

# Something Important in Humanity

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*Joseph William Singer\**

“There is something important in humanity,” said Balin. “I cannot at present describe it.”<sup>1</sup>

—T. H. White, *The Book of Merlyn*

“Are things getting better or are they getting worse?” Laurie Anderson asks in one of her songs.<sup>2</sup> She asks the question because it is important, but she also asks it to demonstrate that it is impossible to answer. If we said, “Things are getting better,” we would immediately want to ask, “*In what ways* are things getting better?” Things could be getting better in some ways and worse in others. Suppose we catalogued all the ways in which things are getting better and all the ways in which they are getting worse. What then? Could we compare the goods and the bads and come up with a judgment that, all things considered, things are getting better rather than worse?

Take the question of whether the twentieth century was better than the nineteenth century. The twentieth century saw advances in medicine, life expectancy, and technology, as well as the spread of democracy and racial justice. It also saw the greatest violence the world has ever known, two world wars, the nuclear bomb, and the Holocaust. How do we “measure” the good and the bad? How do we “weigh” them against each other? Can we do that? Suppose we said, “On balance, the benefits outweighed the costs, so things got better.” If we could say this, would it mean that the benefits justified the costs? Would it mean that we would do it again if we could? Would we have said something meaningful? When we turn our attention to the multiple ways things can be good or bad,<sup>3</sup> it becomes evident that any summary answer to the question of whether things are, on balance, better or worse will not tell us much of anything we want to know. God, as they say, is in the details.

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<sup>1</sup> T. H. WHITE, *THE BOOK OF MERLYN: THE UNPUBLISHED CONCLUSION TO THE ONCE AND FUTURE KING* 42 (1977).

<sup>2</sup> LAURIE ANDERSON, *Same Time Tomorrow*, on BRIGHT RED (Warner Bros. Records 1994).

<sup>3</sup> See ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993) (explaining how we value different things in different ways).

In T. H. White's *The Book of Merlyn*, King Arthur sits in his tent preparing for his final battle.<sup>4</sup> The wizard Merlyn suddenly appears from nowhere to teach Arthur his final set of lessons. Merlyn turns Arthur into various animals to help him learn how they see the world and what they know. In one of these lessons, Arthur becomes an ant. He watches another ant that seems to have a job to do but no idea whatsoever how to do it: "It was inclined to rely upon a series of accidents in order to achieve its objects."<sup>5</sup> Arthur wants to question the ant—to ask "why it did not think things out in advance."<sup>6</sup> He wants to ask it other questions, such as "'Do you like being a sexton?'" or "'Are you a slave?'" or even "'Are you happy?'"<sup>7</sup> He finds that he cannot do it:

In order to ask them, he would have had to put them into the ant language through his antennae: and he now discovered, with a helpless feeling, that there were no words for half the things he wanted to say. There were no words for happiness, for freedom, or for liking, nor were there any words for their opposites. He felt like a dumb man trying to shout "Fire!" The nearest he could get to Right and Wrong, even, was Done or Not-Done . . . .

. . . .

Later on, he was to discover that there were only two qualifications in the language—Done and Not-Done—which applied to all questions of value.<sup>8</sup>

Both Laurie Anderson's question and T. H. White's parable demonstrate the complexity of our values. We are interested in costs and benefits, but we are also aware that some costs and benefits are hard to measure precisely because they are not susceptible to quantitative analysis. They are not susceptible to quantitative analysis because, fundamentally, when we think about what we value, we are interested in something more than measurement. We want to know something about the *character* of the goods and the bads; we want to know *in what way* something is better or worse. We need a richer description of things than one can furnish through a language that reduces all terms of value to pluses and minuses. We need to think in terms of justice, dignity, fairness, equality, democracy, respect, humanity. We need narratives to help us negotiate complex moral quandaries. We need conversation.

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<sup>4</sup> WHITE, *supra* note 1, at 51; see also T. H. WHITE, *THE ONCE AND FUTURE KING* 637–39 (Ace Books 1987) (1958).

<sup>5</sup> WHITE, *supra* note 1, at 51.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 51, 53.

Louis Kaplow and Steven Shavell have gone to great lengths to convince us to ignore these considerations and instead convert all questions of value into questions of costs and benefits.<sup>9</sup> They want us to think only in terms of better or worse. For them, the only legitimate goal of normative analysis is to promote “the well-being of individuals in society.”<sup>10</sup> We should try to make individuals better off and avoid social policies that worsen their condition. Kaplow and Shavell want us to stop talking about things like fairness and justice and turn our attention solely to the goal of promoting human welfare.<sup>11</sup> According to Kaplow and Shavell, there is a method to analyze such questions—welfare economics.<sup>12</sup> Welfare economics aggregates everything anyone might value: “The welfare economic conception of individuals’ well-being is a comprehensive one. It recognizes not only individuals’ levels of material comfort, but also their degree of aesthetic fulfillment, their feelings for others, and anything else that they might value, however intangible.”<sup>13</sup> These intangibles include their “tastes for fairness.”<sup>14</sup> Those tastes affect welfare because satisfying them promotes well-being. However, Kaplow and Shavell argue that fairness should be a factor *only* to the extent that it promotes welfare; it

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<sup>9</sup> Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001).

<sup>10</sup> *Id.* at 967 (“Our central claim is that the welfare-based normative approach should be exclusively employed in evaluating legal rules.”); *see also id.* at 985–88.

<sup>11</sup> *See id.* at 968 (“[A]dvocating the exclusive use of welfare economics, as we do, is equivalent to adopting the moral position that the design of the legal system should depend solely on concerns for human welfare.”). Kaplow and Shavell argue that satisfying human preferences and aggregating them in a suitable way promote welfare. *See id.* at 985–88.

<sup>12</sup> *Id.* at 968. Kaplow and Shavell would allow “ordinary individuals” to use fairness arguments because such arguments habituate the citizenry into acting in ways that maximize their welfare, avoiding the dangers of acting on the basis of “opportunistic, self-interested behavior” that, in the long run, would not be in their own best interests. *See id.* at 1305–06 (“The foregoing points make clear that our criticism of the use of notions of fairness is not relevant to the behavior of ordinary individuals in realms governed by social norms.”). They would also allow politicians and judges to use other forms of analysis suited to their jobs. Politicians may need to use fairness arguments because their constituents may be too indoctrinated or irrational to understand welfare economics arguments. *See id.* at 1318–24 (“One strategy for addressing citizens’ limited capacities to comprehend policy analysis is for political actors to use familiar language—such as the language of fairness—in public statements . . . when explaining their decisions.”) (quotation at 1319). Judges may be constrained from using welfare economics arguments by their judicial role of enforcing precedent or interpreting statutes. *See id.* at 1319 (“Another case is that of judges . . . . The extent to which judges should employ welfare economics or other decisionmaking techniques obviously depends on the nature of the authority they have been delegated and other factors that are outside the scope of our inquiry.”). Legal academics, on the other hand, are enjoined to reason *exclusively* on welfare grounds. *See id.* at 1306–16 (“[L]egal policy analysis should be guided exclusively by welfare economics, and thus . . . no weight should be given to notions of fairness as independent evaluative principles.”) (quotation at 1306).

<sup>13</sup> *Id.* at 968.

<sup>14</sup> *Id.* at 975 (“[A]ny factor that influences individuals’ well-being is relevant under welfare economics, and a taste for fairness is no different in this respect . . .”).

should not be an independent basis for choosing among alternative rules of law.<sup>15</sup>

Kaplow and Shavell perceive two distinct advantages of welfare over fairness as an independent goal for law. First, welfare values human autonomy and equality because it takes individual preferences seriously and does so in an equitable fashion.<sup>16</sup> Welfare is premised on the notion of a nonpaternalistic consumer sovereignty. Welfare economists determine what promotes human welfare by looking at what people want; they do not judge whether people should want what they want.<sup>17</sup> In addition, because welfare analysis aggregates the preferences of individuals, it counts each person equally.<sup>18</sup> Social policies that promote the welfare of human beings therefore promote both autonomy and equality.

Fairness, according to Kaplow and Shavell, does the opposite—it treats the desires of some individuals as “better” than those of others and gives undue power to those who accept favored values. Those who promote fairness and justice seek to impose their views of what is right on others.<sup>19</sup> For instance, a law banning racial discrimination in public accommodations on the sole ground that racism is abhorrent elevates, without proper cost-benefit analysis, the desires of those opposed to such discrimination over the desires of those who favor it.

The second advantage of welfare over fairness analysis is that, in seeking to maximize human welfare, it takes into account everything humans value.<sup>20</sup> A law that is favored because it is fair may or may not promote human welfare. If a law that is deemed fair promotes human welfare, then fairness is a superfluous norm. On the other hand, if the independent value given to fairness results in a law different than what would result from welfare analysis, then fairness has decreased human welfare and made people worse off.<sup>21</sup>

Kaplow and Shavell acknowledge that individuals have “tastes for fairness” and that a law that violates widely held views of fairness might make everyone worse off.<sup>22</sup> Thus, they concede that tastes for fairness

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<sup>15</sup> See *id.* at 1004.

<sup>16</sup> See, e.g., *id.* at 986, 1341.

<sup>17</sup> See *id.* at 1338 (explaining that, in welfare economics, an analyst uses “individuals’ actual preferences” and does not “impose on society his or her own view concerning what other people’s preferences ‘ought’ to be”); see also *id.* at 1337, and related notes.

<sup>18</sup> See *id.* at 986 (“[E]ach individual’s well-being affects social welfare in a symmetric manner, which is to say that the idea of social welfare incorporates a basic notion of equal concern for all individuals.”).

<sup>19</sup> See, e.g., *id.* at 1340–42.

<sup>20</sup> See, e.g., *supra* note 13 and accompanying text.

<sup>21</sup> See Kaplow & Shavell, *supra* note 9, at 1130 (“[W]hatever the notion of fairness is, it will make everyone worse off any time it conflicts with the prescriptions of welfare economics.”); *id.* at 1133 (arguing that when choosing legal rules for contract remedies, “fairness-based evaluation can only make everyone worse off”); *id.* at 1310 n.850.

<sup>22</sup> See, e.g., *id.* at 1211 (“[I]t is possible that individuals have tastes regarding legal procedures governing both the availability of legal redress and the manner in which adjudication is conducted.”); *id.* at 1317 n.863.

should be included in a cost-benefit analysis. However, they do not consider fairness to be a valid *independent* criterion for adopting a law or social policy. Kaplow and Shavell value fairness only to the extent that it makes people happy; they would never value fairness in and of itself. Thus, to them, fairness is a second-class citizen in the marketplace of ideas. It can only detract from well-being.

What types of fairness concerns would contradict welfare considerations? Kaplow and Shavell essentially define fairness concerns as justifications for legal rules that ignore the consequences of those rules for human beings.<sup>23</sup> Respect for human dignity, for example, may justify a rule protecting tenants from eviction without a court proceeding ensuring that the landlord is legally entitled to the eviction. Requiring the landlord to use court-supervised evictions also ensures that the tenant has sufficient time to move. Kaplow and Shavell would argue that these types of fairness justifications fail to consider all the consequences of adopting the rule. Prohibiting landlords from changing the locks on the door and throwing the tenant's belongings onto the street may appear to help tenants—but it may well raise rents, resulting in a lease term for which tenants were unwilling or unable to pay. Fairness is therefore potentially counterproductive. We scholars should forget about making our own judgments about fairness and trying to introduce those judgments into law, because the effort is likely to hurt the people we want to help.

Legal scholars have long subjected law and economics to a series of internal critiques intended to demonstrate that the methods presented by law and economics scholars are indeterminate in the absence of numerous controversial value judgments that cannot be defended by economic analysis itself.<sup>24</sup> I do not want to restate all those arguments here. I do want to respond to what is new in Kaplow and Shavell's argument. In the past, law and economics scholars have said that their conception of value was a partial one.<sup>25</sup> They sought to identify rules that promoted efficiency

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<sup>23</sup> See *id.* at 1004, 1006–07. But see *id.* at 1003 (acknowledging that some fairness theorists consider consequences).

<sup>24</sup> See, e.g., Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769; Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979) [hereinafter Kelman, *Consumption Theory*]; Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980); Frank Michelman, *Ethics, Economics, and the Law of Property*, 24 NOMOS: ETHICS, ECON., & L. 3 (1982); Pierre Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661 (1989). Legal scholars have also subjected law and economics arguments to external critiques that question the core assumptions underlying the analysis. See, e.g., RONALD DWORKIN, *A MATTER OF PRINCIPLE* 237 (1985); C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975); C. Edwin Baker, *Starting Points in Economic Analysis of Law*, 8 HOFSTRA L. REV. 939 (1980); Mark G. Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of "Law and Economics"*, 33 J. LEGAL EDUC. 274 (1983).

<sup>25</sup> See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 13 (5th ed. 1998) (noting that both efficiency and utility have limitations as ethical criteria of social deci-

or welfare and claimed that we were entitled to sacrifice welfare to achieve equality, distributive justice, or other goals if we so desired. Kaplow and Shavell challenge this way of accommodating conflicting values and argue that welfare is the only factor of importance. According to them, legal academics who sacrifice welfare to achieve fairness have acted both irrationally and tyrannically. I do not agree with this view, and I want to explain why.

In Part I, I will explore what is at stake in the choice between what Kaplow and Shavell have called welfare and fairness. I will argue that fairness arguments are not and cannot be wholly nonconsequentialist in nature, nor are they wholly non-aggregative. In certain respects, Kaplow and Shavell attack a straw person. While Kaplow and Shavell have tried to construct a sophisticated, comprehensive approach to welfare analysis, they have defined fairness in an overly simplistic manner—a manner that no actual fairness theorist would accept. I will isolate what I see as the real issues in dispute: (1) differences of opinion about the way one should go about aggregating human interests, (2) how one decides when to aggregate and when not to aggregate, and (3) the role that human judgment plays and should play in legal and policy analysis.

In Part II, I will engage in an internal critique that accepts Kaplow and Shavell's general goals and assumptions while explaining why it is not possible to engage in the form of argument they propose without relying on the very fairness concerns they deplore. I will then move to an external critique in Part III that does not accept their premise that welfare is the only thing of value. I will argue that their defense of welfare depends on several flawed fundamental assumptions. I will conclude in Part IV by arguing that we show respect for people by critically evaluating their preferences rather than deferring to them.

#### I. THE DEFINITIONAL DEBATE: HOW KAPLOW AND SHAVELL DEFINE FAIRNESS UNFAIRLY

Kaplow and Shavell argue that legal scholars should analyze whether legal rules promote human welfare and should refrain from considering whether the rules are fair (except to the extent that they enhance well-being by satisfying tastes for fairness). What is at stake in the distinction between welfare and fairness?

Kaplow and Shavell want to exclude fairness considerations from legal analysis for several reasons. First, they criticize the non-consequentialist nature of fairness arguments, noting that fairness arguments purport to justify protection of particular human interests without regard to the social consequences of adopting those protective rules.<sup>26</sup> In fact, they argue,

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sionmaking).

<sup>26</sup> See Kaplow & Shavell, *supra* note 9, at 1006–07.

fairness concerns are counterproductive because they may harm people instead of helping them.<sup>27</sup> Second, Kaplow and Shavell are critical of the non-aggregative nature of fairness concerns and are willing to consider fairness only insofar as it reflects the views of fairness held by everyone in society.<sup>28</sup> Third, Kaplow and Shavell suggest that scholars themselves generate the fairness problem by developing their own views of the fairness of legal rules and giving those views independent weight when choosing among competing rules.<sup>29</sup> Fairness concerns are tyrannical, the argument asserts, because they substitute the analyst's preferences for those of the very people whom fairness concerns are supposed to help. So-called fairness concerns, according to this theory, interfere with people's autonomy to choose their own values and live their lives on their own terms.<sup>30</sup> Kaplow and Shavell would avoid this problem by requiring that the analyst calculate, for every individual, the extent to which the fairness of a given legal rule affects her "tastes" for fairness and aggregate the resulting utility loss or gain for all members of society.<sup>31</sup>

Yet it is clear that many people, including many legal scholars and even the framers of the Constitution, have given fairness independent weight in legal and policy analysis. Although no one wants to make everyone worse off, Kaplow and Shavell insist that fairness theorists persist in using a method of analysis that will often do just that. Why would they do such a perverse thing? They must do so, Kaplow and Shavell assert, out of habit, because no other discernible reason exists: "[W]e discover very little basis for the use of notions of fairness as independent evaluative principles."<sup>32</sup> Fairness proponents assume their views make sense or unreflectively adopt principles of fairness because they are "internalized social norms."<sup>33</sup> Kaplow and Shavell believe that such persons simply do not understand "that promoting notions of fairness would make *everyone* worse off."<sup>34</sup> This habitual inclusion of fairness concerns is contrary to

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<sup>27</sup> See, e.g., *id.* at 971 ("[A]dvancing notions of fairness reduces individuals' well-being . . ."); *id.* at 1198 (claiming that "notions of fair procedure can easily be counterproductive even with regard to their apparent underlying motivation").

<sup>28</sup> See *id.* at 988 n.47 (asserting that analysts should determine the strength and distribution of people's views of fairness and aggregate them, balancing the effects on welfare of satisfying those views against other human welfare interests).

<sup>29</sup> See *id.* at 1385 ("Given the intensity with which we all believe in notions of fairness and the related difficulty of setting aside our instincts and intuitions when we find ourselves in the role of policy analysts, it is inevitable that many scholars will continue to advance notions of fairness as principles that should be given independent weight in the evaluation of legal policy.").

<sup>30</sup> See *id.* at 1341 ("The idea of an analyst substituting his or her own conception of what individuals should value for the actual views of the individuals themselves conflicts with individuals' basic autonomy and freedom.").

<sup>31</sup> Of course, the analyst can add her own views into the equation, but they count only as one person's views that must be added to the views held by everyone else in society.

<sup>32</sup> Kaplow & Shavell, *supra* note 9, at 972.

<sup>33</sup> *Id.* at 973.

<sup>34</sup> *Id.* at 971.

Kaplow and Shavell's belief that the scholar must subject fairness norms to evaluation.<sup>35</sup>

Kaplow and Shavell advocate the views of utilitarians and consequentialists in their long-standing debate with proponents of deontological approaches to ethics and law. Their argument is simple and elegant and, at first glance, compelling. Who wants to make things worse rather than better? Who wants to harm people rather than help them? Kaplow and Shavell note that "on a general level" this argument "is in fact tautological."<sup>36</sup> They acknowledge that fairness theorists could incorporate the consequentialist analyses they favor, so they define the kind of fairness considerations they want to attack as not including such considerations.<sup>37</sup> They believe that fairness arguments are very likely to make people worse off; if we choose one rule over another *because it is fair*, we will have failed to consider the consequences of choosing that rule. In short, Kaplow and Shavell accuse fairness theorists of being simplistic. Fairness theorists may believe a rule is fair, but if they do not consider the consequences of adopting particular rules of law, they may not see that a rule actually promotes unfairness by causing changes in behavior that impinge on the very interests it was supposed to protect.<sup>38</sup>

I agree that legal scholars should think things through and consider all the relevant facts before coming to a conclusion. I also agree that scholars sometimes present simplistic fairness arguments. However, the problem here is not fairness; it is the failure to consider the complexities involved in the choice between alternative legal regimes. It is true that a proponent of fairness may fail to take into account facts that she should see as relevant, but this is also true of a welfare proponent.<sup>39</sup>

Kaplow and Shavell correctly note that some fairness theorists argue that rules are justified because they protect interests that others have a moral duty to respect.<sup>40</sup> Such analysts have indeed failed to consider competing interests, as well as the individual and social effects of adopting a rule. But fairness theorists generally do not end there. They recognize that the exercise of one legal right might clash with another.

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<sup>35</sup> See *id.* at 974 ("That the analyst, as an individual, has in a sense been programmed to conduct his or her life in accord with social norms is not a legitimate reason for the analyst to elevate such norms to the status of independent evaluative principles for use in a qualitatively different context, the design of legal rules.").

<sup>36</sup> *Id.* at 971.

<sup>37</sup> See *id.* at 999–1001. Kaplow and Shavell suggest, for example, that fairness analysts almost always think *ex post* and ignore *ex ante* considerations that might reduce incidences of unfairness. See *id.* at 1010, 1044, 1355–61 (asserting that, although some analysts hold mixed fairness/consequentialist views, "when we examine and criticize notions of fairness, our discussion should be understood to apply to analysts' views only insofar as they would give weight to their preferred notions of fairness") (quotation at 1044).

<sup>38</sup> See *id.* at 1010–12.

<sup>39</sup> See *infra* note 44 and accompanying text.

<sup>40</sup> See, e.g., JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 3 (1988); see also Kaplow & Shavell, *supra* note 9, at 1308–09.



Fairness theorists are as aware of this as are economists and, when the exercise of one legal right impinges on human interests protected by another legal right, they seek to find some analytical framework for deciding which right will prevail.<sup>41</sup> Therefore, no meaningful fairness argument can be wholly nonconsequentialist.

I agree with Kaplow and Shavell that fairness arguments can be made in a simplistic and unpersuasive fashion. Judicial opinions are replete with statements like the following: "I firmly believe that a landowner's right to use his property within the limits of ordinances, statutes, and restrictions of record where such use is necessary to serve his legitimate needs is a fundamental precept of a free society."<sup>42</sup> The problem with this argument, of course, is that the right to freely use and develop one's own property may have external effects on the property of one's neighbors. If the freedom to use property were unlimited, one property owner would be privileged to destroy the property rights of others. It is therefore commonplace that "the uses by one must not unreasonably impair the uses or enjoyment of the other."<sup>43</sup> Rights of security often limit rights of freedom of action. To take another example, our interests in flying airplanes safely and securely may require us to sacrifice our freedom to board planes without inspection of our baggage.

Fairness arguments can be made in a simplistic, one-sided fashion, but this is not an indictment of fairness considerations. It is merely a criticism of bad fairness analysis. Law professors devote much of their course-time to teaching students how to argue on both sides of contested cases by helping them understand each side's legitimate interests. It is inadequate for the plaintiff's lawyer only to explain why the plaintiff's interests are important. She must either explain why the defendant's interests are not deserving of legal protection or argue that, even though the defendant's interests should be legally protected, the plaintiff's interests are more worthy of protection than the defendant's in this particular case.

Moreover, fairness analysis is not the only method subject to poor use; welfare arguments can similarly be made in a simplistic fashion. Lawyers sometimes argue that a rule is bad because it has costs. But the

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<sup>41</sup> It is true that rights theorists, a subset of fairness theorists that includes Jeremy Waldron, distinguish between rights and interests. They define rights as interests that are so important from a moral point of view that others have a prima facie duty to protect them or refrain from infringing on them. But this means only that others have a prima facie duty not to infringe on them. That presumption may be overcome if the exercise of the right intrudes upon rights held by others. A rights theorist, to be internally consistent, must acknowledge conflicts of and limitations on rights in order to make them compatible with other rights. The only way to do this is to recognize the consequences of exercising one right on the rights of others. Yet not all fairness scholars are rights scholars trying to distinguish rights from interests. Those who are interested in justice but do not distinguish—either in degree or kind—between rights and interests are even less likely to separate fairness arguments from consequentialist arguments.

<sup>42</sup> *Prah v. Maretti*, 321 N.W.2d 182, 194 (Wis. 1982).

<sup>43</sup> *Id.* at 187.

mere fact that a rule has negative consequences is not a reason to oppose it. Every rule has costs. The question is whether the benefits are greater than the costs. Or more precisely, the question is how the costs and benefits of the plaintiff's proposed rule balance against the costs and benefits of the defendant's proposed rule. Any analysis that focuses exclusively on the bad effects of one of the rules is incompetent. Yet one sees such arguments all the time, both in judicial opinions and in legal scholarship.<sup>44</sup>

The reductionism of Kaplow and Shavell's conception of fairness extends to their doctrinal and theoretical treatment of torts and contracts, where they fail to see that sophisticated fairness theorists acknowledge that rights may conflict and that it is necessary to reach an accommodation between them when they do.<sup>45</sup> Instead, Kaplow and Shavell suggest highly simplistic conceptions of the legal and moral principles underlying contract (enforcing promises or punishing promise-breaking)<sup>46</sup> and tort (compensation for harm or punishment for fault).<sup>47</sup> It is true that rights theorists, for example, want to enforce promises because it is unfair to break promises and because people reasonably rely on them. But most rights theorists oppose requiring someone to do what she promised to do if she no longer wishes to do so, because rights theorists value individual liberty and think a person should have substantial freedom to change her mind. This is why courts so rarely order specific performance and instead force the victims of broken promises to mitigate their damages. The right to change one's mind conflicts with the right to rely on a promise, and rights theorists attempt to determine which right should prevail, in what measure, and in what situation. Sophisticated fairness arguments, then, are not wholly nonconsequentialist, nor are they wholly non-aggregative. They take into account the effects of rules on the rights and interests of all members of society.

What, then, is really the difference between fairness and welfare as approaches to justifying legal rules? The difference is best illustrated by considering how welfare and fairness analysts would approach the same question. For example, imagine a policy requiring all U.S. citizens of Arab descent to carry special identity cards. According to a recent survey, approximately forty-nine percent of the United States population thinks this would be a good idea.<sup>48</sup>

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<sup>44</sup> The fact that one sees one-sided arguments does not necessarily mean that the analyst has erred. After all, the argument may assume that the reader understands that the claim is that the costs of one rule outweigh any possible benefits and that those costs are greater than the costs associated with the alternative rule.

<sup>45</sup> See, e.g., WALDRON, *supra* note 40, at 5 (asserting that property rights must be limited to ensure that everyone can own some property).

<sup>46</sup> See Kaplow & Shavell, *supra* note 9, at 1103-14.

<sup>47</sup> See *id.* at 1040-42.

<sup>48</sup> Ahan Kim, *Poll Finds Many Want Restrictions On Arab Americans; Nearly Half Said Special Security Checks Are Necessary*, SEATTLE POST-INTELLIGENCER, Sept. 19,

Given that Kaplow and Shavell argue that fairness should not be given independent weight in normative analysis and that fairness counts only as a preference,<sup>49</sup> what would a welfare theorist conclude? A welfare theorist would likely start out as an agnostic on the question, approaching it from a detached point of view and asking whether the costs of such a program would outweigh the benefits. She would consider the “tastes for fairness” of the population, as well as the long-term effects of adopting the program and the possibility that, looking back on the program, Americans might regret having made the choice to adopt it. But in the end, according to Kaplow and Shavell’s theory, the answer would depend on a prediction about the overall social effects of the program, including public safety “benefits” and “costs” associated with disappointed preferences for individual liberty. If it turns out that the benefits outweigh the costs, the program should be adopted.<sup>50</sup>

In contrast, a fairness proponent would likely start with a very strong presumption against any such program and with a commitment to an outcome that would ensure equality for the American citizens in question. While both the views purportedly held by half the population and the security concerns of the government would enter into the equation, a policy that so severely challenged the equality and rights of a minority group of Americans would require a compelling governmental interest that could not be achieved through less restrictive means. The Supreme Court has provided us with schemas that utilize just this kind of structure.<sup>51</sup>

Thus the debate between welfare and fairness is a debate about the way one should go about aggregating human interests, how one should decide when to aggregate and when not to aggregate, and the role that human judgment plays and should play in legal and policy analysis.

## II. INTERNAL CRITIQUE: WHY PREFERENCES CANNOT BE SATISFIED WITHOUT REASONING ABOUT FAIRNESS

Kaplow and Shavell argue that scholars, analysts, and policymakers should not favor a law simply because they believe it is fair.<sup>52</sup> Fairness is a matter of opinion, and others may well have different opinions about the matter. The fact that people have views about the fairness of alternative laws is relevant only insofar as satisfying their fairness preferences affects their welfare.<sup>53</sup> Analysts should not make independent assump-

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2001, at A7.

<sup>49</sup> See *supra* notes 14–15 and accompanying text.

<sup>50</sup> See, e.g., Kaplow & Shavell, *supra* note 9, at 978–79.

<sup>51</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to racial classifications).

<sup>52</sup> See *supra* notes 11–12 and accompanying text.

<sup>53</sup> See *supra* notes 14–15 and accompanying text.

tions about fairness; they should only attempt to aggregate the preferences of human beings, whether those preferences are based on self-interest, fairness, or whim.<sup>54</sup>

This position is analytically incoherent because it is not possible to determine whether a law will promote welfare (defined as satisfaction of human preferences aggregated in a suitable way) without making independent assumptions about fairness. There are at least three reasons why this is so. First, in justifying the use of welfare as the only proper goal for normative analysis, Kaplow and Shavell actually promote a particular conception of fairness. There is nothing wrong with this, but it does mean that welfare analysis cannot be coherently distinguished from fairness analysis.

Second, welfare analysis requires quantification of human interests—or at least a method for measuring the strength and magnitude of those interests. However, any such measurement would entail controversial value judgments, premised on particular conceptions of fairness and justice.

Third, it is not possible to add in “tastes for fairness” that people happen to have without defining those tastes. The principles that guide moral conduct are often vague guidelines. Moreover, those guidelines, already vague, often conflict with each other at the intersections of difficult questions. Therefore, determining what people think is fair in a particular case requires the analyst to consider carefully how conflicting norms should apply in that instance, and determining people’s tastes requires the analyst to consider critically what the tastes *would be* if people thought about the matter carefully. This, in turn, requires the analyst herself to think critically about the matter. She must consider what arguments *should* convince people. As such, the analyst cannot defer to the preferences of others without engaging in an independent analysis of fairness and guessing whether, upon reflection, others would change their views. This predictive question will turn partly on the analyst’s views about the strength, coherence, and persuasiveness of those fairness considerations. This process is dialogic—one whose very outcome is determined through the process of conversation—making it that much more difficult to predict.

#### A. *Kaplow and Shavell, Themselves, Conduct a Fairness Analysis*

Kaplow and Shavell’s argument promotes human welfare as a goal because it embodies a particular conception of fairness that they personally favor. It appears obvious to Kaplow and Shavell that people are better off when their preferences are satisfied—that is, when people are

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<sup>54</sup> See *supra* notes 14–15 and accompanying text.

given what they want.<sup>55</sup> Kaplow and Shavell want to satisfy preferences because they believe people are the best judges of their own interests and because they believe that satisfying preferences will promote both autonomy and equality.<sup>56</sup>

These are fairness arguments. Kaplow and Shavell rely on notions of respect and equality to justify a system in which they would prohibit legal analysts, such as themselves, from relying on notions of respect and equality. Perhaps these arguments appear self-evident to Kaplow and Shavell. They may believe that it is a truism that everyone will generally be better off if they are able to choose their own ends and pursue them as they see fit. If Kaplow and Shavell's conceptions of autonomy and equality were universally shared, they might require no justification and could be taken as useful premises. However, many legal theorists have different conceptions of both norms.

Kaplow and Shavell assume that autonomy is promoted if individuals are given the freedom to choose their own ends. "Autonomy," however, does not necessarily mean freedom of action or freedom from external restraint. This limited version of autonomy has been termed "negative liberty" by philosophers, and it has long been contrasted with a vision of "positive liberty" as the ability to achieve one's own purposes.<sup>57</sup> Although I am strongly in favor of autonomy, I do not conceptualize it to mean that the law should maximize individual freedom of action. Like Martha Minow<sup>58</sup> and Jennifer Nedelsky,<sup>59</sup> among others, I view autonomy as establishing a context for human action. That context includes freedom to do what one wants and to shape one's life, but it also recognizes that human life is what it is because we do not live alone, but rather in relationship with others, dependent on them. "What actually makes human autonomy possible," writes Nedelsky, "is not isolation but relationship . . . ."<sup>60</sup> To determine whether individuals are "autonomous" in this

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<sup>55</sup> See *supra* note 16 and accompanying text. Note that Kaplow and Shavell are in favor of overriding *actual* preferences in favor of the preferences individuals *would* have if they had better (or perfect) information because they believe individuals would want the law to promote their "correct," rather than their misguided, preferences. See Kaplow & Shavell, *supra* note 9, at 984 ("[I]f individuals do not understand how situations affect their well-being, our argument may be applied to individuals' actual well-being—what they would prefer if they correctly understood how they would be affected—rather than to individuals' well-being as reflected in their mistaken preferences.").

<sup>56</sup> See Kaplow & Shavell, *supra* note 9, at 1341 (arguing that welfare economics is based on the values of promoting "individuals' basic autonomy and freedom"); *supra* note 18 and accompanying text.

<sup>57</sup> See, e.g., ISAIAH BERLIN, *TWO CONCEPTS OF LIBERTY* 6–19 (1958).

<sup>58</sup> See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* 10 (1990) ("Once we understand the relationships that are critical to setting and respecting boundaries, we can examine more honestly which boundaries express and promote the kinds of relationships we know and desire.").

<sup>59</sup> See Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, 30 REPRESENTATIONS 162, 169 (1990).

<sup>60</sup> *Id.*

view, one must discuss the relationships within which individuals are situated. To do that, one must discuss the effects law has on human relationships and the effects human relationships have on law. More fundamentally, one must determine which relationships to foster and which to suppress.

This does not necessarily mean that my conception of autonomy is better than Kaplow and Shavell's. It does mean that their argument for welfare is premised on a particular understanding of fairness that they have neither subjected to critical analysis nor justified as superior to alternative notions.

As I noted earlier, Kaplow and Shavell are correct to condemn simplistic fairness arguments. For this reason, their argument for welfare is incomplete without a better defense of the fairness considerations on which it is based. But, of course, they purport to eschew consideration and evaluation of fairness norms. My point is that they cannot do so. They themselves give independent weight to a particular conception of fairness. Their argument, as a result, depends on the very considerations they purport to banish from the policymaker's and legal scholar's toolkit.

### *B. Purely Quantitative Analysis Is Impossible*

The second problem with separating fairness and welfare is the difficulty of quantification. Kaplow and Shavell insist that their notion of welfare is a comprehensive one. All values are included in the cost-benefit analysis, including such intangible factors as tastes for fairness. Even if they do not assign explicit numbers to costs and benefits, Kaplow and Shavell try to assess their magnitude or strength. But it is not practical, or even possible, to quantify all the factors that might affect human welfare.

What value should we assign to the loss of human dignity suffered by those who are not allowed to sit at lunch counters because of their race? What value should we give to those who want to preserve a way of life based on apartheid? Kaplow and Shavell say that since we implicitly assign values, we should do so explicitly. But how do we do this? How do we assign numbers to these interests?

One possibility is to ask people how happy a particular legal rule would make them. Obviously, such a query faces the most extreme issues with regard to quantification. Should we assign a number based on our guesses about human interests and comparative valuations? There is no way to analyze the strength of human interests without judging them in some way. Suppose, instead, we ask people how much money they are willing to pay to obtain, for example, racial segregation or integration. Since the rich can afford to pay more, that measure of value places a premium on the current distribution of wealth, giving greater votes to rich people than to poor people. This has its own problems of justifi-

cation; before we could accept “willingness and ability to pay” as a basis for quantification, we would have to explain why it is appropriate to start from the status quo distribution of wealth when multiple forms of unfairness created that distribution.

Even if we were to accept the current distribution of wealth, we would still face problems in quantifying “willingness to pay.” Consider the offer/asking problem. It is well known, and accepted by Kaplow and Shavell, that the amount one is willing to pay to obtain an entitlement is often less than the amount one would have to offer a person to induce her to sell or relinquish the same entitlement.<sup>61</sup> To pick a number that indicates the strength of a preference, we need to choose between offer prices (those an individual would be willing and able to pay to buy an entitlement) and asking prices (those an individual would be willing to accept to sell an entitlement).

Kaplow and Shavell dismiss this problem as technical, dealing with it in a footnote.<sup>62</sup> The problem, however, is not merely technical. To pick a contemporary legal problem, consider whether discrimination should be allowed on the basis of sexual orientation. On this issue, it would be easy to find people on both sides whose asking prices would be infinite. Ask someone who has religious objections to homosexuality how much we would have to pay him to get him to agree to sign a law prohibiting sexual orientation discrimination, and the answer might be: “There is no amount of money you could give me to get me to agree to promote immorality.” Ask me what you would have to offer me to induce me to favor allowing sexual orientation discrimination in housing or employment and I would say: “I will not agree to that proposition for all the money in the world.” In this case, if we assign numbers by assuming an extant legal rule and asking how much those who favor it would ask to give it up, the answer is that there might be no sale either way.

Each of these problems in quantification exists for the same reason: there is something important in humanity that cannot be captured in numbers. Consider a young woman deciding where to go to college. She is your friend or daughter and wants your advice. She has narrowed the choice down to two places: College *A* and College *B*. She is very conflicted. The schools are different, but they both seem attractive in certain ways and unattractive in others. How should she decide? It might be a good idea to list the pros and cons of each choice. But what should she do then? Suppose she looked at the list of pros and cons and assigned numbers to each item on the list based on a guess about their relative importance. Then she hands you the list and asks you to add up the numbers

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<sup>61</sup> See Kaplow & Shavell, *supra* note 9, at 1366–67, 1377 n.1019.

<sup>62</sup> *Id.* I have previously explored the significance of the offer/asking problem. See JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 117–30 (2000). That treatment reflects the pioneering work by Mark Kelman. See Kelman, *Consumption Theory*, *supra* note 24, at 669; see also Kennedy, *supra* note 24, at 401–21.

and tell her how it came out. Excitedly, you get a calculator and add up the numbers. You find the answer. "Congratulations! It's College B!" She looks crestfallen. What went wrong?

There was nothing wrong with making a list of pros and cons. The problems were the way she chose the numbers and the fact that she thought the way to compare the pros and cons of two alternatives was simply to do the math. Her number choices did not quite capture the real meaning to her of each of the relevant factors. There is no algorithm for assigning those numbers.<sup>63</sup> Moreover, it would have been better for her to peruse the two lists and then to imagine herself at each of the colleges. She might have considered how happy she felt with each choice and whether she felt a sense of regret or longing for the other choice. She might have considered what her life would be like at each place and how that would relate to her conception of herself and her deepest values, both in the present and in the future. What she needs to make a human decision is an overall judgment based on full knowledge of what is involved in the decision. Numbers do not do the trick.

Now one may think that law is not at all similar. Individual choices, although informed by reason, involve emotion and indirection, while law and public policy require reason alone. This is simply not the case. Choices among alternative legal rules require the exercise of human judgment.

In law, our choices rely in part on narrative. We tell stories. In the O. J. Simpson trial, the prosecution story was that all the facts pointed to Simpson; we would not want him to get away with murder, would we? The defense story was that some of the evidence was planted; if some of it was, doesn't that mean all of it could have been? And if evidence was planted, does that not raise reasonable doubt? These competing stories help us understand and articulate what is involved in the decision.

It is sensible to say that one should not mechanically follow one's first intuition but rather should subject it to critical evaluation. One wants to say that "all things considered" one choice seems better than the other. But this does not mean that the best way to make a choice is by assigning numbers and adding them up. We come to conclusions partly by adding up costs and benefits and partly by making considered judgments based on alternative narratives. This is why judicial opinions do not merely recite rule choices and analysis. Instead, they start with a statement of the facts. They tell the story of what happened.

Even if one wants to analyze legal questions by assigning numbers, it is not possible to assign numbers to human interests without making

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<sup>63</sup> Kaplow and Shavell would likely argue that the decisionmaker simply made a mistake in assigning numbers, and that inaccuracy in quantification does not mean we should abandon their model. My contention, however, is that it is often impossible to quantify intuition, and it does not make sense to use a model that cannot work in practice.



value judgments. Those value judgments, in turn, require discussion of what should go into choosing the numbers. During this process, the analyst gives independent weight to her conception of what would constitute a fair method of assigning numbers. Again, we see that welfare judgments are not separable from fairness considerations.

Kaplow and Shavell implicitly recognize this. Although they emphasize that “tastes for fairness” should be added into the equation, they do not add such tastes into their actual examples. The reason is that it is difficult or impossible to generate a noncontroversial number for “tastes for fairness.” The result, however, is that Kaplow and Shavell have assigned an effective value of zero to such fairness concerns. They insist that empirical studies should be undertaken to define people’s tastes and the prevalence and magnitude of such tastes.<sup>64</sup> Whatever empirical analysis would demonstrate, it would not show that tastes for fairness are valued at zero. There is nothing in Kaplow and Shavell’s method that would allow an analyst to pick a dollar value without making judgments about the appropriate weight to give such considerations. To make those choices, the analyst cannot simply defer to the preferences of others because the very problem she faces is how to determine those preferences. To make such choices explicit would require discussion, analysis, and thoughtful consideration. It would, in effect, require the analyst to give independent weight to fairness and justice.

### *C. People Make Value Judgments in Conversation with Others*

The third problem that arises from making welfare determinations without giving independent weight to fairness considerations is that people come to value judgments through dialogue with others. Values are formed at the complex intersection of conversations, upbringing, personal reflection, and communal mores. People’s value judgments can rarely be quantified as simple yes-or-no answers. Fairness, after all, is much messier and much more interesting.

If our goal is to understand what people’s true tastes for fairness are, we need to engage in a process of discussion that may itself change what people view as fair. This involves two departures from what Kaplow and Shavell envision. First, it is not possible for legal scholars to rely on empirical research because such research often neglects to ensure that people had perfect information on the issues and thought about the matter carefully. Second, we cannot determine what people would think if they thought about the matter carefully unless *we* think about the matter carefully. It is not possible to determine and defer to the views of others on fairness without engaging in an analysis of what arguments should persuade us about the fairness of those rules.

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<sup>64</sup> Kaplow & Shavell, *supra* note 9, at 1350.

For instance, how would Kaplow and Shavell calculate people's "tastes for fairness" with regard to a new law mandating full-body searches at airports for all men of Arab descent between the ages of fifteen and thirty? One might conduct a survey to determine whether the public favors the measure.<sup>65</sup> Suppose it turned out that the majority was in favor and that random interviews suggested that this view was strongly held. Suppose it also turned out that minority views opposing the practice were strongly held as well. I argued previously in a discussion of a hypothetical law requiring Arab Americans to carry identity cards that it would be difficult to assign numbers to these types of interests without engaging in value judgments.<sup>66</sup> But the problem is even more pronounced, because people's views are not necessarily stable. It might be the case, for example, that the recent terrorist attacks on the World Trade Center and the Pentagon have significantly affected public sentiments at the end of 2001. Similar support for the internment of Japanese Americans followed the attack on Pearl Harbor and war with Japan. However, a half-century after World War II, it is generally believed that Japanese internment was a huge mistake and a grave injustice.<sup>67</sup>

Can one predict that sentiments about racial profiling of Arab Americans would undergo a similar shift in the future? One might hope so. At the same time, this is a very complicated question. It is not preordained that the United States will retain its core values in the face of terror. Determining whether people would change their minds if confronted, after the fact, with the consequences of a discriminatory policy requires us to consider what people might think if conditions were different. This involves a substantial amount of guesswork. It also involves judgments on the part of the analyst. The more it seems to the analyst that people's views are wrong, the more the analyst might be convinced that they would change their views over time.

At the same time, assuming people would eventually come around to the "right" answer belies a startling degree of naïveté. I suspect that a conclusion that people "would" change their minds over time is actually a conclusion that they *should* change their minds. Conversely, promoting social welfare through an inflexible adherence to the current preferences of the majority assumes that those preferences will not change. Either way, the analyst must make assumptions about human nature, culture, and the core values that bind and divide us as a nation. We could do so implicitly, by assuming a set of core values, or we could do so explicitly, by defining core values and discussing what they mean for a specific

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<sup>65</sup> In a recent survey, fifty-eight percent of Americans favored more intensive security checks for Arab American plane passengers. Kim, *supra* note 48, at A7.

<sup>66</sup> See *supra* notes 48–51 and accompanying text.

<sup>67</sup> See, e.g., Tom Kenworthy, *Congress Approves War-Internee Fund; Cash, Apology Offered to Japanese Americans*, WASH. POST, Aug. 5, 1988, at A1.

situation. Explicit discussion would require consideration of fairness independent of particularized beliefs regarding current issues.

Another difficulty with quantification is that people change their views depending on the context and manner in which the question is asked and the persuasiveness of arguments presented on the other side. People may give a different answer depending on whether they are asked a question at work, at a place of worship, or at home. They may even be affected by the fact that the person asking the question is a pollster whose phone call interrupted a quiet dinner. These factors do matter.

For example, consider the question of whether landlords should have to go to court to evict tenants. When tenants stop paying rent without cause, many landlords want the right to change the locks on the apartment door and throw the tenant's belongings out on the street. Because the law and most lease agreements used to allow them to do so, Kaplow and Shavell might conclude that both tenants and landlords preferred it that way, perhaps to avoid the costs of litigation. Today, however, laws almost everywhere prohibit this practice. Why do people favor these new laws if they are not what people want? Kaplow and Shavell may believe that tenants do not value this right more than it costs because they do not bargain for it in the marketplace and there are no demonstrable market failures involved here to justify overriding the market solution.

This analysis fails to acknowledge that there are distortions to the market analysis. Market bargaining is biased against adopting rules that establish minimum standards of fairness in market transactions. The views of people expressed through legislation are as valid a measure of "what they want and value" as is arm's length bargaining. Kaplow and Shavell might believe that the political process is biased because people think they are getting something for nothing and do not understand the costs of regulation; market decisions, on the other hand, require individuals to face the reality of scarcity and make trade-offs to determine what they want given limited resources. However, in the market, we are impeded from thinking clearly about what sets of rules are needed to create basic standards of fair treatment. After all, if you have to pay for common decency, you may well trade it off against other things. Kaplow and Shavell may find this to be a virtue.<sup>68</sup> They are correct to suggest that trade-offs must be made and that we should be aware of those trade-offs. But the market setting presumes a baseline set of norms that constitute the framework within which bargaining occurs. One appropriate setting for generating those norms is the courtroom; another is the legislature; a third is social interaction.

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<sup>68</sup> They seem to be arguing that such tradeoffs are sometimes necessary. *See, e.g.,* Kaplow & Shavell, *supra* note 9, at 1280 ("Citizens do choose to be governed by regimes that sometimes punish the innocent rather than to live in anarchy . . .").

The residential tenancy laws that outlaw self-help eviction are justified partly because people want them. They are the law almost everywhere because legislatures elected by the people enacted them, and they were formulated in decisionmaking settings that were just as appropriate as *ex ante* market bargaining. Kaplow and Shavell fail to understand that a rational decisionmaker—or a legal academic—might consider the elaboration of basic standards of minimum decency for market transactions to be better worked out in custom, legislation, or legal scholarship than in *ex ante* bargaining. This does not mean that *ex ante* bargaining is not a legitimate source of fairness norms; social custom is informed by contracts and may contribute substantially to the development of just ground rules.<sup>69</sup> It does mean, however, that *ex ante* bargaining is not the only legitimate decisionmaking procedure for determining what people want and value.

Fairness and welfare are not wholly separable. Welfare judgments depend on prior fairness judgments. Fairness judgments include consequentialist considerations. It is therefore not sensible to argue that legal scholars should refrain from making judgments about fairness. They can do so only by refusing to reason at all.

### III. EXTERNAL CRITIQUE: WHY HUMAN WELFARE IS ADVANCED WHEN SCHOLARS MAKE JUDGMENTS ABOUT THE VALIDITY OF HUMAN PREFERENCES

Kaplow and Shavell argue that legal academics should not inject their own values into normative arguments about the law because it is inevitably tyrannical for them to do so and the result will only make people worse off. Their entire argument, however, rests on one two-part premise: the only way to make people better off is by increasing their welfare or utility, and the only way to increase their utility is to give them what they want. I fundamentally disagree with both assumptions.

#### *A. People Will Not Necessarily Be Better Off If We Give Them What They Want*

If we give people what they want in an effort to maximize each individual's personal utility, we may end up creating an unjust society that no one would have chosen on her own—and in which everyone is worse off.

In a short story by Ursula Le Guin, a land called Omelas has achieved (almost) perfect happiness.<sup>70</sup> It has done so at the expense of

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<sup>69</sup> See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (changing views about cohabitation outside marriage led to development of "palimony"); *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970) (changing expectations of tenants led to creation of implied warranty of habitability).

<sup>70</sup> URSULA K. LE GUIN, *THE ONES WHO WALK AWAY FROM OMELAS* (1993).

one miserable child. Every adult knows that this child is imprisoned and forced to lead a horrible life and that this child's suffering is necessary for the happiness of others. Every child, upon maturity, is taken to view the unfortunate one and taught that grown-ups know that the good of the many outweighs the good of the one. Yet, Le Guin writes, some people find they cannot live in Omelas. They walk away, not knowing where they are going or what they will find when they get there. They simply cannot live in such a world.

Are they right to walk away? Is Omelas right to find that the well-being of thousands outweighs the imprisonment of one child? This is a paradigmatic example of what separates welfare economists from fairness theorists. The dilemma is routinely taught in college philosophy courses and parallels the age-old debate between utilitarianism and deontology. Let us assume that when we consider all factors affecting welfare in Omelas—including "tastes for fairness"—every citizen (except for the child) is made better off from the child's imprisonment. In other words, no one walks away. Moreover, these views are stable and will not change over time. Nor are there any bothersome externalities; the willingness to harm one child apparently does not translate into a greater willingness of the citizens of Omelas to inflict suffering on each other.

Is Omelas really better off? I would say no. Kaplow and Shavell, I believe, would say yes. Kaplow and Shavell might think that Omelas is better off because there is only one victim and the welfare of the many outweighs the welfare of the one. But I would say that Omelas is not better off, because it has perpetrated a horrible injustice. Omelas has, without a finding of fault, chosen to violate this child's autonomy and extinguish the child's free will. Omelas has infringed upon the basic decency owed to every human being. It has turned every person in Omelas into an inhuman being. They have all become something they should not be. They are all worse off.

Kaplow and Shavell might ask me, "Where are you getting this from? Who are you to ignore the will and well-being of everyone?" If (practically) everyone is better off, Kaplow and Shavell might say that Omelas is better off. Here is where I disagree. Omelas has used an impermissible means to obtain a permissible end. It may be that someone could generate a fact situation that would prompt me to agree that, horrible as it may be, the torture of one child is justified by the need to prevent even greater suffering of numerous other children. (Consider the suffering created by wars waged in legitimate self-defense, in which children certainly suffer unbearably.) The mere facts that the many outnumber the one and that the many find nothing unfair about what they are doing are not a sufficient basis to conclude that Omelas has presented a persuasive justification for its systemic reliance on the sacrifice of one child. Perhaps Kaplow and Shavell would agree with this assessment, but if they do, they would have to give an explanation that departs, to a

significant extent, from their model. They would have to give up their insistence that we give no independent weight to fairness.

*B. Reasoning About Fairness Promotes Both Autonomy and  
Human Welfare*

Should Congress pass a law prohibiting discrimination on the basis of sexual orientation in public accommodations, housing, and employment? How should lawmakers decide this issue? What advice should a legal scholar give Congress? Some would characterize the issue as a moral one, others as one of autonomy, others as one of equality, and others, I suppose, as a question of economic efficiency. In answering such questions, it is typical for legal scholars—as well as “ordinary folks”—to engage in persuasive dialogue about what is just and unjust, right and wrong. What is striking about Kaplow and Shavell’s thesis, however, is that they deem it tyrannical for the scholar to consider which legal regime is just, or what kind of society individuals *should*, all things considered, favor. Kaplow and Shavell seem to exclude the possibility that the work of academics is to engage in the process of persuasion.

Kaplow and Shavell would disable legal academics from writing articles designed to convince people that discrimination on the basis of sexual orientation is unjust because it forces people to live “in the closet” and prevents them from forming the kinds of human relationships that most people take for granted. They do not want scholars to give independent weight to fairness. Yet ironically, Kaplow and Shavell have devoted a great deal of time and energy to the task of attempting to persuade others that their way of thinking is better than alternative ways of thinking. If most people like to talk about fairness, then why are they trying to persuade us to stop doing so?<sup>71</sup> They think that we may be persuaded to change our minds. They do not want to give us what we want. They want to change what we want.

Kaplow and Shavell do not avoid the problem of tyranny. The purpose of their theory is to ensure that a rule is in the people’s best interest, as the people conceive it. Yet their approach will often result in favoring rules that differ from the results one would get by relying on most people’s ordinary intuitions about what is fair. They think that if people thought things through, they would not necessarily want what ordinary views of fairness would suggest. If lawmakers followed this approach,

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<sup>71</sup> Note that Kaplow and Shavell do acknowledge a role for persuasion regarding what people *should* want if people’s well-being will improve over the long run. See Kaplow & Shavell, *supra* note 9, at 1338 (“[A] long-run strategy designed to change preferences may make society as a whole, over time, better off. . . . [H]owever, it is not appropriate under welfare economics to use the law to shape preferences when individuals’ actual well-being will not be improved as a result, but rather the analyst wishes to impose on society his or her own view concerning what other people’s preferences ‘ought’ to be.”).

they would impose these rules on people against their wishes on the ground that, if people thought it through, this is what they would want. Thus, adoption of welfare analysis is no guarantee against paternalism.<sup>72</sup> Kaplow and Shavell suggest that fairness theorists want to impose their views on others. It seems that fairness theorists are not the only ones who give independent weight to their considered judgments about what the law should be. Welfare economists, like Kaplow and Shavell, seek to promote a method of analysis that will often violate strongly held intuitions, and they want to immunize themselves from criticisms for doing so. In the end, it may be welfare economists, not fairness theorists, who imperialistically withhold relevant norms from the discussion.

I am in favor of judging norms. I see tensions between principles of reliance and autonomy, fault and internalization, compensation and freedom from ruinous liability. I am interested in the incidence of acts of unfairness. I want to know what incentives rules create and whether a rule that seems fair on the surface will backfire. I want to know how legal rules affect behavior as well as the costs and benefits of that behavior.

But I am also interested in talking about what kind of world we want to live in. People's welfare will improve when scholars and lawmakers engage in conversation about justice and fairness. This conversation should include consideration of what, on reflection, academics believe people *should* think is fair, not just investigation into what people actually believe is fair or what they *would* think was fair if they thought carefully.

C. *We Should Not Reduce Our Understanding of Life into  
"Costs" and "Benefits"*

Finally, we should not convert all our values into costs and benefits because, in doing so, we lose a part of what makes us human. Kaplow and Shavell want to reduce our normative vocabulary to a rationalized comparison of the costs and benefits that are the consequence of adopting one rule over another. Like King Arthur,<sup>73</sup> I find myself wanting to say something other than "costs and benefits" or "better or worse." At the very least, I want to be able to give a more complete story of what makes a situation better or worse for me and for other people. I want to talk about the *reasons* people might prefer one rule and not just *whether* they prefer one outcome. I am persuaded not only by the direction and magnitude of preferences but also by their causes and justifications.

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<sup>72</sup> Kaplow and Shavell offer a would-be defense against allegations of paternalism. *See id.* at 1334–35 (“[A]n analyst might argue in favor of a legal reform that is contrary to individuals’ current preferences—individuals would be made worse off if their preferences were taken as given—but that will produce a change in preferences such that, under the new preferences, individuals will ultimately be better off.”); *id.* at 1334 n.911.

<sup>73</sup> *See supra* notes 4–8 and accompanying text.

The limitations of Kaplow and Shavell's model are best illustrated by example. Consider the desirability of the Civil Rights Act of 1964 through the lens of welfare economics. In other words, consider whether the prohibition on racial segregation in restaurants and inns made things better or worse with respect to people's well-being. Kaplow and Shavell have created a normative and conceptual straitjacket that requires all judgments to be described in terms of *magnitude*. They would begin by deducing the costs and benefits of prohibiting segregation, and they would consider tastes for fairness, including tastes for racial equality and racial segregation, only insofar as necessary to determine the relative strength of competing interests and to assign them numbers. It is conceivable that allowing racial discrimination would maximize overall "welfare" (however that is quantified) since such discrimination has historically benefited the majority at the expense of minority groups. If that were true, Kaplow and Shavell would oppose the Civil Rights Act of 1964, even if *they themselves* thought racial discrimination was unjust. Indeed, their model could be used to revisit the entire Bill of Rights.

According to Kaplow and Shavell, the only legitimate questions for analysts to ask are: "What do you prefer?" and "How strong is your preference?" The *reasons* individuals prefer one thing over another are deemed irrelevant to the legal academic. Like the ant with whom King Arthur interacts, Kaplow and Shavell have a two-word normative vocabulary: better and worse. Other guises of their evaluative terms come along—costs and benefits, pluses and minuses, well-being and harm, preferences and distastes. But in the end, the comparison between two legal rules, like all other comparisons, is a comparison that can be adequately described only by a sense of magnitude.

Kaplow and Shavell's normative vocabulary largely banishes any role for qualitative distinctions, and tastes for fairness are ultimately assigned a numerical value.<sup>74</sup> Judgments are reduced to equations: does a rule improve or harm "well-being"? There is no room in this analysis for ambivalence, for judgment, for moral reflection.

"Better or worse" analysis, as Kaplow and Shavell use it, banishes from legal scholars' tool bag any consideration of what constitutes a just society. The analysis that Kaplow and Shavell's scholar performs consists of amassing a list of the costs and benefits of alternative rules, assessing their relative value, and doing the math correctly. Multiple questions are inapposite. We cannot ask, "What is the right thing to do?" We cannot ask, "What is fair to everyone involved?" We cannot ask, "Which rule is most compatible with our considered judgments about the ground rules organizing a free and democratic society?" Judgment—in the sense that "ordinary folks," legal scholars, and lawmakers usually think of it—is not part of the picture.

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<sup>74</sup> See discussion *supra* Part II.B.



But why banish judgment? Why outlaw constitutional analysis that accepts the need to outline basic standards of justice and decency within which individuals may pursue happiness? Why is that sensible, much less the only rational way to think about things? Kaplow and Shavell criticize fairness theorists for failing to give an adequate account of their views of fairness.<sup>75</sup> Yet nowhere do Kaplow and Shavell adequately explain why issues like racial discrimination should be addressed from a standpoint of agnostic detachment rather than engaged commitment.

Perhaps racial discrimination, like rape, is, in their words, a “provocative example.”<sup>76</sup> But what kind of system have Kaplow and Shavell provided us if it cannot speak to the most fundamental questions that our society faces? Are the problems of race or rape unusual ones? Although the question of sexual orientation discrimination is a current question on the political agenda, Kaplow and Shavell would have scholars and policymakers be noncommittal about this fundamental question of justice, at least until we have added up the costs and benefits of allowing or prohibiting such discrimination.

Whatever choices Kaplow and Shavell would make on these and related questions, it strikes me that any analysis of such pressing issues requires judgment. If we are going to make value judgments—at the very least, those judgments necessary in identifying the values of individuals—Kaplow and Shavell are right to suggest that we should do so explicitly rather than implicitly.<sup>77</sup> Articulating the judgments we make means we need to consider narratives about what life is like under alternative legal regimes. We need a richer vocabulary, not an impoverished one. We need, in other words, to think about justice and fairness.

#### IV. SOMETHING IMPORTANT

In my conflict of laws course, I begin with a famous case from 1892 called *Alabama Great Southern Railroad Co. v. Carroll*.<sup>78</sup> An Alabama employee worked for an Alabama-based railroad company on a train that ran back and forth from Alabama to Mississippi.<sup>79</sup> A fellow employee negligently inspected the train in Alabama and failed to spot a defective link between two train cars.<sup>80</sup> The train left Alabama, crossed the border into Mississippi, and the link broke, causing an accident in which the

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<sup>75</sup> See Kaplow and Shavell, *supra* note 9, at 972 (“Indeed, some writing on notions of fairness takes the principles to be self-evident and thus not needing any explicit justification.”).

<sup>76</sup> *Id.* at 1345–46.

<sup>77</sup> See *id.* at 1369 (“[T]here is a virtue in formal policy analysis being explicit about the valuations to be used.”).

<sup>78</sup> 11 So. 803 (Ala. 1892).

<sup>79</sup> *Id.* at 803.

<sup>80</sup> *Id.* at 804.

employee was seriously injured.<sup>81</sup> Alabama had abolished the fellow servant rule and enacted a statute authorizing an employee to sue an employer for vicarious liability for the negligence of a fellow employee.<sup>82</sup> Mississippi retained the old rule that immunized employers from liability.<sup>83</sup> Which law should apply?

Although the case is simple, the issue is complicated.<sup>84</sup> Today, courts no longer view the issue as solely tortious or solely contractual. Instead, they look at the justified expectations of the parties and the policies and interests of the affected states. The case is difficult because the sovereign at the place of the contract has strong interests in regulating an employment relationship centered there, while the sovereign at the place of injury has strong interests either in deterring negligent conduct and providing compensation for parties injured there, or in freeing employers doing business in the state from ruinous and unjustified liabilities. It is also hard because the employee could well have expected on-the-job injuries to be governed by the law of his home state when he was hired there, and application of such a law would not unfairly surprise the employer. Conversely, the employer may have expected that its business activities in Mississippi would be subject to Mississippi law and that it would be entitled to compete in the Mississippi market on equal terms with Mississippi businesses. The employee, similarly, would not be unfairly surprised that he would be exposed to the vulnerabilities, as well as the benefits, of Mississippi law once he chose to work there.

Kaplow and Shavell would approach the issue by trying to figure out what rule of law would promote human welfare. They might do this in a variety of ways. They might, for example, ask what rule of law the states would adopt if they were gathered together in a constitutional convention or in *ex ante* bargaining. What would the states seek in such a bargaining situation? The states might seek to maximize the number of occasions in which their own law would apply to cases that involved contacts with their territory or people. They might also be willing to agree, in certain

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 804–05.

<sup>83</sup> *Id.* at 805.

<sup>84</sup> The employer argued that the case involved a tort issue and sought application of the traditional rule applying the law of the place of the injury (Mississippi) when conduct and injury are in different states. The employee argued that the case concerned the contractual obligations of employers and employees and sought application of the law of the place where the contract was made (Alabama). The Alabama Supreme Court accepted the employer's argument, noting that the Alabama statute imposed obligations on the employer and thus could not constitute a contractual obligation because contractual obligations are voluntarily assumed. *Id.* at 807–08. To characterize the issue as contractual, wrote Justice McClellan, "would be astounding to the profession." *Id.* at 807. Forty years later, the United States Supreme Court decided a similar case, *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932), *overruled in part by*, *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965). This time, the Court characterized the issue as a contractual one. *Id.* at 157–58.

cases, to apply the law of other states in order to obtain the right to have other states apply their own laws in appropriate cases.

However, it is not obvious that determining what rule of law would promote human welfare would be the states' goal. They might instead seek to develop a conception of federalism that attempts to allocate spheres of government power based on particular views of what types of issues should be controlled locally. In other words, they might seek not to maximize satisfaction of state interests but to develop an idea of comity—of deference to the ability of other states to regulate events centered in those other states or which crucially affect their interests or values. They might have an affirmative interest in *not* maximizing application of their own law. They might seek, instead, to defer to the interests of other states in appropriate cases rather than solely to maximize the achievement of their own.

Still another view might adopt a particular substantive policy as presumptively applicable. The states might agree that freedom of contract takes precedence over other issues so that regulatory laws should be confined to regulatory states, and an inability to keep all the consequences of conduct within those states should free individuals from presumptively oppressive legislation. Conversely, states might adopt a substantive policy of protecting individuals from harm; after all, the most basic reason we create governments is to protect our lives, and under this view, if one cannot confine harmful conduct or its consequences to a state that immunizes the actor, then one will be subject to the regulatory law of the state that imposes a penalty for engaging in harmful conduct. The problem, of course, arises when two states reach opposite answers to the question of which rule better promotes justice and welfare. Choosing a baseline policy will privilege the powers of one state and its citizens over those of the other.

It is not clear what the underlying policy of the field of conflict of laws should be. Conflicting and incompatible goals are possible. Choosing an approach is a constitutional moment. It will structure social life by structuring the relations among sovereign states. It will also affect individual rights by determining when individuals are, and are not, entitled to the protection of a particular state's law. One could say: Choose the goal that maximizes human welfare. But this answer is inadequate, no matter how one measures or characterizes the components of human welfare. This apparently simple choice-of-law issue requires us to choose among incompatible and incommensurable goods, to set the boundaries of state sovereignty, to determine the extent to which we are willing to sacrifice our own interests for those of others and the extent to which we should defer to the ability of someone else to say what will happen to us. It requires us to determine the baseline levels of protection we want a federal system to ensure. These matters require judgment.

Of course, we want to adopt rules that will make us better off, but that is not the only thing we want. We want to do well, but we also want to do good. We want justice, and we want to be able to say that we have constructed a society that promotes human welfare and treats individuals with respect and dignity. This is something Kaplow and Shavell want as well, but it entails something more than satisfying preferences. We do not need theories that magically generate answers to human conflicts by reference to presumed rights, but neither can we live with a disinterested acquiescence to whatever preferences people happen to have. We need to talk about the conflicts that arise among our preferences. We need to tell stories to help us confront the tensions we face between our desires and our better selves. We need to talk with each other to understand what it would mean to live up to our better selves.

People will be better off—their welfare will improve—if lawmakers and legal academics exercise practical wisdom in judging between alternative legal rules and regimes. Part of what it means to judge wisely is to think critically about the rules that are necessary to accord human beings fair treatment. Deferring to the preferences of human beings is not the only way to show respect for people. Indeed, deferring to their preferences will often show *disrespect* for people insofar as it treats them as non-thinking creatures. It assumes that beliefs about fairness are not something we can reason about and that people cannot be persuaded, upon reflection, to change their minds. It assumes that people can make up their own minds without engaging in conversation with others about right and wrong. It assumes that dialogue about right and wrong is not part of what it means to be human.

But there is something important in humanity—something that is lost if we defer to preferences, no matter what they are. There is something lost if we do not consider peoples' preferences for being treated fairly and ensuring that others are treated fairly. Those preferences are not mere data to add into the analysis. They are an independent reason for adopting rules of law. If something is not fair, and we cannot say it is not fair, it is going to stay unfair. People want those of us who think critically about the law to judge preferences on the basis of the norms that form the basis of their—and our—most cherished values. Even if they did not want this, we would not be respecting them if we did not think and reason and talk about what it means to treat human beings fairly.