalist-Utilitarian Notes on Rawls's Theory of Justice*, 70 J. PHIL. 245, 257 (1973) (noting that a system that taps the talents of the more able for the benefit of the less able uses people as means, though stating that he found that result acceptable).

tion of whether the wrong of slavery is fully cashed out by the inegalitarianism of its historical uses, such that compulsory labor in the service of equality would be unobjectionable.

Of course, most redistributive schemes do not call for payment in body parts or in labor, but in money or other alienable external commodities. In considering such monetary transfers, it may be helpful to explore an interesting argument put forward by Albert Weale.⁶³ He envisions a tax scheme that managed to achieve the liberal egalitarian objective of taxing only natural ability and not choices. Such a policy would not want to tax income, which is a product of the combination of natural talent and choices. Instead, it would need to have state assessments of each individual's potential, and require that the talented individuals make payments based upon those potentials regardless of the choices they might make which ultimately determined how wealthy they would be. As Professor Weale notes, however, the closer a policy came to effectuating this goal, the clearer it would be how similar the policy was to a system of forced labor.⁶⁴ Talented individuals would face a social obligation to contribute based merely upon their talent, so that their labor efforts would not be truly voluntary but would instead be compelled in order to raise the funds needed to meet these obligations. Treating talents as a collective asset for tax purposes uses the talented person as a means in much the same way that forced labor or redistribution of the lucky person's body parts would use him.⁶⁵

It is true that there is room for some redistribution within a Kantian framework that seeks to avoid the use of individual persons as a means only. Much wealth is the result of cooperation among persons, and the returns which people earn in a market will often reflect cooperative surplus, or rents that are larger than needed to coax the individuals into supplying their efforts.⁶⁶ The Kantian objection is essentially that Person A should not use Person B in such a way that B is worse off than if A had not existed, and A is better off than if B

63. Albert Weale, *Justice, Social Union and the Separateness of Persons*, in *RATIONALITY, JUSTICE, AND THE SOCIAL CONTRACT* 75 (David Gauthier & Robert Sugden eds., 1993).

64. *Id.* at 81-82 ("What the proposal for a lump-sum tax on ability brings out clearly is that a simultaneous concern both for efficiency and for patterned redistribution will limit the labour choices of those with skills in high demand.").

65. This argument was first made in ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 169 (1974) (stating that redistribution is "on a par with forced labor"). As Weale points out, this is not really true of a traditional income tax, which does not compel work but sets conditions on which a person can work. However, it would be true of a tax on ability that had to be paid whether a person worked or not.

66. Weale, *supra* note 63, at 84-85 (discussing importance of rental component of income).

had not existed.⁶⁷ Altering the share of the cooperative surplus derived by A and B would not violate this constraint, but redistribution beyond those limits would do so.

The point here is not to embrace or reject the Kantian objection to redistribution or pooling of talent. The point is rather to see that a plausible argument can be made against such redistribution, so that there is room for a notion of efficiency that can bypass this objection and thus obtain more widespread acceptance. If I were asked for my own view, I would say that I am a moderate on the topic. Sometimes people who are blessed with exceptional talent by nature should be required to contribute to those significantly less fortunate, even if it means that the more fortunate are worse off than they would be if the less fortunate did not exist. However, social organization should be characterized primarily by cooperation for mutual advantage, not by half the population living in a permanently parasitic relationship on the other half. We will have a healthier democratic polity in many ways if people generally have reason to believe that they benefit from, or at least are not harmed by, the presence of their fellow citizens.

Now let us compare States of Affairs S and P, i.e., the status quo and a package of changes consisting of a Kaldor-Hicks improvement together with redistribution that leaves both parties better off than before. This is of course a Pareto improvement, making it sensible to say that remaining with S would be inefficient and wasteful. Pareto improvements seek to bypass the utilitarian and Rawlsian objections to Kaldor-Hicks changes not accompanied by redistribution, and the liberal and Kantian objections to redistribution not accompanied by Kaldor-Hicks changes. Pareto efficiency is thus a concept that is well suited to the function of an efficiency norm in providing a common ground norm. The crucial question is whether the efficiency idea can be given more scope than Pareto gives it without sacrificing this character of a norm designed for a society characterized by pluralism in conceptions of distributive justice.

C. Ex Ante Efficiency and the Plurality of Reasonable Views of Distributive Justice

A package of Kaldor-Hicks efficient legal rules and redistributive taxation should succeed in making most people better off. It will not, however, make everyone better off. As noted before, some people will lose so badly in individual transactions that they cannot be effectively compensated either by other Kaldor-Hicks transactions in which they

67. Larry Alexander, *"With Me, It's All er Nuthin'": Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 558-59 (1999) (discussing Kantian objection to appropriation of another to make oneself better off than if the other had not existed and the other worse off than had the actor not existed).

are winners or by redistributive taxation.⁶⁸ In particular, some losses are not compensable by money. This is especially true of losses that affect the marginal utility that a person could derive from that money, such as being killed or being in such severe pain that one could not really enjoy what one could buy with the money.⁶⁹ The question that needs to be explored is whether an efficiency criterion can be developed that addresses this problem of noncompensable injuries, or whether on the other hand the presence of such injuries dooms the efficiency criterion and leaves us in Calabresi's fully normative, or even Lenin's who-whom, universe.

The interesting question is whether one can defend a policy on the ground that everyone would have expected gains from that policy even though some people actually suffered losses under it.⁷⁰ And, in particular, we want to know whether such a policy can be defended as an *efficiency* norm. This is not a debate about words. An efficiency norm has a crucial social function to fulfill, which is to identify a range of policies that can be defended from an overlapping consensus of reasonable conceptions of distributive justice. Pareto efficiency may meet that test, but this is not Pareto efficiency because some people come out losers. Does a policy that is in everyone's *ex ante* interest meet that requirement for an efficiency norm?

Let us return to the discussion undertaken earlier about Kaldor-Hicks efficiency, Pareto efficiency, and redistribution.⁷¹ We saw that Kaldor-Hicks efficiency encountered difficulty with certain highly plausible notions of distributive justice. In particular, the Rawlsian conception of protecting the least advantaged, and the utilitarian conception of diminishing marginal utility of income, seemed threatened by the Kaldor-Hicks systematic bias against the poor. On the other hand, the purely redistributive policy encountered difficulty with other plausible notions of distributive justice. Where wealth was a result of prior choices, redistribution ran into meritocratic and liberal egalitarian objections. Where it was the result of differences in talent, it ran into objections based upon Kantian or libertarian notions that a person should never be used merely as a means. Pareto efficiency steered around these objections. The question we need to explore is whether a policy that is in the rational *ex ante* interest of everyone, although some will ultimately lose from it, also steers around these objections.

68. See *supra* notes 45-48 and accompanying text.

69. Kornhauser, *supra* note 48, at 1048 (discussing irreplaceable goods for which insurance cannot provide compensation).

70. An early statement of the thesis, but without the supporting defense offered here in underlying theories of distributive justice, was presented in Gordon Tullock, *Two Kinds of Legal Efficiency*, 8 *HOFSTRA L. REV.* 659, 664 (1980) (addressing *ex ante* improvement although some will have an unpredictable run of bad luck).

71. See *supra* notes 55-67 and accompanying text.

Let us first consider the issue of Rawlsian side constraints on weakening the position of the least advantaged. Pareto efficient moves never can make the least advantaged worse off.⁷² By contrast, it is possible, if some of the least advantaged turn out to be unlucky, that they will be made worse off by a policy that was in the rational ex ante interest of everyone. Does this mean that such a policy violates a Rawlsian notion of distributive justice?

A broader view of the Rawlsian project suggests that this notion of rational ex ante interest should fit within its constraints. People behind a veil of ignorance, being risk averse, choose to protect the position of those least well off, but they do not know their own conception of the good so they seek a position that will be acceptable once they discover what that conception is. The question to ask is whether people behind a veil of ignorance would seek to prevent people from taking *rational* risks with the primary goods they have been allotted. One certainly might worry that people will take irrational risks, failing to appreciate what a one-in-a-hundred chance really means or how horrible they will feel if the feared loss eventuates.⁷³ The issue we are discussing, however, is not whether to pursue a laissez faire policy of letting people take whatever risks they wish, but whether people should be able to take rational risks that are *in fact* in their ex ante interest.⁷⁴ Rawlsian contractors are supposed to respect the notions of the good entertained by actual people and choose terms that would be acceptable whatever their notions of the good turn out to be. Certainly it is hard to achieve many good things in life without taking some calculated risks. This is not a matter of licensing speculative or reckless risk taking by the poor. The poor will suffer more severely from the downside of their choices, so it would be rational for the poor to be conservative in the risks they are willing to take. Rawlsian con-

72. Rawls argues that parties in the original position would accept the principle of Pareto efficiency. Rawls, *supra* note 22, at 67. The idea that Rawlsian contractors would always embrace Pareto superior options is discussed in Lawrence G. Sager, *Pareto Superiority, Consent, and Justice*, 8 HOFSTRA L. REV. 913, 922 (1980) (stating that Rawlsian contractors would view Pareto improvements as free lottery tickets).

73. A related argument is whether cost-benefit analysis should discount future pains, or whether this should be treated as an irrationality of actors that should not be duplicated in public policy. Frank, *supra* note 19, at 915-16. Frank quotes from STANLEY JEVONS, *THE THEORY OF POLITICAL ECONOMY* 72-73 (1941) (1871) ("To secure a maximum benefit in life, all future pleasures or pains should act upon us with the same force as if they were present, allowance being made for their uncertainty. . . . But no human mind is constituted in this perfect way: a future feeling is always less influential than a present one.").

74. Frank, *supra* note 19, at 928 ("Hedonic pricing models use observed choices to infer discount rates, which cost-benefit analysts then use to compute present values. To the extent that many important intertemporal choices are driven by hyperbolic discounting, conventional methods will give too little weight to future costs and benefits.").

tractors should not oppose a policy that was in the rational ex ante interest of every member of the least advantaged representative class of persons, and that would therefore be chosen by all such persons if transaction costs had permitted it.

Consider now the utilitarian position. We know that Pareto efficient moves pass muster under a utilitarian criterion, at least if the notion of total or average utility is coherent at all, as it must be if utilitarianism is to be taken seriously as a reasonable theory.⁷⁵ If some people gain utility from a policy and no one loses utility, then the total utility of the people must have increased. However, with the rational ex ante policy we are considering, it is no longer true that everyone will gain or at least stay the same under the policy. Some will lose, and indeed will lose so severely that they cannot be effectively compensated by any gains they might derive from other transactions. A person who is poor may lose wealth that will push her even deeper into poverty, which would be a major loss in utility for a person living in a position where each dollar confers considerable marginal utility. Is utilitarianism an objection to the approach of pursuing policy packages that are in the rational ex ante interest of all?

In fact, utilitarianism seems the least likely philosophy to have trouble with this standard. For the individual, it is usually thought rational to take a risk if the expected utility of the risk is positive, i.e., if the utility of the upside, discounted by its probability, outweighs the disutility of the downside, discounted by its probability.⁷⁶ A particular individual may lose this game, but a large number of similarly situated individuals will make the average or total utility reflect quite closely the objective probabilities. Since the expected gains for each individual were positive (for rational risks), the total utility of all the actors will also be positive. Utilitarianism's willingness to tolerate losses for some when they are outweighed by gains for others, which is sometimes considered a defect, makes it much less likely that utilitarianism would be a problem for the ex ante approach than other philosophies more concerned with each individual's position considered alone.

As noted earlier, the original defense of the efficiency criterion was that it could provide a norm that would bypass the problem of interpersonal utility comparisons.⁷⁷ I have argued that this problem has been overemphasized, but there is no doubt that it is frequently difficult to compare the utilities of different people, especially when they are pursuing dramatically different projects with different kinds of

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

76. Expected utility when deciding under uncertainty is a concept developed in JOHN VON NEUMANN & OSKAR MORGANSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (1944).

77. See *supra* notes 2-10 and accompanying text.

objectives. If one believes that utilities cannot be cardinally measured and compared, then it becomes difficult to say when a policy increases the total utility of the group's members. However, Pareto efficiency seems to solve that problem, again on the assumption that total utility is at least a coherent concept even if not cardinally measurable.⁷⁸ We do not have to know how many utils any particular person gained or lost to be sure that total utility is higher if some have gained and none have lost. When we move to the idea of *ex ante* efficiency, however, it is not as clear that this solution works. Some people will end up losing from the rational risks they take. If their disutility cannot be cardinally compared with the utility gained by the winners, how can we say that there is social progress as a result of the change?

At one level, this objection is quite sound. If the utility of one human being is completely incommensurable with the utility of another, then Pareto efficient moves are the only ones that we can say increase utility overall. Of course, we have noted that total incommensurability is a very implausible story.⁷⁹ But we can make a much stronger point about the relationship between the incommensurability objection and the issue of *ex ante* efficiency. To the extent that incommensurability is an issue, the *ex ante* approach seems a singularly attractive way of dealing with the problem.

To see this, let us pose a hypothetical that deliberately exaggerates the incommensurability problem. We finally confront a race of beings from outer space that seems utterly alien in almost every way from us, although our scientists are fairly sure they are able to tell when the aliens assent to something and when they do not. Somewhere in their circuits they seem to be able to derive something vaguely like utility, but the nature of that utility is a permanent mystery for us. What principles should govern our interaction with these aliens? We would have no reason to oppose Pareto efficient moves, and in the spirit of interplanetary good will we should probably favor those moves whether it is we or the aliens who derive the affirmative gains. We would not have any reason to support a Kaldor-Hicks policy, however, because there would be no way to evaluate whether an increase in wealth for us outweighed a decrease for them or vice versa. But what about the policy of *ex ante* efficiency?

It would seem to be in our interest to support a policy of adopting *ex ante* efficient changes when dealing with the aliens. Each human being expects to benefit, and therefore our human society expects to

78. For an argument that utility can be coherently compared across persons, see ERIC RAKOWSKI, *EQUAL JUSTICE* 25-26 (1991). He argues that "[o]nly if one demands extraordinarily fine comparisons between the conscious states of different persons, or of one person at different times, will utilitarianism be found deficient. But almost all defensible moral theories will fail this test too." *Id.*

79. See *supra* notes 9-13 and accompanying text.

benefit (and, by the law of large numbers, almost certainly will benefit) from the policy. The problem being formal and symmetrical, the aliens should reason the same way about us and embrace the policy of ex ante efficient changes. We do not have to understand the nature of the gains the aliens expect to derive from the policy, or why they are willing to take the risks, and they do not have to understand the nature of the gains we expect to derive from it. It is enough that we understand our own gains and risks, and that the other beings are willing to go along with the policy for reasons of their own.

Let us now consider some of the objections to the redistributive policy identified earlier, and ask whether these objections can also be leveled against a policy of ex ante efficiency.⁸⁰ One of the objections was that the redistributive policy did not appropriately reward or respect the choices which led to the prior distribution of wealth and might lead to perverse incentives for people similarly situated in the future who were confronted with those choices. Pareto efficiency avoids this problem. Whatever meritorious action or autonomous choice went into the present level of entitlements is preserved because no one is reduced below the level of her previous entitlements through Pareto efficient moves. However, with the ex ante policy we are considering, some people will wind up losing, and thus will have taken from them some of the wealth that they acquired through their past choices. Does this represent a problem for the ex ante efficiency approach?

The answer is that there should not be a conflict between the ex ante policy and respect for the prior choices that produced existing wealth positions. The policy imposes upon a person only the risks that she herself, with her own values and starting point of wealth previously accumulated, would rationally be willing to take. Ex ante efficiency does not impose any systematic regime of unwanted risk on particular classes of people because of the wealth they have accumulated through their choices. And from the perspective of avoiding perverse incentives for the future, no one will be deterred from working hard or making other choices that lead to wealth by the prospect that she will thereafter be subjected to policies that impose the level of risk that she would rationally have sought to impose upon herself. To the contrary, those risks represent further expected gains, and will only serve to reinforce the choices that put the person into a wealth position where those risks could be rationally taken.

Another objection to purely redistributive policies was the Kantian or libertarian objection against using a person merely as a means. Pareto efficient changes do not involve Person A making herself better off than she would be without Person B's presence through actions

80. See *supra* notes 51-66 and accompanying text.

that make B worse off than she would be without A's presence.⁸¹ This is for the simple reason that Pareto efficient changes do not make anyone worse off. Again, however, when we explore the ex ante efficiency approach, this simple answer is not available, for some people will be worse off. If a talented person's efforts wind up being lost through the ex ante policy, while others gain from those efforts, has the libertarian or Kantian injunction against using the talented person's labor as a means been violated?

Once again, there should not be a fundamental conflict between these libertarian or Kantian norms and the ex ante approach. The Kantian norm is not generally understood to say that one cannot have a policy that in fact winds up benefiting one person and harming another. What is prohibited is intentionally using one person as a resource or means of promoting the welfare of the other.⁸² This is not done by the ex ante approach. Talented people may end up losing if their rational risks do not pan out, and the untalented may gain at their expense; however, the talented are not being purposely conscripted into being resources for the benefit of the less talented. The talented person remains an end in herself; it is the values that she holds which determine the risks she would be willing to take if transaction costs were lower.

There is, however, one area of possible tension between the libertarian idea and the ex ante approach that should be noted. There is a potential conflict between the ex ante approach and the idea of inalienable rights.⁸³ For example, one might say that a person not only has a right to her own body parts such as her kidneys, but that she has a duty to retain those kidneys rather than alienate them. It is not obvious to whom this duty is owed or why it is imposed against the wishes of the right holder, but perhaps the idea is that a kidney is too integral a part of a person to be viewed separately from that person.⁸⁴ However, one can at least imagine a rational risk being taken by a

81. Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 231 (1980) (noting that respect for principle of autonomy of persons supports Pareto principle as embracing changes that are consensual, even if consent is only hypothetical).

82. John Finnis has argued that deontological constraints require that we individuate actions, and that "human acts are to be individuated primarily in terms of those factors which we gesture towards with the word 'intention.'" JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 122 (1980). The injunction is "do not choose directly against a basic value." *Id.* at 122. It has been argued, however, that this is related more to culpability than to wrongfulness. Heidi M. Hurd, *What in the World Is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157, 174-87, 215-16 (1994).

83. The idea of inalienability was discussed and applied to body parts in Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-15 (1972).

84. A related argument is that alienability commodifies as a saleable thing something that should not be viewed in that way because of its personal character.

person with her own kidney. Perhaps a group of people might enter a kidney pooling club in which one kidney would be forcibly taken from a club member chosen at random if any other club member had lost both of her kidneys. To avoid objections irrelevant here, imagine that a regular and respected legal process existed for compulsory takings of kidneys, and that there was no risk of breach of the peace from disobedience of that system. If the right to one's kidney is inalienable, does it not represent a problem for the idea that changes which are in the rational ex ante interest of people are desirable?

Before looking at the kidney pooling club and the question of rational risks, it should be noted that this is by no means a problem uniquely created by the ex ante standard. It is not clear that even the Pareto efficiency idea meets the inalienable rights objection. If a person rationally wants to sell one of her kidneys to feed her starving children, Pareto efficiency would presumably approve of the transaction, which makes both parties better off, at least if one could package the rule with others that would effectively compensate moralistic onlookers.⁸⁵ Some inalienability rules can probably be defended as prophylactic checks on difficult-to-prove problems of rationality and competence.⁸⁶ Certainly people should not be separating themselves from their body parts without considerable circumspection, and perhaps the risk of abuse or mistake is sufficiently great that the prohibitions can be justified. But a true inalienability norm that would hold even against rational actions is in tension with the Pareto efficiency idea, so the problem of inalienability exists even before one thinks about the ex ante efficiency notion.

Still, one might worry that the ex ante approach is creating an even more serious problem with the inalienability norm than the Pareto approach had done. One might be willing to live with the idea of people rationally selling their kidneys, where each party considered herself coming out ahead at all stages of the transaction. The essence of the ex ante approach, however, is that some people eventually consider themselves losers, albeit losers from risks that were rational to take in the first instance. And where the loss consists of something in which people might be thought to have an inalienable right, this may seem especially problematic. That is why the kidney club hypothetical suggests itself as the type of issue with which an ex ante approach

Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1921-37 (1987).

85. Whether the preferences of moralistic onlookers are entitled to count in cost-benefit analysis is a controversial topic. For an argument that they should not count, see Adler & Posner, *supra* note 12, at 1113-14.

86. I have argued elsewhere that this represents the best defense for the prohibition against selling oneself into slavery. See Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 STAN. L. REV. 87, 134-35 (1993).

might have to deal.⁸⁷ One could even imagine an out-of-control court saying that people should have to give up their kidneys because they *would have* entered into a kidney club agreement if they had thought about the issue, so the court is kindly doing to them what they would have done to themselves if transaction costs had been lower.

At this point, the prophylactic considerations become dominant. We noted before that it is important to be very sure that people are acting rationally when they are doing something so potentially harmful to themselves as parting with their kidney.⁸⁸ This point is compounded when what people are doing is not selling their kidney but running a risk that they will lose it in the future, as one has reason to worry about how salient that future risk is to the present actor.⁸⁹ Finally, if the court is going to consider what it thinks the parties would have done, there is the need for still another layer of circumspection, as we do not even have an actual choice that might carry with it at least a suspicion of rationality. For what it is worth, it is extremely unlikely that rational parties would enter into a kidney pooling club, which could call upon people who valued their kidneys very highly to part with them, as opposed to an insurance system in which the insureds would pay money that would be used to procure volunteers to give up their kidneys.

The practical significance of any tension between the *ex ante* approach and the inalienability norm is therefore quite small. Still, one wonders about the tension at a theoretical level. Assume away all problems of rationality, knowledge, prophylactic rules, worries about governmental coercive powers and difficult-to-compensate moralistic tastes. Imagine that people were completely rational in deciding what risks to run, that they would be peaceful and orderly in allowing their kidneys to be judicially extracted, that all moralists could be fully compensated, and that courts would impose upon the parties only those forfeitures of inalienable rights that the parties themselves unquestionably would have been rationally willing to impose upon themselves.

Stripped down so completely, the inalienability idea probably is no longer a reasonable position. Where is the reasonableness of celebrating a person's right by denying that very person the most rational use to which she can place that right when no one else's interests are adversely affected in any way? Apart from eminently reasonable practical considerations, inalienable rights constitute an overly good name

87. Of course even a voluntary sale of a kidney could be regarded as taking a calculated risk that one's other kidney will not experience problems.

88. See *supra* note 86 and accompanying text.

89. People have a tendency to be optimistic in their risk assessments. More than 90 percent of all drivers, for example, feel that they are better drivers than average. Frank, *supra* note 19, at 929.

for a basically bad idea. The reasonable idea that one's rights cannot be controlled or taken by others has been transformed into the unreasonable idea that the rights cannot be controlled by oneself no matter how rationally one acts. So at a deep theoretical level I do not think that inalienable rights represent a problem for the notion that efficiency, either Pareto or *ex ante*, is a common ground norm among reasonable views of distributive justice. It was never claimed, and cannot be claimed, that there are no *unreasonable* ideas of distributive justice that would oppose efficient changes. But if I am wrong about the unreasonable of theoretical inalienability, the practical difference is small, because one can say that efficiency is desirable except in those cases where inalienable rights are involved and yet no institutional worries about knowledge, interest or power warn against their being taken.

Let us summarize the analysis to this point. We are considering a policy criterion of adopting a particular change when all parties rationally would have supported the change at the time of its adoption, even though some of those parties eventually lose from the change. We have seen that such a policy is consistent with a wide variety of reasonable views on distributive justice. It is consistent with a Rawlsian standard for protecting the least advantaged, with a utilitarian standard that aggregates or averages gains and losses, with liberal or meritocratic standards that call for respecting choices previously made, and with libertarian or Kantian injunctions against using people merely as conscripted talent machines for the benefit of the greater good of others. The *ex ante* rationality standard therefore seems deserving of the term "efficiency;" it plays the same essential role that Pareto efficiency does. The advantage of the *ex ante* approach, of course, is its larger scope and therefore its greater potential to be a practical guide for policy. It does not require a policy package that has no actual losers, merely one that is not expected in advance to cause particular people to lose.

D. A Criterion for De Minimis Expected Losses

One might worry that the increase in the effective scope of the efficiency norm by moving from Pareto to *ex ante* efficiency is still not sufficiently large. There apparently remains a requirement for literal unanimity; not a single person in a society of perhaps hundreds of millions can be expected to lose a single net cent as a result of the policy package. In a famous exchange between Richard Posner and Ronald Dworkin, Posner argued that only a "fanatic"⁹⁰ would insist on absolute unanimity, and Dworkin responded that this was simply inherent in the nature of the efficiency norm, and that "[n]onfanatical Paretian-

90. Posner, *supra* note 46, at 495.

ism is utilitarianism merely⁹¹, subject to all the standard objections to utilitarianism.

Our approach to the efficiency question suggests a way of dealing with the issue of fanaticism and the requirement for absolute unanimity. We want to say that some losses can be *de minimis*, but *de minimis* by what criterion? The answer that is consistent with the purpose of the efficiency norm is that particular expected losses are *de minimis* if the cluster of reasonable views of distributive justice would consider them *de minimis*. In a Rawlsian conception, would parties behind a veil of ignorance be deterred from adopting a policy if they expected that it would cause one member of the least advantaged class to lose one cent, when the vast majority of the least advantaged expected to gain hundreds of dollars?⁹² Would a libertarian or deontologist defend the view that the smallest violation of a right cannot be justified by the largest possible consequential gain?⁹³ Again, we are looking for reasonable views, and a particular philosophy that cannot produce any resources to deal with the *de minimis* problem needs modification to be considered reasonable.

There is a need for some pragmatism and incompletely theorized agreement here.⁹⁴ In the workaday, nonfanatical world of legal policy, an assertion that a policy is "efficient" essentially represents a confidence that the expected losses of particular people ultimately will be regarded as *de minimis* (i.e., insufficient to reverse the conclusion of approval of the policy) by any reasonable, thoroughly worked out notion of distributive justice. One can expect that there will be disagreement about whether particular losses are *de minimis*, just as there are disagreements on other pragmatic judgments. So it may not be obvious to everyone that a particular policy is efficient, but then no one could have expected otherwise. At least one can say that there is agreement on what divides the parties, which is whether the cluster of fully worked out reasonable views of distributive justice ultimately will conclude that the expected losses are insufficient to reverse the conclusion that the policy is appropriate.

91. Ronald Dworkin, *Why Efficiency?*, 8 HOFSTRA L. REV. 563, 583 (1980).

92. Arrow, *supra* note 62, at 255 (noting that maximin would lead to unacceptable consequences if the world were such that it differed too drastically from the sum-of-utilities criteria).

93. Deontological theorists have in fact argued that these injunctions against using people as means can yield to consequentialist considerations once a certain threshold of significance is passed. The issue is discussed in Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893 (2000).

94. The idea of an incompletely theorized agreement comes from Cass Sunstein, who has used it to defend the use of cost-benefit analysis. Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1061 (2000).

E. Deontology and Efficiency

Truly deontological philosophies are the hardest to reconcile with any efficiency ethic. Deontologists believe that certain actions are categorically forbidden or mandatory without regard to their consequences.⁹⁵ For example, one might believe that it is forbidden to punish an innocent person, even if this produces good consequences because people falsely believe the person was guilty and feel the social order has been vindicated. And one might believe that a violent criminal is retributively deserving of punishment even if that punishment could be demonstrated not to do any good in terms of deterrence, rehabilitation, or any other indirect effect on human welfare.⁹⁶

The deontological maxims are often understood as constraints on utilitarian reasoning.⁹⁷ An innocent individual has a right not to be punished, even if the greater happiness of the greater number would outweigh the misery inflicted on the punished individual. Understood this way, deontology is no threat to efficiency. A change is not efficient merely because it is expected to cause great happiness for some, if that happiness is purchased at the expense of inflicting a fully expected state of misery upon some individual.

However, the deontological idea that the maxims are independent of consequences can in principle be carried beyond utilitarian consequences. One might say that it is wrong to punish an innocent person even if everyone, including the person punished, would be expected to come out ahead from the policy, or even if everyone would in fact come out ahead. And the retributivist says that it is good to punish those who morally deserve it, even if no one is made happy in any way by the effects of that punishment, so that everyone would expect to be better off in welfare terms if the punishment were foregone. This constitutes a genuine challenge to the efficiency notion.⁹⁸ How should that challenge be met?

There are basically two ways of addressing the issue of deontological norms which allegedly bind even when everyone would expect to be better off by abandoning them. One can take on the objection at the level of principle, and deny that such norms can be sound. Or one can

95. Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 264 (1996) ("Recall the implications of identifying an act as a violation of a deontological maxim: that act is categorically prohibited.").

96. This position is defended in Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179 (Ferdinand Schoeman ed., 1987).

97. Kent Greenawalt, "Prescriptive Equality": *Two Steps Forward*, 110 HARV. L. REV. 1265, 1288 n.62 (1997) ("The utilitarian position is typically qualified by certain deontological constraints: most importantly, not punishing the innocent.").

98. The idea that deontological norms might make everyone worse off in welfare terms is a principal theme of LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002).

respond pragmatically, by saying that there is very little practical effect of the deontological objection. I am tempted by the principled response, but if it is wrong it is of little moment because the pragmatic response is so powerful.

The principled argument would say that it just cannot be right that we have categorical obligations to behave in particular ways even if absolutely everyone would expect to be worse off as a result of our doing so. We may have rights (including rights against unjust punishments and rights to inflict just punishments on guilty fellow citizens), but those rights are a moral albatross unless they are waivable when they stand in the way of the welfare of everyone including the right holder. Those who are tempted by a contrary view should ask whether their concern is ultimately epistemic. It might well be desirable to have rights that are unwaivable even when the state thinks that everyone would in fact be better off by their being waived. The state might be in error in its judgments, and might have interested reasons for seeing the issue incorrectly. Legal rights might well be justifiable on this basis. The purely moral question is sharpened, however, by abstracting from these questions of knowledge and legal institutions. If the assertion of a right truly were expected to work to the detriment of everyone, would one still wish to interpose the right as a matter of fundamental morality?

These brief remarks are certainly not going to settle the controversy between deontology and consequentialism as a question of first principle. Fortunately, it is not necessary to resolve the dispute at that level to move forward with an efficiency ideal. The pragmatic problem with efficiency has always been that it is too demanding; it is hard to come up with policies that are not expected to harm anyone. Deontology tries to prevent certain kinds of actions, but the actions it targets are almost always actions that involve harm to individuals or groups. Utilitarians might think the harm justified by the benefits to others, but the policies would normally not be thought to be efficient.

For example, a retributivist would hold herself willing to inflict a punishment even in the case where absolutely no good resulted to any human being's welfare as a result. This puts the retributivist into theoretical tension with the efficiency ideal. But it is hard to imagine the punishment of a serious wrong that did not produce, or would not be expected to produce, any good for anyone. If the individual herself is not incapacitated or reformed or specifically deterred by the punishment, how frequently will it be the case that no one at all in the society is ever moved to refrain from a crime by the threat of such a punishment, no one has his or her own taste for retribution satisfied, no one is restrained from initiating private violence, and the like?

Or consider the innocent person's right against being unjustly convicted. There is an ongoing debate between proponents and critics of

utilitarianism about how realistic it is that the greatest happiness would really result from a regime that punished the innocent.⁹⁹ For efficiency purposes, however, it is not necessary to resolve that debate. The right against punishment represents a threat to efficiency only in the case where no one would expect to be worse off as a result of the punishment. Those hypotheticals would have to be much more far-fetched than those used to challenge the utilitarians, where it is only necessary that the benefits to the winners outweigh the costs to the losers.

In short, the committed deontologist can say that she favors efficient moves except in those cases where deontological constraints would be violated. And because deontological constraints tend to be violated in cases where individuals suffer massive harm, the practical effect of this is that the deontologist will almost always support any efficient move. The real world controversies between the deontologist and the utilitarian are fought out at the other end of the spectrum — where actions impose lots of harm on some and are supposedly justified by the greater good they provide for others. Such changes are not efficient, however, and therefore the debate has very little practical bite into the question of whether changes that are efficient are desirable.

There is one other connection between deontology and efficiency that needs to be discussed. Richard Posner argued that an efficiency ethic could be justified on deontological grounds. His argument was that people consent to it, and that their *ex ante* consent justifies the policies independently of any effect on people's welfare *ex post*.¹⁰⁰

One problem with Posner's argument is that he was using it to defend Kaldor-Hicks or wealth maximization, and as we have seen it is not true that everyone would necessarily expect to benefit from such a policy.¹⁰¹ However, we can reformulate Posner's question in terms of the conception of efficiency defended here. If it is in fact true that everyone would expect to benefit from a particular policy, can their

99. A famous attempt to construct such a hypothetical is H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, in *CONTEMPORARY UTILITARIANISM* 239, 244-49 (Michael D. Bayles ed., 1968) (noting that utilitarianism might condone killing of innocent African American falsely accused of rape and murder of white woman when necessary to prevent vigilante behavior). On the other hand, it is hard to see any way a system that permitted this type of decision could be happiness promoting for very long.

100. Posner, *supra* note 46, at 488-90 (discussing that principle of consent supports wealth maximization ideal independently of any happiness that may result from it).

101. See *supra* notes 49-51 and accompanying text. It is not certain that the poor would lose from Kaldor-Hicks. It is possible that the bias of the notion against them would mean only that they would benefit less from the criterion than the nonpoor.

consent to that policy be used to justify it without further inquiry into the actual welfare effects of the policy on individuals?

A problem here, as numerous commentators have seen, is that the fact that a particular policy might be in the *ex ante* interest of an individual does not mean that the individual has consented to the policy.¹⁰² Consent is usually thought of as an action or decision in which the individual commits to a particular course. Contract law presumably has its roots in consent.¹⁰³ While there are many potential contracts that we might have expected to benefit from entering, we generally have no contractual rights or duties unless we entered those contracts in fact. One can say that it would have been rational for the individual to have consented, but not that she did consent.

This argument seems quite powerful. The case I have presented for the efficiency notion in this article is not grounded in consent.¹⁰⁴ Efficiency is justified by an overlapping consensus of reasonable views of distributive justice, including utilitarian, Rawlsian, liberal egalitarian, and libertarian views. This is sufficient without the additional baggage of saying that individuals consented to the action.

On the other hand, the consent idea retains its attraction and potential relevance. It is, after all, rational for individuals to consent to efficient policy changes. And when something is rational for people to do, one often observes people doing it. There may be actions that are

102. This distinction is stressed in COLEMAN, *supra* note 3, at 137. Coleman argues that interest is one thing and that consent is another. Consent is a property of the process by which social states are reached, while efficiency or utility are properties of the social states themselves. We might not consent to the bringing about of a good social state by a bad process. *Id.* See also Calabresi, *supra* note 28, at 1225 (providing that no social compact to go along with Kaldor-Hicks changes was ever made).

103. This thesis is defended in Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

104. When there is no moment of actual consent, there is a question about the time at which hypothetical consent should be assessed under the efficiency criterion, an issue discussed in Daniel A. Farber, *Economic Efficiency and the Ex Ante Perspective*, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 54, 61 (Jody S. Kraus & Steven D. Walt eds., 2000). This depends on the question one is asking. If one is a policy maker contemplating a rule change, the issue is presumably whether people at the time the policy is adopted would expect to gain from that policy during the period one expected it to remain in force. If the issue is whether a policy change should have been made in the past, one can ask whether the change would have been efficient to adopt at various times. Since information levels change, it is quite possible that everyone would have expected to benefit from a policy if it had been adopted at certain times but not at others. But this is not really different from saying that certain policies would have been Pareto efficient if they had been adopted at certain times and not at others. There is no incoherence because the efficiency criterion does not claim that particular policies are efficient regardless of the baseline from which they are being adopted. The failure to adopt a policy at one particular time can be criticized as inefficient while the failure to adopt it at another time cannot be so criticized.

being taken which constitute a kind of consent for efficient policies. All are imperfect as expressions of consent, for perfect ways of expressing the collective preferences of citizens have not been invented. There is general acquiescence, pride and patriotism in a society and its institutions, such as private rights and public programs, which seem to promise reasonable prospects for individuals to progress over time. There is legislation as an indication of the consent of the citizens as well as the constitution of a society and its supermajoritarian support. There are a society's traditions, customs, and unquestioned practices. In societal evolution it is probably overly rationalistic to expect one grand gesture in which people announce their commitment to abide by a particular class of rules. But there will be many little gestures, and together they may constitute a consent of sorts to rules from which people have a good expectation of benefiting, though they know it is possible they will not. I would not be comfortable resting any substantial part of the case for efficiency on this kind of indirect consent. But it does tend to reinforce the argument for overlapping consensus made earlier. Indeed it is another strand of the overlapping consensus.

There is one potential problem with the idea that the *ex ante* efficiency approach advances the values underlying the idea of consent. The *ex ante* approach approves of policies that would have been rational for the parties themselves to adopt had transaction costs been lower. There is a potential tension, however, between the idea that the policy is "rational" and the idea that the policy respects the actual preference structures of the parties. What if the parties themselves are irrational?

Not all irrationalities are equally central to personal identity. A Christian scientist may not want medicine when she is capable of making her own choices. Should the state subject her to medical treatment whenever she becomes unconscious and thus incapable of expressing her own preferences? What if the state believes her preferences are irrational, and that she could be convinced to abandon them if shown available evidence that Mary Baker Eddy was a fraud? On the other hand, suppose that one would not have allowed Smith to perform an operation because of a false belief that Smith was the person whose license was recently suspended for malpractice; in fact it was another physician named Smythe. If the person is unconscious and incapable of expressing her own preferences, should the state prevent Smith from performing a life-saving operation that she is in the best position to perform at this moment?

The difference between the Christian science and the mistake of name cases is that the former is much more closely tied to personal identity. One is not really saying what *this person* would do if better informed; a person who had abandoned her religion would be a some-

what different person.¹⁰⁵ On the other hand, a person who was shown that it was Smythe and not Smith who had been suspended for malpractice would not regard herself as personally changed to any meaningful extent by the revelation. It is a continuum, and the exact point at which the state should stop correcting errors out of respect for the person whose errors they are is not easy to determine. Since the idea is to find a policy that would be *rational for this person* to accept, however, the state should feel increasingly reluctant to correct irrationalities that are central to the person's identity and sense of who she is.

IV. RECONSIDERING PROBLEMS ENCOUNTERED IN PRIOR ATTEMPTS TO DEFEND KALDOR-HICKS AS AN EFFICIENCY NORM

This section of the Article takes a new look at some of the problems that beset earlier attempts to defend Kaldor-Hicks or wealth maximization as an efficiency norm. In some cases, it is argued, the objections to the attractiveness of Kaldor-Hicks were correct but have no purchase against the ex ante efficiency idea. In other cases, the objections were unsound even on their own terms.

The section is divided into three parts. Part A looks at the argument that the willingness-to-pay criterion from Kaldor-Hicks is flawed. The argument of that Part is that the willingness-to-pay criterion performs an overlooked heuristic function in identifying those legal rules and uses of resources that are candidates for efficiency enhancing changes. Part B examines the argument that Kaldor-Hicks is objectionable because wealth is not something that has either instrumental or intrinsic value; it argues that such value does indeed exist. Finally, Part C considers the issue that Kaldor-Hicks encounters basic problems of incoherence; it is argued that such problems are valid but do not affect the ex ante efficiency criterion.

105. A related question is what should be done if the ex ante probability estimates of the individual differ from those of the state. Kornhauser, *supra* note 48, at 1043 (comparing actor-assessed and policy maker-assessed approaches). This is actually two questions, one moral and one political or epistemic. The moral question is what should be done when the state's probability estimates are in fact more accurate than those of the individual. The answer from the text is that the state's estimates should govern unless the individual's personal identity is tied to her estimates. The political/epistemic question is what should be done about the problem that the state may wrongly believe that it knows the probability estimates better than the affected individual herself. A sphere of individual sovereignty along the lines of Mill's theory may be a sound political institution to deal with this practical problem of state arrogance. JOHN STUART MILL, *ON LIBERTY* 15 (Oxford University Press 1974) (1859) ("Over himself, over his own body and mind, the individual is sovereign.").

A. The Heuristic Value of the Willingness-to-pay Criterion in Identifying Efficient Changes

The bias of Kaldor-Hicks against the poor seems so blatant that one wonders how it could ever have passed as an efficiency norm in the first place. What would motivate a willingness-to-pay criterion that did not even require actual payment, other than a perverse desire to enrich those already well off? Of course, one can imagine someone's defending willingness-to-pay on the grounds of measurability¹⁰⁶ and seriousness of preference, but is it not obvious that what one is measuring is often not depth of preference but merely ability to pay that magnifies the personal significance of every whim?

And yet the willingness to pay criterion has a subtle point that is not linked to the measurability or seriousness of preferences. It is often observed that the Kaldor-Hicks criterion is one of *potential* Pareto superiority, in that it would be theoretically possible to redistribute the additional wealth brought about by the Kaldor-Hicks transaction in such a way as to make everyone better off.¹⁰⁷ But one rarely stops to think about precisely what this statement means, and what it tells us about the willingness to pay criterion.

In discussing the Kaldor-Hicks criterion, Ronald Dworkin offered the example of Amartya and Derek competing over a book.¹⁰⁸ The book was one of Derek's few pleasures, but he was poor and sick and needed medicine. Amartya was wealthy and had little use for the book but still "valued" it in monetary terms more than Amartya did. Kaldor-Hicks would then say that the book should be taken from Derek, even without compensation, and given to Amartya. Dworkin argued that the new state of affairs, where Amartya has the book, was not better *in any way* than the previous one.¹⁰⁹ In other words, Dworkin said that he was not arguing merely that the new state of affairs was on balance worse than the previous one, but that there was no sense in which the new society was better than the old, even one that was outweighed by senses in which the new society was worse.¹¹⁰

106. Posner argues that cost-benefit analysis is pragmatic rather than foundational, and that attempts to make it a better measure of overall well-being would serve merely to make it more complicated and less objective. Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153, 1168 (2000).

107. DAVID W. BARNES & LYNN A. STOUT, *THE ECONOMIC ANALYSIS OF TORT LAW* 16 (1992) ("Under the *Kaldor-Hicks* position, compensation need not be paid for a reallocation to be efficient. A reallocation is efficient if there is sufficient gain to create the *potential* for full compensation.").

108. Dworkin, *supra* note 55, at 197.

109. *Id.* at 196-97 (stating that social wealth is not a component of value).

110. *Id.* at 197.

Daniel Farber has taken issue with Dworkin's conclusion on this particular point.¹¹¹ Farber argues that the change from S to K is better in one way, by making society wealthier, although in the Amartya/Derek example it is worse off on balance because the increased wealth comes packaged with a regressive maldistribution of wealth.¹¹² He says that this can be shown by imagining a world in which wealth was increased but not coupled with maldistribution; this would be an improvement, Farber suggests, even if utility was not increased.¹¹³ People behind a veil of ignorance would want to increase the quantity of wealth available if the increase were not coupled with regressive redistribution.¹¹⁴

I would like to offer a third position, which might be regarded as intermediate between that taken by Dworkin and Farber. An analogy may help to illustrate this position. Suppose that we asked the question "Is society better off *in any way* when the foundation has been laid for a new building?" The answer would surely be "No, if nothing else is to be done, but if the building is useful and is actually completed, then the foundation was indeed a progressive step." In the same sense, a Kaldor-Hicks improvement that is coupled with regressive redistribution constitutes social progress *if and only if* it is then followed by or packaged with an offsetting progressive redistribution of wealth.

This intermediate position agrees with Dworkin that a regressive Kaldor-Hicks change that is not coupled with redistribution constitutes no progress whatsoever. A Kaldor-Hicks change of this sort allows the wealthy to obtain a new resource without actually paying for it, merely because they would have been willing to pay for it.¹¹⁵ The wealthy retain their wealth, which they can use to outbid the poor on the next transaction. Indeed, the wealthy augment their wealth, increasing their ability to outbid the poor on the next transaction.¹¹⁶

Importantly, this increase in the position of the wealthy cannot be defended on the same grounds that the wealthy defended their opposition to redistribution. The wealthy put forward a reasonable argu-

111. Farber, *supra* note 104, at 61-66.

112. *Id.* at 65 (arguing that the example shows only that distributional consequences matter more than efficiency effect).

113. *Id.* (providing that wealth increase without maldistribution would be progress even if Amartya were a drone and Derek were keenly sensitive so that Derek showed more utility response to wealth change than Amartya).

114. *Id.* at 56 ("I will argue that a limited principle of economic efficiency would be adopted behind a Rawlsian veil of ignorance, subject to higher ranking principles of justice governing basic rights and wealth distribution.").

115. Kronman, *supra* note 81, at 240 ("Even if there is no justification for making those who are already wealthy share what they have, there is something offensive in the suggestion that their wealth is a reason for giving them even more.").

116. ERIC RAKOWSKI, *supra* note 78, at 211 (stating that wealth maximization creates "snowball effect" in which bias in favor of wealthy grows over time).

ment that wealth which was the result of autonomous choices should not be confiscated. This would be retroactively unfair to the person who had made these choices, and prospectively it would provide perverse incentives to those contemplating similar choices in the future. This argument works, however, only if the wealthy person *pays* (from the proceeds of her previous choice) the opportunity cost her new demand has imposed on others. If there is no payment, people will actually have *too much* incentive to become "wealthy" (in monetary terms, though perhaps measured correctly they would be less wealthy in fact).¹¹⁷ Their monetary wealth can buy them the opportunity to impose repeated losses on the poor merely by displaying and bidding that wealth, without ever forfeiting it. People's choices will be distorted against leisure and toward labor, because leisure entitles them only to the immediate utility it affords while labor entitles them to the utility of using the corresponding wealth over and over again to outbid the poor on repeated transactions.

Similarly, the reasonable Kantian/libertarian argument that the wealthy used to oppose redistribution of talents does not avail in defense of regressive Kaldor-Hicks efficient transactions. The wealthy were asserting a reasonable claim not to be used merely as a means or resource toward the satisfactions of others.¹¹⁸ With regressive Kaldor-Hicks moves, however, it is the poor who can complain that they are being used as resources or means. The transaction goes through despite the suffering it imposes on the poor and the fact that they would never consent to undergo that suffering, merely because (in monetary terms) that loss is outweighed by the gains to the wealthy. The transaction renders the poor worse off than they would be if the rich had not existed and, unlike typical market transactions, this is true even of the combination of transactions by which the wealthy first acquired and then spent their resources. The Kantian/libertarian argument, to the extent it is valid, argues against rather than in favor of transactions such as the movement of the book from Derek to Amartya.

Dworkin is right, therefore, in claiming that the transaction, by itself, does not make society better off in any way. That is, there is no reasonable conception of distributive justice, even one that is outweighed in the specific context by some other reasonable conception,

117. A person's wealth increases when she has an opportunity to work for \$1000 but turns that opportunity down in order to pursue leisure. However, I am not aware of any operational use of cost-benefit analysis or wealth maximization that would treat the person who now has no money as "willing to pay" for some new entitlement.

118. Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243, 251 (1980) (objecting that Rawls treats "virtually everything that distinguishes one individual from another as a moral accident" and that his approach ends up "pooling individual talents in the service of the state").

which makes the Amartya-Derek transaction socially progressive. However, the transaction does constitute a foundation for a Pareto efficient move if it is followed up by appropriate progressive redistribution. And it is important to explore this foundational aspect of Kaldor-Hicks in greater depth.

To most commentators, it has seemed obvious that a Kaldor-Hicks transaction might be the first step to a desirable Pareto efficient change, although they usually follow this by expressing doubt that the required redistribution will in fact be forthcoming.¹¹⁹ The obviousness of this point, however, exists only because one has already made the transition from utility reasoning to willingness-to-pay reasoning. If Derek is willing to pay \$2 for a book and Amartya is willing to pay \$3, it does not take a rocket scientist to see that a transaction in which the book was moved to Amartya in exchange for \$2.50 would be mutually beneficial, and that staying with the status quo when this option was available would be wasteful. If one had simply focused on the utility that the book would provide to Derek and Amartya and had never asked about their willingness to pay, the idea of a transfer of the book probably never would have occurred to anyone.

The crucial point is that *the possibility of redistributive transfers is the fundamental reason for introducing the concept of willingness to pay in the first instance*. As long as one continues to think in utility terms – what utility does a particular right, or what disutility does a particular duty, provide for a person? – one will miss an enormous range of desirable changes from the status quo. In many cases, it is desirable to impose duties that, in themselves, create more disutility for one person than the utility provided to another by the corresponding right. It is desirable to do so when such a change can be packaged with a redistributive transfer that offsets the utility effects. And a redistributive transfer will have that offsetting tendency *if and only if* the new package of rights and duties is beneficial on balance *in willingness to pay terms*.

The redistributions that should accompany Kaldor-Hicks efficient changes must be viewed in a special light. Like other redistributions from rich to poor, they can be defended on utilitarian grounds (diminishing marginal utility of income) and on Rawlsian grounds (maximizing the position of those least well off). However, these particular

119. This objection is discussed in Frank, *supra* note 19, at 917. Frank finds the objection problematic, because it presupposes that the poor somehow do have the political power to block the Kaldor-Hicks move (or the discussion would be pointless) but lack the power to insist upon the lesser step of insisting on redistribution as part of a package with the Kaldor-Hicks policy. This is an interesting point, although it is possible that the poor would have more influence on the branch of government contemplating a Kaldor-Hicks move than on the branch contemplating redistribution, or would have more influence when they had the status quo on their side.

redistributions cannot be opposed on the same reasonable grounds that can be used to oppose redistribution generally. They cannot be opposed on the grounds that they penalize autonomous choices made in previous periods that have made some people wealthier than others. As noted before, the Kaldor-Hicks transaction by itself penalizes and distorts the effects of choices, and the redistribution is required to counteract that distortion.¹²⁰ It is only when coupled with the redistribution, and not when left by itself, that the Kaldor-Hicks efficient move respects the autonomous choices which produced the pre-transaction wealth of each party. Similarly, it is only when coupled with the redistribution, and not when left by itself, that the Kaldor-Hicks efficient move avoids the Kantian/libertarian worry that one person should not be used merely as a resource for the benefit of others.

To summarize, the willingness to pay criterion serves an important heuristic role. It identifies allocations of rights and duties that produce their utility and disutility in just such a manner that their effects can be counteracted by the disutility and utility of monetary redistributions. By so doing, it identifies otherwise unsuspected allocations of rights and duties that are wasteful, and that can be changed without violating any reasonable distributive norms. When the indicated monetary redistributions are from rich to poor, they can be defended not only by the utilitarian and Rawlsian reasons with which such redistributions are usually defended but also by the liberal choice and Kantian/libertarian reasons with which they are usually opposed.

B. The Instrumental and Intrinsic Value of an Enriched Life

One additional point should be made about the dispute between Dworkin and Farber. Dworkin was arguing against Posner's conception of "wealth maximization," and one of his arguments was that wealth by itself could not constitute something of intrinsic moral value.¹²¹ Wealth may or may not be instrumental toward something of ultimate value such as utility, but to treat it as of intrinsic significance is to become "a fetishist of little green paper."¹²² Farber, on the other hand, argued that wealth enhancements constitute progress independently of utility. Wealth, when legitimately earned and when not perversely distributed, was a kind of appropriate power over resources analogous to voting rights, which are also valuable even when they do not produce utility.¹²³

120. See *supra* note 117 and accompanying text.

121. See Dworkin, *supra* note 55, at 200 (providing that person who gains happiness and loses wealth has lost nothing of value).

122. *Id.* at 201.

123. The analogy between voting rights and the willingness to pay criterion is made in Farber, *supra* note 104, at 66.

This debate might be especially important if one entertains the view that human happiness levels are more-or-less fixed by biological nature in such a way that they are largely impervious to improvements in external circumstances. Arguably, people adjust to what is possible in their world, and learn to be just as contented or discontented in a world of plenty as they would have been in a world of scarcity. It is hard to know how true this description is. It may be that a person who goes through a life of pains in a world where that is common will report herself as just as happy as another person who goes through a life of pleasures in a world where that is common. This may say more about the retrospective intellectualization of happiness than it does about happiness as an immediately lived experience, however. Although there are exceptions, one does not commonly observe people choosing to live under conditions of privation that they have it in their power to avoid. Nevertheless, let us accept for the sake of argument the idea that human happiness is independent of wealth levels, and ask whether an increase in wealth by itself would nevertheless constitute an improvement in the society.

Asking whether wealth has intrinsic value is much like asking whether freedom has intrinsic value. Is there intrinsic value in being able to experience the works of Shakespeare, even when they leave one craving other plays one will not have time to see, or newly discontented with the quality of contemporary dramas? The person who cannot think of anything useful to do with wealth other than count little green pieces of paper can be matched by the person who cannot think of anything useful to do with her religious liberty or freedom of conscience, yet even such people might reasonably appreciate having options they would otherwise lack.

Like liberty, wealth pushes back tradeoffs that otherwise would have constricted choices, tradeoffs not just between physical commodities but between safety, pleasant working conditions, opportunities for leisure and education, and anything else requiring scarce resources with alternative uses. It should not be forgotten that redistributive taxation has frequently been defended on the reasonable ground that poverty is a constraint on liberty.¹²⁴ Undoubtedly the grumbling of our ancestors for how slow foot transportation was will be matched by the grumbling of our descendants for how slow their galactic rocketships are. Even if utility is equal, however, I would say that it is a better world when effective options are expanded by increases in

124. An early statement of this proposition was Robert L. Hale, *Law Making by Unofficial Minorities*, 20 COLUM. L. REV. 451 (1920). The link between liberty and wealth has not been asserted only by commentators on the left of the political spectrum. See, e.g., George J. Stigler, *Wealth, and Possibly Liberty*, 7 J. LEGAL STUD. 213 (1978) (stating that liberty is the size of the individual's opportunity set).

wealth. It is not an accident that our language lets us speak of factors that *enrich* our lives by enabling real interactions between ourselves and previously inaccessible facets of the world, and our utility levels are kept in line only because our tastes have become elevated by the knowledge of what is possible.

A thought experiment might help to reveal one's views on whether wealth has intrinsic value. Imagine that you were dying and had to place your newborn child for adoption with an average family in one of two foreign countries. The countries differed from each other primarily in that one of those countries was much poorer than the other; one society is overwhelmingly agricultural while the other is on the verge of interplanetary space travel. Assume further that because the child is a newborn she will be able to fully adapt to the expectation level of the particular society so that she will report the same level of happiness in either.¹²⁵ Would you be indifferent about whether to place your child for adoption in one of these countries or the other, or would you share my preference for placing the child in the wealthier society? Would you not want your child to experience the limits of what is possible in the arts and sciences even if her tastes and expectations expanded to the point where her happiness level remained the same? Perhaps it is technically an enriched life rather than wealth itself that is of intrinsic value, but the two are quite closely linked, for physical goods in the world are not "wealth" unless they are in fact brought within the sphere of a person's life sufficiently to figure in her valuations.

Of course, an enriched life is far from being the only thing of intrinsic value. Indeed, in many cases the craving for wealth can be a positive obstacle to the pursuit of other things of far greater value. People who sell out their happiness, their relationships, or their morals in order to accumulate wealth frequently do both themselves and their societies a disservice. It would violate common sense to say that wealth is all that really matters either in life or in law, or to deny that the pursuit of wealth is at the root of many evils. But it violates common sense just as badly to say that something that has always been a major objective of persons and societies has zero intrinsic value; one senses again an unhealthy contempt of the intellectual classes for the pursuits of ordinary people.

125. Again, this may be too strong an assumption. I also believe there is some truth to Friedrich Hayek's view that a society which is *growing* economically is likely to have happier individuals than one which is *stationary* or *declining*. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 41-42 (1960). This might support a policy of promoting economic growth even if it could not be said that a society that was rich and had stopped growing would have happier citizens than one that was poor and had stopped growing.

This defense of wealth as increasing the absolute level of well-being differs from that offered by Farber. He argued that wealth might be important only for relative reasons, but that they were *legitimate* relative reasons.¹²⁶ For Farber, wealth fairly earned constituted legitimate relative power, a point that could be true even if a society which was wealthier overall was not any better off than one that was poorer.¹²⁷ It is not clear, however, that one needs to embrace such a relative, and zero-sum, conception of the role of wealth. Is it true that people value wealth primarily for the relative status it confers and not for the absolute standard of living it makes possible?¹²⁸ One piece of evidence in some tension with that idea is the pattern of international migration. If absolute status mattered more than relative status, one might expect to see movement of people from poor countries to rich ones, even though those people realized that their relative position in the new society would be lower. If relative status mattered more than absolute status, one might expect to see movement of people from rich countries to poor ones because their relative position could be enhanced even though their absolute level of wealth would be lower. The former pattern seems much more pervasive than the latter.

The importance of wealth as a part of well-being is controversial, but its importance should not be overstated. The question of what precisely constitutes the well-being of an individual is an enormously difficult question within philosophy.¹²⁹ The goal of efficiency analysis is not ultimately to answer that question. Efficiency analysis is concerned with distributive justice in the peculiar sense that it seeks to find improvements that bypass reasonable disagreements about the nature of distributive justice. Whatever well-being precisely is, it is wasteful to sacrifice one person's expected well-being when that sacrifice is not necessary to enhance the expected well-being of another person. There is a need for such an efficiency concept even if wealth has nothing to do with well-being. However, if wealth does contribute to well-being, this has pragmatic significance because legal rules and policies probably have better tools for combating material poverty than they do for directly altering the utility of persons.

126. See Farber, *supra* note 104, at 66 (noting that under appropriate background institutions, wealth is appropriate way of allocating power).

127. See Farber, *supra* note 104, at 66 (drawing comparison between fairness of auctions and fairness of choosing candidates by elections)

128. Posner himself purported to be worried about studies suggesting that people in wealthier countries did not report themselves as happier than people in poor countries, though within a given country the wealthier reported themselves as happier. See Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 122 (1979), citing Richard A. Easterlin, *Does Money Buy Happiness?*, 30 PUB. INT. 3 (Winter 1973). I have given some reasons to be skeptical of such self-reports in the text accompanying notes 123-24, *supra*.

129. Some of the proposed answers are discussed in Dworkin, *supra* note 14.

C. Ex Ante Efficiency as a Solution To the Incoherence Problems with Kaldor-Hicks

A final point needs to be made about the comparison between Kaldor-Hicks and ex ante efficiency. We have noted that the willingness to pay criterion serves an important heuristic function, and that the Kaldor-Hicks idea, which depends upon willingness to pay, serves a valid foundational role in the package of policies that rational persons would want to adopt. The Kaldor-Hicks criterion, however, has been criticized not just as normatively unattractive but as incoherent because of its reliance on the willingness to pay notion. The question that needs to be addressed is whether this incoherence carries over to the ex ante efficiency idea.

There are two basic arguments for the incoherence of Kaldor-Hicks. The first is that it is possible for each of two states of affairs to be more Kaldor-Hicks efficient than the other, the so-called Skitovsky paradox.¹³⁰ As an example, imagine two states of affairs A and B, in each of which there are two commodities, Bacon and Eggs, and two people, Smith and Jones, both of whom have a strong taste for the combination of Bacon and Eggs. In State of Affairs A, Smith has all the Bacon and Jones has all the Eggs. In State of Affairs B, Smith has all the Eggs and Jones has all the Bacon. A move from State of Affairs A to State of Affairs B could be Kaldor-Hicks efficient. This is because some of Smith's Eggs and some of Jones's Bacon in State of Affairs B theoretically could be redistributed to the other person in such a way as to leave them both with a pleasant combination that neither had in State of Affairs A. However, a move from State of Affairs B back to State of Affairs A could also be Kaldor-Hicks efficient. This is because one could theoretically redistribute some of Smith's Bacon and some of Jones's Eggs in State of Affairs A to the other person in order to produce a pleasing combination unavailable to either party in State of Affairs B.

Fortunately, this paradox generally does not haunt the ex ante efficiency idea. The paradox arises from the fact that Kaldor-Hicks does not require actual redistributions, but merely compares the effect of a theoretical redistribution of the commodities in the new state of affairs to the actual distribution of the commodities in the old state. The criterion we have defended is one that requires actual redistributions of the commodities in the new state of affairs produced by a Kaldor-Hicks change. The redistributions can be either through the tax system or through other Kaldor-Hicks improvements with gain/loss packages that offset those of a particular change, with the goal that no one is expected to come out worse off from the package. In general, there

130. The idea was developed in Tibor De Scitovszky, *A Note on Welfare Propositions in Economics*, 9 REV. ECON. STUD. 77 (1941).

is no magic that can make everyone rationally expect to gain by moving from A to B, and then rationally expect to gain again by moving back from B to A. The one exception worthy of note arises from the grass-is-greener syndrome, where people develop tastes for whatever they do not have; it is indeed difficult to figure out how to please such people.¹³¹ But this is a curiosity arising from particular tastes, not a foundational flaw in the standard, and perhaps the answer is that such tastes, if they cannot be changed through reasonable means,¹³² are indeed best satisfied by limited cycling of states of affairs along the lines of fashion trends.

The second incoherence objection to the willingness to pay idea is that one cannot use some exogenously determined willingness to pay to determine entitlements when what people are willing to pay for a particular entitlement is a function of their wealth, and their wealth is in turn a function of what they are entitled to.¹³³ This is a serious objection to Posner's attempt to use "wealth maximization" as a criterion for identifying a single optimal state of affairs or as an effort to produce a set of entitlements from nothing.¹³⁴ The objection has no merit against the ex ante efficiency standard because that standard does not aspire to identify such a unitary state of affairs or to justify the creation of a system of entitlements ex nihilo.

The ex ante efficiency standard, like the Pareto standard, is strictly comparative.¹³⁵ One compares a baseline state of affairs with

131. Dworkin, *supra* note 55, at 192 (contrasting "grass is greener" idea with possibility that people will become accustomed to whatever they have been endowed with).

132. An important question is whether a change is efficient if everyone is expected to favor it only because the policy itself has changed people's tastes in such a way that they would now be expected to embrace the change. The issue is taken up in Farber, *supra* note 104, at 72-73. In principle, such changes should be regarded as "efficient" if the method by which preferences have been changed would be regarded as legitimate by any reasonable normative views. But it is beyond the scope of this Article to discuss what reasonable views there might be on the issue of governmental changing of tastes.

133. Guido Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553, 554-55 (1980) (providing that without starting points, one cannot give meaning to the idea of an increase in wealth).

134. COLEMAN, *supra* note 3, at 109 (stating that because of the dependence of wealth on prices, the system of wealth maximization "cannot provide a basis for an initial assignment of entitlements").

135. For that reason one must be careful about the frequent statement that a particular rule in the status quo is "efficient." One needs to be clear about the states being compared to talk about efficiency coherently. One meaning of the statement is that the existing rule is Pareto optimal, i.e., that no alternative rule would make everyone better off (or, under the standard defended in this Article, would make everyone rationally expect to be better off). Another meaning is that the existing rule is more efficient than some or all alternative rules, i.e., that everyone would rationally expect to be better off with the status quo than with some or all alternatives. The latter constitutes a much stronger defense of a par-

some alternative, and asks whether people could rationally expect to benefit by moving from the baseline to the alternative. The baseline is a state of affairs consisting of particular entitlements that determine levels of wealth. The efficiency standard is not a defense of the baseline or of the new state of affairs. It is a defense only of the change from the baseline to the alternative. If we started with different baselines, then there would be other changes which would be *ex ante* efficiencies, and conversely the changes that one has identified as efficiency improvements from a particular baseline might very well not be efficiency improvements from the alternative baseline. This would be a problem only if the efficiency criterion claimed to be able to identify the one optimal state of affairs that should be reached, either through any baseline or through the one "best" baseline.¹³⁶ There is simply no such claim, and for that reason it is not asserted that any particular policy or legal rule change would be efficient in every setting.

The *ex ante* efficiency standard defends as progress the movement from baselines to particular alternatives. Like the Pareto test, it is strictly silent on whether one should make changes that *are* expected to harm some people, and thus shift the society from one baseline to another.¹³⁷ That silence is the predictable result of the function of an efficiency norm, which is to serve as a ground for making a limited class of judgments that would be acceptable to those holding the array of reasonable views of distributive justice. It would be quite absurd to imagine that "efficiency" is all there is to identifying the one best state of affairs. There are unavoidable tradeoffs between genuine goods, and the efficiency criterion simply does not tell us how to make those tradeoffs.

V. A PHILOSOPHY OF ECONOMIC CONSERVATISM

This section of the article looks at the question of the political orientation of the efficiency idea. Part A argues that the frequent claim that the efficiency idea itself has a conservative political orientation is false. Part B defines a notion called Conservatism, which does in fact use the status quo as a baseline for opposing inefficient changes, and

ticular status quo rule than the former, especially if one is asserting that the status quo rule would be rationally selected over every other alternative.

136. The Kaldor-Hicks criterion did indeed aspire to be a complete ordering of states of affairs, unlike Pareto efficiency. See Kornhauser, *supra* note 9, at 99. It did not achieve that objective, nor is it possible to achieve that objective with the efficiency criterion alone.
137. Lewis A. Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591, 594 (1980) ("[S]ome states are not comparable on grounds of efficiency."). This does not mean that the efficiency criterion declares the states equivalent in value. It simply has nothing to say on the matter one way or the other.

contrasts that Conservatism with the idea of efficiency. Part C offers an evaluation of Conservatism, identifying circumstances in which it would be rational to support or oppose a Conservative posture on legal change. Part D argues that signs of Conservatism at work can be found in important legal commentary and in American political institutions.

A. Is Efficiency a Politically Conservative Norm?

Law-and-economics has frequently been described as having a conservative political orientation.¹³⁸ Some of this is merely the result of positive economics as a science of cause and effect, which sometimes studies the unintended effects on the poor of ostensibly liberal policies like rent control.¹³⁹ However, the allegation is that there is a conservatism inherent in the *norms* of law-and-economics, and, in particular, its norm of efficiency. We need to explore whether that claim is valid.

In fact, there is no particular political orientation to the efficiency idea in the way it has been described and defended here. The whole thrust of the efficiency norm is to identify the limited class of judgments that can be acceptable to those holding the reasonable range of philosophical or political orientations. In particular, it is designed to be acceptable to those who favor redistribution from rich to poor because it enhances utility or Rawlsian justice, as well as to those who oppose that redistribution because it penalizes autonomous choices or uses talented people merely as means.

As noted before, this is not to say that the efficiency criterion as we have used it is somehow "value-neutral" or purely positive.¹⁴⁰ It affirms the value of persons and their welfare. It is therefore "political"

138. See, e.g., Robin Paul Malloy, *Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner and the Philosophy of Law and Economics*, 36 U. KAN. L. REV. 209, 245-46 (1987) (arguing that Posner's wealth maximization framework is "biased in favor of the rich" and reflects the "tyranny of the status quo," and is more conservative than libertarian in orientation).

139. On the other hand, the science of economics often offers support for liberal policies, such as the theory of externalities as a justification for environmental regulation.

140. See Izhac Englard, *The Failure of Economic Justice*, 95 HARV. L. REV. 1162, 1163 (1982). Izhac Englard expressed doubts about the idea that economic efficiency could be an ethical as well as a scientific concept, asking "How can such a descriptive tool have normative dimensions? Can one properly speak of 'bad' causation, 'good' gravitation, or 'just' energy? If economics is a science in the strict sense, it must be positive and descriptive." Englard, *supra* note 41, at 1163. It is true that economics as a positive science can be distinguished analytically from any normative use that one might wish to make of the efficiency criterion. The science would be useful for someone utterly determined to act as inefficiently as possible. There is no reason in theory, however, why a particular concept cannot both have explanatory power (with human actions, not the inanimate objects typically studied in physics) and be a normatively attractive ideal.

in the broad sense; it does not try to be acceptable to every normative vision, however unreasonable. If there is a political faction that believes humans ought to suffer as much as possible on earth so that their characters will be aligned with the Evil Deity's will, that faction is not likely to be attracted to the efficiency idea as defended here. The interesting question is whether the efficiency concept ought to be controversial within the range of reasonable left-right political views of people who share an essential vision that enhancing human welfare is a good thing but might differ on issues such as the just distribution of income.

As noted earlier, the Kaldor-Hicks criterion, used by itself, is biased against the poor.¹⁴¹ Therefore, a view that we should adopt every Kaldor-Hicks policy, whether coupled with redistributive taxation or not, could justly be described as conservative. Perhaps better, Kaldor-Hicks alone might even be described as a right wing economic norm because it could make the rich even richer and the poor even poorer, rather than conserving or seeking to enhance the absolute status of each. The idea of allocating resources in accordance with willingness to pay has seemed to many to be a signal of the right-wing orientation of law-and-economics.¹⁴² At one level, this argument is quite sound and indeed merely restates the valid point that a Kaldor-Hicks standard by itself would be biased against the poor. On the other hand, as noted earlier, willingness to pay serves an essential heuristic function in identifying those changes in resource use that can be expected, when coupled with redistributive taxation, to lead to improvements for all parties.¹⁴³ Used in that way, the willingness to pay criterion should not be described as politically loaded or partisan.

It is frequently argued that the redistributive taxation needed to make Kaldor-Hicks transactions politically neutral is not likely to be forthcoming.¹⁴⁴ Even if this is true, it is not an argument against the *ex ante* efficiency standard as a norm, merely a criticism of the status quo for failing to live up to the norm. In any event, the criticism probably is not true. The regressivity of Kaldor-Hicks should not be overstated; it is frequently noted that it is extremely difficult to use the system of private law to accomplish much redistribution from rich to poor or poor to rich.¹⁴⁵ The market adjusts to legal interventions in such as way as to blunt much of their redistributive force. Moreover,

141. See *supra* notes 25-26 and accompanying text.

142. See, e.g., Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 *HOFSTRA L. REV.* 905 (1980) (noting that law and economics is inherently conservative).

143. See *supra* notes 119-20 and accompanying text.

144. This argument is noted in Kaplow & Shavell, *supra* note 59, at 675. They argue in response that it is unlikely the courts could accomplish significant redistribution through the legal system without attracting the attention of legislators. *Id.*

145. See Kaplow & Shavell, *supra* note 59, at 674-75 (noting difficulties with achieving systematic redistribution through instruments other than the tax code).

the criticism makes the assumption that a change in the tax laws would need to accompany any use of the Kaldor-Hicks criterion. That is not necessarily the case.¹⁴⁶ We already have a progressive income tax on the books, so if Kaldor-Hicks transactions increase the wealth of the wealthy, the government will capture a good deal of it.

The effect of the tax system on the distribution of wealth is a complex subject. Some taxes, like the sales tax, are often thought to be regressive in incidence because the poor consume a larger percentage of their income than the rich.¹⁴⁷ But even "regressive" taxes can redistribute income from rich to poor. Unlike private commodities, where the rich and poor normally have to pay the same price for the same service, government services financed by sales taxes will involve the rich paying far more total dollars for those services than the poor do. There is also the question of government's spending of the tax dollars. Some government programs, such as defense, police, and fire protection, may be more valuable (at least in money terms) to the rich than to the poor.¹⁴⁸ But the government spends a great deal of money specifically on anti-poverty programs, or on public services that the rich make little use of because they can afford private alternatives.¹⁴⁹ In any event, one should always remember that existing institutions of taxation and public spending of wealth are the backdrop for Kaldor-Hicks transactions that seek to increase the level of wealth.

The system of taxation and spending is not the only way in which the poor can be expected to share in a general increase in wealth brought about by Kaldor-Hicks changes. Perhaps the most important factor is that some portion of the increase in wealth will be invested, and probably a larger proportion will be invested if the initial increase in wealth is disproportionately concentrated among the rich. Invest-

146. The argument would be valid in the case of increases in wealth that did not translate into additional income, sales, or property that could be taxed, invested, or given away. It is not easy to come up with examples of this. The rich might get a good view through a Kaldor-Hicks transaction. But that would increase the market value of their real estate. In any event, if one is dealing with the package of Kaldor-Hicks transactions, it is likely that the transactions which do generate income, sales, or property would dominate and that the redistribution arising from those transactions would be sufficient to ensure that the poor are not harmed by the complete package.

147. Donna M. Byrne, *Progressive Taxation Revisited*, 37 ARIZ. L. REV. 739, 742 (1995) (making this point for sales and wage taxes).

148. This is not certain. The argument in the text is based on the fact that the rich own more property that might be taken by foreign invaders, criminals, or fires. On the other hand, the rich often live in less crime-ridden neighborhoods than the poor, in more fire-proof dwellings, and they may well have private security and fire services that the poor lack. As for national defense, if deterrence were to fail the poor often suffer more in wars than the rich.

149. David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231 (1998) ("According to the Congressional Research Service, we have spent \$5.4 trillion (in 1992 dollars) on federal means-tested poverty programs since 1960.").

ments in new plant and equipment and the development of new technologies will create jobs, products, and economic growth from which the poor would expect to benefit.¹⁵⁰ One final factor is charitable contributions, which are a significant source of private redistribution of wealth that supplements the system of public redistribution.¹⁵¹

B. Conservatism and the Status Quo as a Baseline for Assessing Efficient Changes

This brings us to a different claim that efficiency is conservative, which is the idea that it uses the status quo as a privileged baseline.¹⁵² Changes from the status quo are approved if everyone has an expected gain from them. But the status quo itself is not called into question, and indeed is affirmed by talking about changes from that point which are expected to benefit everyone from the baseline of an assumed status quo. This is a very important issue, and needs to be considered quite carefully.

The immediate answer is that the objection simply misunderstands the efficiency criterion, whether the criterion is Paretianism or the ex ante efficiency idea. The efficiency idea does not defend the status quo or any other baseline. It says merely that an efficient change from the status quo is better than the status quo, and that an efficient change from other baselines is better than those baselines.¹⁵³ It would be completely inconsistent with the spirit of the efficiency idea as a norm acceptable to those holding the array of reasonable views of distributive justice for the rule to embody any commitment to the status quo.

On the other hand, I believe it is true that many commentators on efficiency implicitly do have in mind the status quo as a normative baseline, though usually one that remains undefended. These commentators can justly be characterized as conservative, and it would

150. Future prosperity is very sensitive to changes in growth rates. Richard A. Easterlin, *The Globalization of Human Development*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 32, 34 (2000) (noting that at 0.2% rate of growth, GDP doubles every 350 years; at 1.5% rate GDP doubles every 46 years).

151. See Lisa Loftin, Note, *Protecting the Charitable Investor: A Rationale for Donor Enforcement of Restricted Gifts*, 8 B.U. PUB. INT. L.J. 361, 364 (1999) (providing that in 1996, Americans contributed \$150.7 billion to charitable organizations). The money builds up over time as well. Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 ARIZ. L. REV. 873, 886 (1997) (noting that public charities held \$421.5 billion in investment nonoperating assets, according to 1993 tax data).

152. Calabresi, *supra* note 133, at 555 (arguing that it is wrong to view the status quo starting point as somehow inevitable).

153. Cooter, *supra* note 18, at 822 ("Applying a Paretian analysis to the status quo is, however, a habit of mind among economists, not a necessity imposed by the analysis itself. The background distribution of rights assumed to be constant in a Paretian analysis need not be the status quo.").

help with clarity for them to come out of the closet and say so. For the remainder of this article, I would like to sketch an idea which I will simply call Economic Conservatism, or Conservatism for short.¹⁵⁴ My goal is not to defend Conservatism as ultimately desirable, though I will say some words on its behalf intended to make it more plausible than it might appear at first blush. The ultimate goal is to give some articulation to a conservative philosophy that does seem to be implicit in many writings on the topic of efficiency, and to further clarify the relationship between the idea of efficiency and the idea of Conservatism.

As I use the term, Economic Conservatism is the view that society should make those changes from the status quo, and only those changes, that are efficient. Conservatism is thus a philosophy that makes use of the concept of efficiency. But it is not coextensive with the efficiency idea, which is also useful for nonconservative philosophies that dislike the status quo and seek efficient moves from completely different baselines.¹⁵⁵

Conservatism is not the most economically right-wing idea one can imagine. In particular, it does not approve of changes that redistribute income in the status quo from poor to rich. It does not approve of Kaldor-Hicks transactions uncoupled with redistributive taxation that would weaken even more the position of the poor. Throughout history, the rich have used their wealth to further pillage the poor, a practice that would be opposed by Conservatism. And, indeed, in the modern welfare state, the poor have a large number of entitlements that Conservatism would protect from being taken without compensation of one kind or another.

Nevertheless, Conservatism is likely to be an attractive philosophy for the rich, who have a lot of money and would like to conserve or augment it. It is not a philosophy that would come readily to mind for the poor, or for those sympathetic to the poor, because the poor do not have a lot of money and would like to get their hands on some of the money that the rich have. Conservatism would forbid this procuring of the rich's money, other than by transactions expected to be mutually advantageous. Thus, Conservatism has no pretensions to being a politically neutral criterion. This is reflected in the word Conservatism, a name that practically shouts its political orientation. And it contrasts with Efficiency, a name that quite properly suggests its rela-

154. My discomfort with the pure term "Conservative" is that in political discourse this is usually taken to include issues of social conservatism such as abortion and school prayer that seem quite unrelated to the analysis here. Still, there is no doubt that Economic Conservatism is part of the contemporary label of "Conservatism," so there should be no claim of political neutrality made on this issue.

155. See, e.g., Cooter, *supra* note 18, at 823 (stating that the "best just arrangement" is reached by making efficient changes from a just or Rawlsian baseline).

tive neutrality and acceptability across political lines. We should aspire to truth in labeling, and not confuse Efficiency and Conservatism, especially since that confusion is made more plausible by the fact that Conservatism does make a particular use of the Efficiency idea.

C. An Evaluation of Conservatism

Is Conservatism a sane idea? The first point to note is that it is dependent upon the proper meaning of the term "efficiency." Conservatism forbids changes unless those changes constitute efficiency improvements on the status quo. But is this efficiency defined as Pareto efficiency, Kaldor-Hicks efficiency, *ex ante* efficiency, or something else? If efficiency means Pareto efficiency, then Conservatism really is a status quo straitjacket.¹⁵⁶ One cannot implement any policies that harm anyone. This would not be realistic, even if one considered large packages of policies, and even if one made appropriate *de minimis* exceptions. Such a rule would forbid not merely deliberate attempts to redistribute income but most other changes that were not designed to do so but nevertheless had systematic distributive effects.

The Kaldor-Hicks criterion would not be so confining, as there could be appreciable losers from changes as long as they lost less than the gainers won. But we have already ruled out the Kaldor-Hicks concept as not fundamentally an efficiency norm at all, but merely one foundational part of a broader efficiency norm.¹⁵⁷ And Conservatism as we have defined it seeks to conserve and enhance the position of the poor as well as the nonpoor; it would not be willing to embrace a norm that might systematically harm the interests of the poor.

Conservatism as we are discussing it is linked to the Efficiency concept that this article has sought to defend. Conservatism argues that the society should make those changes from the status quo, and only those changes, that *ex ante* would be in the rational interest of all parties to embrace. Some people would end up losing as a result of the policies, but the state would not have set out to harm them as such and they would be harmed only as an incidental effect of risks that *ex ante* were in their interest to take. In terms of broad classes such as the rich and the poor, the efficient changes would make both classes better off, though individual members of each class would end up worse off. Conservatism does not seek to defend the relative position of the parties, and would have no problem with upward mobility policies that were expected to benefit the poor so much that they passed

156. Dworkin, *supra* note 55, at 193 ("It would be absurd to say that judges should make no decision save those that move society from a Pareto-inefficient to a Pareto-efficient state.").

157. See *supra* notes 49-53 and accompanying text.

up the wealthy, as long as the wealthy would not rationally have expected to lose in absolute position from those policies.

With this conception of efficiency, Conservatism clearly is not as ridiculous as it would be with a Pareto conception. Consider the standard fare of legal issues. Should we change from expectation damages to reliance damages for breach of contract? Should we change from a reasonableness standard to more of a strict liability, physical invasion test for nuisance? Should restitution be more freely available for those who provide goods or services by mistake? Each of these policy changes will end up harming someone. But the incidence of effects of these rules is quite broad, especially when one considers the interests of parties with an indirect interest in the litigants to these disputes such as their customers and employees. It is not easy to predict exactly who will wind up ahead and behind from any of these policies, and still more difficult if the policies are considered as a package and the question is who could expect to lose from the overall package of policies. If our best positive analysis shows that the changes will produce more gains than losses in a Kaldor-Hicks sense, and if one is adopting these changes against a background of institutions of taxation and public spending, then it is quite likely that one will not be able to say that anyone can expect to lose from the entire package of policies. If there were systematic expected losers, the package could be expanded still further until the expected losses fell within the range of the *de minimis*.

One way to see the difference between Efficiency and Conservatism is to look at their respective attitudes toward packaging. Broadly speaking, one can say that the larger the package of changes, the more likely one is to produce an efficient change. The breadth of packages can be measured in different ways, each of which contributes to the likelihood of efficiency. The longer a particular rule is expected to remain in place, the more its specific effects on individuals will be hard to predict, in part because people will be able to structure their long-term relations around the legal rule.¹⁵⁸ The generality of a legal rule also makes its individual effects harder to predict; it is harder to tell whether a change in the negligence standard can be expected to harm particular people than whether a change in the medical malpractice standard would do so.¹⁵⁹

The important point to notice is that the Efficiency idea does not actually argue in favor of packaging. Efficiency merely tells us that a particular package of policies should be adopted as opposed to adopting no policy from the package. It does not, however, tell us that we

158. BUCHANAN, *supra* note 38, at 56 (noting that unanimity of interest is more likely to be possible for durable rules).

159. *Id.* at 56 (providing that rules of broad generality are more likely to generate consensus).

should adopt the package of policies as opposed to adopting one of the policies from the package with a clearer distributional incidence of effects.¹⁶⁰ The package and the individual policy from the package may well be Efficiency-noncomparable. By contrast, Conservatism *does* argue in favor of packaging. The Efficient change of the package should be adopted, and the individual depackaged change should not be adopted because it is not an efficiency improvement on the status quo.

A leading advocate for what I have called Conservatism is the economist James Buchanan. He has been a major figure in a field that has become known as "constitutional economics"; indeed, he received a Nobel Prize for his contributions to this field.¹⁶¹ The idea of constitutional economics is that there is often a better chance to achieve more-or-less unanimous agreement when we are not looking at individual policies but at general systems of power allocation that would govern large numbers of policies.¹⁶² We might agree, for example, that the government should be empowered to pass environmental legislation, but that the government should not have the power to restrict entry into occupations.¹⁶³ Even people who oppose many individual environmental initiatives or who would support restricted entry into some occupations might be willing to sign on to these constitutional rules. Some environmental laws are clearly necessary, and having environmental battles in the legislative arena might be better than in any other forum. And one might worry about unleashing a rent seeking struggle in which each occupational interest group sought to close off access to its occupation, opposed only by the diffuse interests of consumers and would-be entrants who may not even be able to identify themselves.¹⁶⁴ Buchanan's work on how the zero-sum game of politics can be reoriented into a system of mutually advantageous constitutional moves from the status quo is powerful and important.

160. COLEMAN, *supra* note 3, at 92 (arguing that it is not always desirable to follow a Pareto-superior path and leave no losers uncompensated).

161. See generally James M. Buchanan, *The Domain of Constitutional Economics*, 1 CONST. POL. ECON. 1 (1990).

162. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 63-84 (1962) (stating that uncertainty required for individual to support public-regarding policies is present at constitutional stage).

163. Perhaps more accurately, we could have a discussion about the package of ideas that was based upon genuine concern for the facts rather than the biased concern for "facts" that support one's interest. Buchanan concludes that most restrictions on entry into professions, occupations, types of investment, and geographic location would be rejected at the constitutional stage. JAMES M. BUCHANAN, *FREEDOM IN CONSTITUTIONAL CONTRACT* 16-17 (1977). I have argued for constitutional scrutiny of this class of legislation on similar grounds. Christopher T. Wonnell, *Economic Due Process and the Preservation of Competition*, 11 HASTINGS CON. L.Q. 91, 108-11 (1983).

164. Wonnell, *supra* note 163, at 103-08 (arguing that political process disadvantages consumers and would-be entrants into occupations).

Unfortunately, Buchanan has not offered a convincing rationale for embracing Conservatism. He clearly wants policies (including constitutional rules that involve packages of policies) that command the actual consent of people as they are,¹⁶⁵ and is skeptical of claims of interpersonal distributive justice.¹⁶⁶ But consent and skepticism will not do the trick, because they founder on the problem of justifying the status quo.¹⁶⁷ Buchanan is clear that he does not assert that the status quo is itself justifiable on distributive justice grounds, which would be inconsistent with his general approach of skepticism toward those claims.¹⁶⁸ Nor can one say that the status quo has been consented to by everyone.¹⁶⁹ He sometimes speaks of a preference for voluntary over coercive mechanisms,¹⁷⁰ but the status quo is a system of entitlements that is maintained by the coercive force of the law. As is usually the case, moral skepticism is a nonstarter for a moral argument.¹⁷¹

How can one justify Conservatism? One way to justify it would be to argue that the status quo is in fact desirable as a matter of distributive justice.¹⁷² If it were, the status quo would then be an appropriate baseline from which one might want not only to defend efficient changes but to oppose other changes. One might believe that the actual status quo has been formed under the influence of the various reasonable views of distributive justice, with some disproportionate rewards going to those with talent and wealth-producing choices, but with considerable redistribution reflecting the claims of need and util-

165. Buchanan sees the economist's role as presenting a hypothesis that a particular policy, or constitutional metapolicy, would command the consent of all, a hypothesis that is then tested against processes for procuring actual consent. JAMES M. BUCHANAN, *ECONOMICS: BETWEEN PREDICTIVE SCIENCE AND MORAL PHILOSOPHY* 6-7 (compiled by Robert D. Tollison & Viktor J. Vanberg, 1987).

166. *Id.* at 173 ("A social value scale as such simply does not exist.").

167. C. Edwin Baker, *Starting Points in Economic Analysis of Law*, 8 *HOFSTRA L. REV.* 939, 947-48 (1980) (stating there is no reason for saying that it is only changes from the status quo, and not the status quo itself, which requires normative justification).

168. See BUCHANAN, *supra* note 38, at 205 (providing that the use of status quo as baseline "implies neither approbation nor condemnation by any criterion of distributive justice.").

169. Buchanan argues that everyone in a state of nature would have expected to benefit from leaving the state of nature and adopting the institutions of the status quo instead. *Id.* at 203-04. While this is probably at least approximately true, it is not clear why the advantages which the strong might derive under anarchy form part of a morally appropriate baseline, or why the status quo is better than other states of affairs that would also have been rational improvements for everyone over a state of nature.

170. *Id.* at 37 (providing that the results of voluntary moves are beneficial by definition).

171. See generally Michael Moore, *Moral Reality*, 1982 *WIS. L. REV.* 1061.

172. Calabresi, *supra* note 133, at 555 ("One can also get a starting point [for efficiency analysis] if one is willing to accept historical starting points as "just" . . .").

ity as well. In some ways, using the status quo as a baseline seems less frightening than taking the other normative views very seriously.¹⁷³ For example, we have (at some considerable pain) worked many of the greatest evils out of our system, such as slavery, and one need not worry about such evils being reintroduced by intellectual arguments that enslavement of some might promote the greatest happiness for the greatest number or maximize the economic position of the poor.

On the other hand, it cannot really be the case that the status quo reflects the perfect balance among the various views of distributive justice. This would be the most freakish of coincidences, if for no other reason than that one knows actual distributive shares are affected by the pulls of power politics at least as much as by any intellectual conception. And even if by some miracle the status quo had generated the absolutely perfect balance of normative factors, it would not represent an argument for using the status quo *as such* as a baseline, and next year's status quo will not preserve the ideal balance one happened to find in this year's status quo. If Conservatism depends on the idea that the status quo embodies the ideal balance of distributive factors, it is surely a weak and fragile philosophy.

Conservatism clearly needs an argument that would justify embracing its strictures even from a baseline of an imperfect status quo. Consider the following argument. It is desirable to have some stable baseline because of the costs of having everything be up for grabs, and the status quo is more likely to supply that stable baseline than are alternatives. The first point is that it is desirable to have some baseline. There are great costs incurred when everything is up for grabs; one will devote enormous effort to take resources away from others and to resist having them taken away from oneself.¹⁷⁴ Politics without baselines is a somewhat more genteel version of the Hobbesian war of all against all, and there are a lot more losers than winners from most such wars.¹⁷⁵ The second point is that the status quo is more likely to be a stable baseline than are alternatives. As radical critics frequently lament, the status quo has a mystique to it; that

173. The idea that the status quo is less frightening as a baseline has Burkean overtones and may in part reflect epistemic worries about our ability to understand alternative baselines. Henry Sidgwick argued that we do not know enough to start from fundamentals and can only talk sensibly about improvements on what exists. HENRY SIDGWICK, *THE METHODS OF ETHICS* 473-74 (7th ed. 1907). One can question, however, whether an epistemic argument for the status quo is really conservative. See, e.g., Hardin, *supra* note 4, at 2013 ("Epistemological skepticism is not itself conservative. It is a matter only of facts and our knowledge of them.")

174. See Ann O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974) (introducing the term rent seeking).

175. THOMAS HOBBS, *LEVIATHAN* 83 (A.R. Waller ed., 1904) (addressing war of "every man, against every man").

which is tends to seem natural and inevitable.¹⁷⁶ People are cognitively oriented to resist losing what they already have more aggressively than to obtaining what they do not have.¹⁷⁷ Respecting the entitlements of others is a habit, but so is regarding entitlements as entirely contingent. When normative critics say that we will *first* fight to get a good baseline and *then* respect entitlements, one must wonder whether the habit of fighting can be extinguished in the clean and simple way this model seems to require.

Several points need to be made about the nature of this argument in support of Conservatism. The first point is that Conservatism is *not* a philosophy that one would want to entertain from all conceivable status quo baselines. The benefits of stable baselines have to be weighed against the costs reflected in the extent of moral imperfection of baselines in any given status quo. Conservatism should not be regarded as a competitor to, or on the same level with, the philosophies discussed earlier such as Utilitarianism, Rawlsianism, Liberal Egalitarianism, or Libertarianism. If one believes we should promote the greatest happiness for the greatest number, one presumably can believe that intact no matter what is happening in the factual status quo, though the facts may influence what does promote the greatest happiness.¹⁷⁸ Conservatism is a political philosophy that one would want to entertain only from the baseline of certain status quos.¹⁷⁹ However, because of the benefits of stable baselines, one might want to embrace the philosophy from a variety of status quos, even ones that were otherwise quite imperfect.

The second point is that Conservatism is a disposition that one can entertain in varying degrees. One can be extremely conservative, moderately conservative, or slightly conservative, reflecting different degrees of unwillingness to see status quo baselines set aside. Indeed, it seems to me that most people embrace Conservatism to at least a modest degree. Few people are comfortable with regarding everything as up for grabs, such that there is no established order one can count on and use to orient oneself. And, of course, one can be extremely con-

176. See, e.g., James Boyle, *A Symposium of Critical Legal Theory: The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003, 1063 (1985) (providing that it is important to deconstruct arguments that status quo is somehow natural, inevitable, and just).

177. Experimental evidence for this proposition is collected in Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990).

178. Also, one may have more confidence in the epistemic competence of those utilitarian judgments made from the baseline of the status quo. Sidgwick, who made this epistemic point, was of course a leading utilitarian. See *supra* note 173.

179. I have discussed the differences between pure normative philosophy and applied political philosophy elsewhere. Christopher T. Wonnell, *Four Challenges Facing a Compatibilist Philosophy*, 12 HARV. J.L. & PUB. POL'Y. 835 (1989); Christopher T. Wonnell, *Problems in the Application of Political Philosophy to Law*, 86 MICH. L. REV. 123, 123-30 (1987).

servative from certain status quo baselines and only slightly conservative from others.

A third point is that one can embrace Conservatism as an ideal for some institutions and not for others. In particular, one might want to entertain the idea that Conservatism is a particularly appropriate philosophy for common law courts as opposed to legislatures.¹⁸⁰ The subject of judicial role is obviously a controversial one. Many people, including Buchanan, argue that the courts' role is to faithfully apply the institutions of the status quo to disputes that arise, and not to entertain broader notions of policy such as economic efficiency.¹⁸¹ Others see little or no difference between the courts and the legislatures as decision making institutions; both are fundamentally political decision-makers entitled to implement their policy visions.¹⁸² Conservatism is a role description situated between these extremes and might therefore be attractive to those who see the courts as having a limited reformist role; the courts apply the status quo unless existing common law rules are wasteful in the sense that everyone could rationally expect to benefit from some alternative rule. Individual rules could have expected losses for some if those rules instantiated principles the court was willing to affirm that would remove those expected losses when the principle was applied to other rules as they arose. One could favor this role for the courts at the same time that one favored aggressive, anticonservative alterations of baselines by more democratically accountable branches of the government that were not entrusted with the task of applying the system as it is.

A fourth point is that Conservatism does not aspire to be a normative truth in the way that Efficiency does. Efficiency is modest in the

180. The reverse attitude is also possible, though it seems to me far less tenable. Ronald Dworkin has argued that courts should ignore policy arguments because their duty is to provide existing litigants with their entitlements under the status quo properly interpreted; anything more is objectionable social engineering. RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY*, ch. 4 (1977). Actually, I find Dworkin's willingness to permit Herculean interpretation methods that reach deeply into moral philosophy to be just as disturbing to conventional expectations as any policy argument. And there is a close parallelism between retrospective fairness arguments such as keeping one's promises or not allowing wrongdoers to profit from their wrongs and forward-looking efficiency considerations. In any event, the question of retrospective fairness to litigants from failing to apply a terrible rule should not be overemphasized. Many efficiency arguments are within the range of expectations of previous litigants for law change, as argued in Farber, *supra* note 104, at 78. And when they are not a bad precedent can be overruled prospectively.

181. BUCHANAN, *supra* note 38, at 87 ("The function of the judiciary is protection of that which is, which remains perhaps the most critical function for the maintenance of order and stability. The judicial branch serves a stabilizing, rather than a reformist or restorationist, role.").

182. See generally *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 1982).

scope of its judgments; it remains silent about any move where one party could expect to lose. But the modesty of scope is coupled with an immodesty of metaphysical and epistemic claims. We have argued that it really is morally better to make an efficient change than to stay with the corresponding inefficient baseline.¹⁸³ We have further argued that we are more certain of this moral truth than we are of any particular moral system that might be thought to underlie it, because it is designed to be defensible across a range of reasonable normative views.

By contrast, Conservatism is immodest in the scope of its judgments; it not only defends Efficient changes but opposes all changes from the status quo from which anyone would expect to lose. But Conservatism is modest about the metaphysical and epistemic claims it makes. Conservatism is not a normative truth. The status quo is not morally ideal, and therefore efficient changes are not necessarily morally better than inefficient ones. Conservatism is a pragmatic, all-things-considered judgment that we are better off living with the moral imperfections of the status quo (and relying on mutually beneficial growth to generate improvements) than trying to shift baselines (which might threaten that growth). And it is understood that others with different pragmatic judgments will quite reasonably disagree about that all-things-considered view.

One issue of some difficulty is defining the "status quo". Buchanan argues that the status quo should be defined by the existing legal rules in force.¹⁸⁴ But is this clear? What if a rule is obviously tottering and out of step with other rules such that people are expecting the rule to fall any day? Or what if the rule is ambiguous, and people disagree about its proper interpretation?¹⁸⁵ Finally, what if there is no rule on a particular point, and the question is one of first impression?¹⁸⁶ This becomes especially serious if one broadens the inquiry

183. This point may need to be qualified if there are nonhuman subjects with moral claims, such as animals. A change is not necessarily beneficial because it makes two humans better off if it makes millions of animals worse off. This is a problem not only with efficiency but with background norms such as Rawlsianism or libertarianism, i.e., can people behind a veil of ignorance agree on anything regarding animals? I assume that there are constraints on human behavior regarding animals, and that efficiency analysis, like the background norms which justify it, would need to be qualified by reference to those constraints.

184. BUCHANAN, *supra* note 165, at 157 (existing rules define baseline for efficient changes, which are mutually acceptable changes in those rules).

185. Buchanan himself is not helpful on this issue, assuming it away. *Id.* at 166 ("My whole analysis in this paper has been based in the presupposition that, in both the market and the political order, rights are well-defined.").

186. This situation is stressed by Baker, *supra* note 167, at 941-943. He argues that the efficiency criterion is not coherent in the case where there is no existing entitlement preceding the case. As Baker acknowledges, however, it is possible to say that the previous rule was one in which each side had a certain probability of

into the status quo beyond judicial rules, for example by considering next year's discretionary appropriations by Congress. With no legal entitlements to any particular amount of money, when does Congressional funding uphold the status quo and when does it constitute a change from the status quo?

There may not be "correct" or uncontroversial answers to these questions. However, the inquiry is at least given structure by its purpose, so some tentative suggestions can be made. Conservatism privileges the status quo because it wants to avoid dissipating energies on negative-sum rent seeking games, and because respect and disrespect for established entitlements are both habits of mind that can be reinforced or weakened by particular decisions. The "status quo" should not be defined in ways that would jar ordinary expectations of what is likely to happen if extraordinary energies are not applied. Normally this would involve the current positive rules where they exist, although there may be exceptional cases where a particular rule as articulated seems so weak that the conventional wisdom expects it to be abandoned rather than applied. Lawyers are familiar with the game of disguising policy arguments in the form of creative "interpretations" of the genuine status quo, but the spirit of Conservatism is that interpretations or rule constructions that are jarring to conventional understandings of what has already been decided should be evaluated as if they were changes from the status quo. As for future appropriations, the purpose of Conservatism would suggest that the status quo would be defined as the most probable result in the absence of extraordinary energies or initiatives, and for many appropriations this might be an expectation that appropriations levels will remain the same in real terms.¹⁸⁷

Whether one should embrace Conservatism, and whether one should be extremely or only slightly Conservative, depends not only on the status quo with which one is working but also on one's background normative vision. With Efficiency, one could see the merits of efficient moves without having to decide among a range of reasonable distributive views. But with Conservatism, this agnosticism is not ultimately

prevailing. *Id.* at 943. This is consistent with the spirit of Conservatism in preserving conventional expectations. He suggests that from this baseline, any rule will necessarily make someone worse off. *Id.* But this is a problem only if one expected the legal rule itself to call for immediate compensation of losers. It will be much more common, both in cases of first impression and in cases where the legal rule is clear but the court wants to change it, that the compensation of losers will come from their participation in a larger package of changes.

187. I am least confident about this conclusion. Perhaps the status quo should simply be defined by the Constitutional rules that permit Congressional spending; this would be especially appropriate if one were thinking about changing those rules. But this result seems to make "the status quo" unhappily indeterminate, given the basic purpose of Conservatism, especially if one imagines a legislator asking what Conservatism calls for in terms of next year's spending.

possible. If the status quo does a fairly good job of respecting rights but fails miserably to promote utility, this may lead a normative Libertarian but not a normative Utilitarian to embrace Conservatism as a political philosophy. And the reverse of course could also be the case.

A final factor that would affect one's decision about whether to embrace Conservatism is the extent of the harm that one can expect from a world in which baselines are up for grabs. If this problem is modest, it may be that Conservatism is a good way of promoting average utility but that its strictures would be undesirable from the perspective of the poor. If the problem is severe, however, it may be that even the poor will benefit from a stabilizing of the baseline and the growth that this makes possible.¹⁸⁸ The strongest possible claim that one could make for Conservatism is that it would be more Efficient than Non-conservatism, i.e., that everyone would expect to benefit from the prohibition on baseline changes. This would eliminate reasonable normative disagreement, and say that all reasonable views would agree on the desirability of Conservatism, at least on a particular assessment of the factual consequences of Conservatism. But this extremely strong claim does not need to be true for one to judge that, on one's own philosophical commitments, Conservatism is a sensible political philosophy to hold at this particular time.

Conservatism is not a comprehensive system for ranking all changes from the status quo. It is possible that both policies P1 and P2 would constitute efficiency improvements on the status quo, i.e., that everyone would derive expected gain by changing from the status quo to either P1 or P2. However, it might be that once having adopted P1, it would no longer be efficient to adopt P2, and that once having adopted P2, it would no longer be efficient to adopt P1. In this case, Conservatism states only that both P1 and P2 pass muster under its strictures; we should definitely adopt one of those policies or the other rather than stay with the status quo. Conservatism would not tell us whether to adopt P1 as opposed to P2, however.¹⁸⁹ It also would not tell us how to divide the surplus that either P1 or P2 made possible.¹⁹⁰

188. BUCHANAN, *supra* note 38, at 246 ("I surely do not claim ethical legitimacy for the distributional patterns that the historically evolved distribution of premarket endowments along with the workings of the market itself might generate. I should, nonetheless, argue that, pragmatically considered, these patterns may well be preferred, *on agreed upon criteria of equality*, to those that are being generated in the rent-seeking politics of the churning state, as observed.") (emphasis in original).

189. Hardin, *supra* note 4, at 1992 ("Various states of affairs may be better than the current state, but no one of them may be better than the others.")

190. *Id.* at 1997 ("The indeterminacy of the notion of Pareto improvement is in the allocation of some surplus available to us beyond the status quo.")

Those judgments could be made only by direct application of the underlying normative vision one embraced to that policy comparison.

D. Signs of Conservatism in Previous Writings and in America Institutions

Richard Posner introduced his concept of Wealth Maximization in an attempt to improve upon Utilitarianism.¹⁹¹ He argued that Wealth Maximization would be more respectful of rights than utility maximization would be.¹⁹² For example, one could imagine situations in which it would increase overall utility to enslave a person or take away her sexual autonomy, perhaps by giving compelled sexual access to those who were disadvantaged in the private market. Posner argued that wealth maximization would avoid these evils because people could procure the services of others only by buying them or in some other voluntary way securing their consent.¹⁹³ The critics pointed out, however, that if basic entitlements are themselves up for auction, there may be many situations in which others would be willing to pay more to have a slave, or to have compulsory sexual access, than the person herself would be willing to pay to have her freedom.¹⁹⁴ So Wealth Maximization is not after all a guarantor of rights and might even be worse along this dimension than utilitarianism.

On the other hand, Conservatism (from the existing status quo) would entail the result for which Posner is pleading. In the status quo (U.S. 2002), people do have the right to refuse work or sexual access, even if other people could derive a lot of utility from compelling them to act against their wishes, so any changes would have to be in the interest of persons already so entitled. Posner might best be interpreted as saying that Conservatism promotes rights at the present time more reliably than Utilitarianism does. Posner was especially worried that Utilitarianism (and Rawlsianism) would justify using productive people purely as means to promote the utility or needs of others.¹⁹⁵ In moderation, this is a reasonable point, but Posner

191. Posner, *supra* note 128, at 103 (stating that wealth maximization provides firmer basis for normative economics of law than utilitarianism).

192. *Id.* at 125 (exhibiting a stronger commitment to notion of exclusive rights).

193. *Id.* at 125 ("If transaction costs are positive, the wealth-maximization principle requires the initial vesting of rights in those who are likely to value them the most. This is the economic reason for giving a worker the right to sell his labor and a woman the right to determine her sexual partners. If assigned randomly to strangers, these rights would generally (not invariably) be repurchased by the worker and woman respectively.")

194. See, e.g., Behchuk, *supra* note 47, at 688 (providing that it is especially clear with sexual autonomy, as sexual freedom does not generate a monetary surplus that can be used to buy oneself out of bondage, as could be argued in the case of productive labor).

195. Posner, *supra* note 46, at 498-99 (arguing that utilitarianism wrongly values capacity to enjoy rather than capacity to produce for others, and Rawls would im-

seemed to carry it to extremes by saying that those who were unproductive because of natural handicaps had no moral claim on resources whatsoever,¹⁹⁶ a conclusion firmly rejected in every democratic society. However, if one starts from the baseline of those democratic judgments, it is much more reasonable to say that the lesser evil from here is Conservatism because it will not further conscript the talented.

Indeed, the kind of defense Posner offered of Wealth Maximization is the right kind of defense for Conservatism. He said that Wealth Maximization would promote utility, but not as fanatically as Utilitarianism, being more respectful of rights and entitlements.¹⁹⁷ It would protect liberties, but not fanatically in the manner of Libertarianism, where property rights could not be taken or abridged for important public projects even with just compensation.¹⁹⁸ It would promote the virtues such as truth telling, promise keeping, and cooperativeness, which are part of positive-sum moves.¹⁹⁹ These pragmatic, multi-factored arguments are definitely the right kind of argument for a political theory like Conservatism. And the arguments are more persuasive when offered for Conservatism than when offered for Wealth Maximization, which might indeed jeopardize liberties and sacrifice without limit the utility of those incapable of producing.

Another Nobel-Prize winning economist, Friedrich Hayek, wrote a book entitled *The Mirage of Social Justice*, part of his remarkable trilogy of books collectively known as *Law, Legislation, and Liberty*.²⁰⁰ In *The Mirage of Social Justice*, Hayek argued that the idea that society could come to accept and live by a notion of social or distributive justice was false.²⁰¹ People think that a free society gives them a smaller share of the social product than they deserve, but each person thinks that is true for a reason that is inconsistent with the reasons entertained by others.²⁰² Moreover, in a free society each person's

properly weight the choices of the unproductive equally with those of the productive).

196. *Id.* at 497 ("By the same token, those who have no productive assets have no ethical claim on the assets of others.").

197. *Id.* at 496 (providing that wealth maximization gives weight to preferences, though less heavily than utilitarianism).

198. *Id.* at 496 (providing that wealth maximization gives weight to consent, though less heavily than Kant would have done).

199. Posner, *supra* note 128, at 128 (1979). Elsewhere I have discussed the kinds of values, including especially the values reflected in the U.S. Constitution, which tend to be generated by market institutions. See Christopher T. Wonnell, *Market Causes of Constitutional Values*, 45 CASE W. RES. L. REV. 399 (1995).

200. F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY*, VOLUME I: RULES AND ORDER (1973); VOLUME II: THE MIRAGE OF SOCIAL JUSTICE (1976); VOLUME III: THE POLITICAL ORDER OF A FREE PEOPLE (1979).

201. HAYEK, *THE MIRAGE OF SOCIAL JUSTICE*, *supra* note 200, at 62-100.

202. An early statement of this position was DAVID HUME, *AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS*, § II, pt. II, Works IV, at 197 (T.H. Green & T.H. Grose 1890) (1777) ("[S]o great is the uncertainty of merit, both from its natural

perceived income-to-worth gap is rendered somewhat tolerable by the belief that the state is not in the business of trying to make all incomes correspond to people's overall deserts. The more the state takes on this role, the more glaring and intolerable will be the public declarations of merit that differ so dramatically from each individual's assessment of her own merits. The fight over relative status and distributive shares will simultaneously shrink the size of the pie and make everyone increasingly angry over her relative slice of the pie that remains.

Hayek's argument might be seen as Conservative in orientation. The status quo system of entitlements has a certain perceived legitimacy merely by virtue of being the status quo, without regard to any system of public ranking of the worth of persons. In a Conservative regime, people learn over time that they are not rewarded for nursing grievances with their relative status. Nor is the state willing to protect the high relative status of some against the absolute gains of others that threaten it. People do not necessarily become convinced that they have their just share of the pie, but they do not have to endure the anger of seeing the state consciously embrace someone else's conception of just shares. And as the fight over shares abates the size of the pie increases, making the frustration over relative shares a little easier to tolerate.

Hayek is not necessarily agreeing with Buchanan that there is no truth of the matter regarding distributive justice. Perhaps there is an algorithm that captures ideally the role of past choices, talents and libertarian entitlements, utility, Rawlsian concern for the disadvantaged, and the like. Hayek's point, however, is that expecting a society-wide discussion to lead to agreement on this point is unrealistic, and indeed, that the more seriously such a discussion is undertaken the more thoroughly the society will come apart. Instead, we must reach the ideal through indirect means that do not call upon the state to rank the worth of individuals and their accomplishments. Conservatism is one such indirect means of sneaking up on the social optimum, and from a certain range of status quo entitlements may well be the best means.

Richard Epstein's vision might also be seen to embody some commitment to Conservatism. Contrary to the libertarians, he argues that basic property rights can be taken, but only if the property owner is paid just compensation.²⁰³ He applies this standard to taxes as well as more targeted takings, so the overall vision is much like Conserva-

obscurity and from the self-conceit of each individual, that no determinate rule of conduct could ever follow from it, and the total dissolution of society must be the immediate result.").

203. See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

tism in embracing efficient changes from the status quo and rejecting other changes.²⁰⁴ Moreover, Epstein says that the various injustices of the past that have been involved in the history of title to any given property should be regarded as a "giant wash,"²⁰⁵ which is quite consistent with the spirit of Conservatism. Epstein also acknowledges that the reliance interest should be a significant constraint on using his approach to dismantle the existing welfare state.²⁰⁶ He is not comfortable with the idea that these entitlements constitute a "new property,"²⁰⁷ although many of these entitlements are negative-sum, so it should be possible to change a package of those entitlements in ways that will make their holders expect to be better off.

One final point should be made about the concept of Conservatism, especially as it affects the study of law in this country. The United States Constitution might be understood in part as a Conservative document, because of its structural features such as supermajoritarianism and a bill of rights. As Buchanan has argued, supermajoritarianism becomes a sensible institution when the goal is the conservative one of seeing to it that law change is supported by a broad consensus.²⁰⁸ The U.S. Constitution itself was adopted by supermajority and can only be amended by supermajority. It also establishes a rather cumbersome process for the enactment of legislation, or law *change* from the pre-legislation status quo. Bicameralism and the Presidential veto, together with such initial institutions as the absence of direct election of Senators, seem designed to resist changes that are the product of narrow factions or even simple majorities rather than a broad consensus.²⁰⁹ The Constitution indeed makes little sense except on the assumption that the Framers thought that the common law background against which legislative change would have to be made was at least a reasonably tolerable institution, and that they wanted legislation once passed to become a fairly stable part of the social framework.

204. Epstein describes taxes as "takings from many" and subjects them to scrutiny under the takings clause. *Id.* at 99-100.

205. *Id.* at 349 ("My own judgment is that any effort to use massive social transfers to right past wrongs will create far more tensions than it is worth, so treating all errors as a giant wash is the best of a bad lot.").

206. *Id.* at 327 ("The current patterns /of welfare programs/ are so deeply rooted that they cannot be undone by constitutional means, even if there is some faint chance of containing them.").

207. Richard A. Epstein, *No New Property*, 56 BROOK. L. REV. 747, 762 (1990) ("So long as resources are scarce, there is the clear expectation that no recipient has any vested rights in the continuation of present welfare schemes.").

208. BUCHANAN, *supra* note 165, at 178 ("In a very real sense collective choice cannot be considered as being reached by voting until relatively unanimous agreement is achieved.").

209. See generally John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365 (1999).

Another important aspect of the U.S. Constitution's institutional structure is a bill of rights that rules certain categories of legislation out of bounds. One might see the First Amendment, for example, as a kind of package deal in which each interest group is effectively saying "we won't pass laws censoring you if you won't pass laws censoring us."²¹⁰ While any particular censorship law would have definite winners and losers, it is quite possible that almost everyone could see herself as coming out ahead from the Congressional disability package as a whole. For the logical reasons discussed earlier, package deals are often a good sign of conservative thinking at work.²¹¹

The preamble of the United States Constitution speaks of "We the People" coming together "in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."²¹² At least to my ears, this is the rhetoric of a cooperative enterprise designed for expected mutual advantage. Conspicuously absent is talk of some people embracing this Constitution in order to gain at the expense of other people.²¹³ We are forming a union that will be able to achieve some common objectives we could not achieve on our own as individuals or as unconnected states. And with respect to Liberty we are using this Constitution not to bring about liberty for the first time but to "secure" it against threats that it may be taken from us or from our posterity. In the terms this Article has used, the spirit of the preamble is Conservative.

There is a paradox of Conservatism. By putting issues of baseline entitlements on the back burner, Conservatism sets the stage for growth, progress, and change. A Conservative society by no means will be a stationary society, and the fact that the United States has gone from an agrarian to an industrial to an information-based economy under the framework of the same document is hardly a coincidence. Conservatism as it has been defined here is not afraid of change. Its fear is rather of the legislative agenda that purposely creates as its objective, direct or mediate, the expected harming of some person or class of persons. It is a system that tries to instill in the

210. MILTON FRIEDMAN & ROSE D. FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 299-309 (1980) (presenting this bundling theory of free speech, and applying it to a proposed economic bill of rights).

211. See *supra* notes 159-60 and accompanying text.

212. U.S. CONST. pmbl.

213. One suspects that "Justice" probably was intended modestly, as providing procedures and remedies for civil and criminal wrongs, rather than in the freewheeling spirit of Rawlsian social justice, which would have contemplated a federal government almost surely much more expansive than the Framers had in mind. This is not to say, however, that Rawlsian social justice would be an inappropriate objective for the federal government under the Constitution properly interpreted today.

citizenry a taste and expectation that change will come about through cooperation in which everyone rationally can expect to make progress over time.

VI. CONCLUSION

This Article has made three basic claims. The first is that the motive behind the idea of efficiency is not so much the difficulty of interpersonal utility comparisons as it is the plurality of reasonable conceptions of distributive justice. The second is that the proper extension of Pareto efficiency to accommodate that motive is not to embrace Kaldor-Hicks efficiency alone but rather to use Kaldor-Hicks as a foundational step in the direction of *ex ante* efficiency. The third claim is that efficiency itself does not have a conservative or narrowly political orientation, but that the concept can be used as part of a conservative political philosophy that opposes changes from the status quo that are expected to operate to the systematic detriment of particular persons or groups.